MAINE REPORTS

115

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

APRIL 3, 1916—JANUARY 16, 1917.

TERENCE B. TOWLE

REPORTER.

PORTLAND, MAINE
WILLIAM W. ROBERTS
1917

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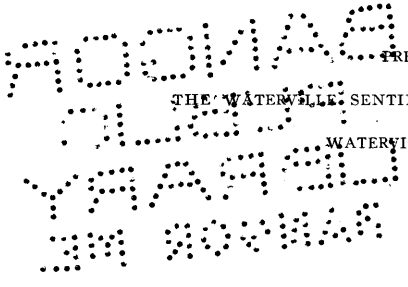

JUSTICES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS

HON. ALBERT R. SAVAGE, CHIEF JUSTICE
HON. LESLIE C. CORNISH
HON. ARNO W. KING
HON. GEORGE E. BIRD
HON. GEORGE F. HALEY
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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 1916–17

DURING THE TIME OF THESE REPORTS

LAW TERMS

BANGOR TERM, First Tuesday of June

SITTING: SAVAGE, CHIEF JUSTICE, KING, BIRD, HALEY, HANSON, PHILBROOK, ASSOCIATE JUSTICES.

PORTLAND TERM, Fourth Tuesday of June.

SITTING: SAVAGE, CHIEF JUSTICE, CORNISH, KING, BIRD, HALEY, PHILBROOK, ASSOCIATE JUSTICES.

AUGUSTA TERM, Second Tuesday of December.

SITTING: SAVAGE, CHIEF JUSTICE, CORNISH, BIRD, HALEY, HANSON, MADIGAN, ASSOCIATE JUSTICES.

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BY THE COURT

CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE

THE DOMINION FERTILIZER COMPANY *vs.* T. HERBERT WHITE.

Penobscot. Opinion April 3, 1916.

Actions of tort and contract brought by foreign corporations. Interpretation of Chapter 152, Laws of 1911.

1. The provision in chapter 152 of the Laws of 1911, that if a foreign corporation fails to file with the secretary of State the certificate required in section 2, "such failure shall not affect the validity of any contract with such corporation, but no action shall be maintained or recovery had in any of the courts of this State by any such foreign corporation so long as it fails to comply with the requirements of said section" is held not to apply to an action of trover brought by a non-complying foreign corporation against an attaching officer who attached, as the property of a third person, goods claimed by it to belong to the corporation.
2. The limitation in chapter 152 of the Laws of 1911 of the right of a foreign corporation which has not complied with the requirements of section 2 of the chapter, to maintain an action in the courts of this State applies only to actions on contracts, and not to actions for wrongs against the corporation's property, which do not grow out of any contract it has made.

Action of trover to recover the value of fifty tons of fertilizer seized and sold by one of the deputies of the defendant on a judgment recovered against one Carroll B. Burns. Defendant pleaded general issue and filed brief statement alleging that the plaintiff

corporation could not recover in this action, because it was a foreign corporation and had not complied with certain statutes of the State of Maine relative to foreign corporations doing business in this State. The evidence disclosed at the trial that the plaintiff company was a foreign corporation and had not complied with the provisions of chapter 152 of the Public Laws of 1911, requiring such corporations to pay certain fees and to perform certain other acts, as provided in said chapter.

At close of all the testimony, the defendant requested the court to direct a verdict for defendant, on the ground that the plaintiff corporation, being a foreign corporation, did not comply with the provisions of chapter 152 of the Public Laws of 1911 of the State of Maine. The court thereupon directed the jury to return a verdict for the defendant. To this ruling of the court, the plaintiff filed exceptions. Exceptions sustained.

Case stated in opinion.

Ryder & Simpson, for plaintiff.

Morse & Cook, W. H. Mitchell, and L. V. Jones, for defendant.

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

SAVAGE, C. J. Action of trover against a sheriff for the value of a certain quantity of fertilizer. The fertilizer was attached on a writ, and sold on execution by the defendant's deputy as the property of one Burns. The plaintiff claims that the fertilizer was consigned by it to Burns, but not sold to him, and that it was the owner at the time of the attachment.

The plaintiff is a foreign corporation located at St. Stephens, New Brunswick. It shipped the fertilizer in question from St. Stephens to Burns at Levant, Maine. It was shipped to Burns to be sold by him, as agent, in this State. Mr. Dresser, the plaintiff's manager, resides in Calais, Maine, where he has an office, and where he transacts more or less of the plaintiff's business. The plaintiff has about one hundred agents in this State, to whom it consigns fertilizer for sale at their respective places of business. And some of them, at least, advertise that they have fertilizer for sale.

At the conclusion of the trial of this case, the presiding Justice directed a verdict for the defendant on the ground that the plaintiff

being a foreign corporation had not complied with the provisions of chapter 152 of the Laws of 1911. The plaintiff excepted.

Section 1 of chapter 152 of the Laws of 1911 requires every foreign corporation, with some exceptions not material here, which has a usual place of business in this State, or which is engaged in business in this State permanently or temporarily, without a usual place of business therein, to appoint a resident of the State to be its true and lawful attorney upon whom all lawful processes in any action against it may be served, and to file the power of attorney in the office of the secretary of State and to pay a fee of ten dollars.

Section 2 provides that "every such corporation before transacting business in this State, shall, upon payment of a fee of ten dollars which is in addition to the fee provided in section one of this Act, file with the secretary of State a copy of its charter, article or certificate of incorporation, . . . a true copy of its by-laws, and a certificate . . . setting forth: (a) The name of the corporation: (b) The location of its principal office: (c) The names and addresses of its president, treasurer, clerk or secretary and of the members of its board of directors: (d) The date of its annual meeting for the election of officers; (e) The amount of its capital stock, authorized and issued, the number and par value of its shares, and the amount paid in thereon to its treasurer." The officers and directors are made subject to penalties and liabilities for false and fraudulent statements and returns, and for failing to comply with the provisions of this section and of sections one and five. The section concludes as follows: "Such failure shall not affect the validity of any contract with such corporation, but no action shall be maintained or recovery had in any of the courts of this State by any such foreign corporation so long as it fails to comply with the requirements of said section." This plaintiff had not complied, at the time of the trial.

We need consider only one or two of the many questions which have been argued. The plaintiff's point that non-compliance with the statute should have been pleaded in abatement is not open to it here. The point was not ruled upon at the trial below, and is not raised in the bill of exceptions.

The only question raised in the bill is whether non-compliance with the provisions of chapter 152 of the Laws of 1911, if properly pleaded and shown, will defeat the maintenance of this suit. We may assume that the plaintiff, a foreign corporation, was engaged in intrastate business in this State, and so became subject to any state regulation which did not burden interstate commerce. (See *Interstate Amusement Co.* v. *Albert,* 239 U. S., 560.) The question still remains whether the 1911 statute applies to this action of trover. We think it does not.

Though it is not technically a penal statute, it virtually penalizes a foreign corporation for non-compliance with its provisions. The courts generally have shown a marked tendency to construe such statutes with considerable strictness, and not to extend their meaning beyond what is fairly expressed. And we think this rule of construction is the correct one. The statutes of this sort in one or more states, by their express terms, are made applicable to actions ex delicto, as well as to actions of contract. The statute in this State is not so made. We think it should not be extended beyond a fair interpretation of its language. To interpret a statute correctly it is necessary to read the context as well as the text, to read a whole sentence and not merely a phrase, to read a section or a chapter and not merely a sentence. The scope of inquiry may embrace even more. The language of a statute may be interpreted in the light of the legislative purposes, the objects to be served, the evils to be remedied.

It is true that in this 1911 statute there is the phrase, "no action shall be maintained or recovery had in any of the courts of this State by any such foreign corporation so long as it fails to comply with the requirements of this statute." But this phrase is a part only of the sentence. The sentence as a whole is, "such failure [to comply with the statute] shall not affect the validity of any contract with such corporation, but no action shall be maintained or recovery had," and so forth. No action for what? no remedy for what? The context shows quite clearly, we think, that the legislative thought, the legislative intent, was concerned with corporate contracts, and with remedies on such contracts. By the statute, a foreign corporation doing business in this State is required

to file certain statements concerning its organization and financial resources. In the course of its business it makes contracts. Those contracts are valid, whether the statute is complied with, or not. *But,* the statute says, "no action shall be maintained, or remedy had by the corporation so long as the corporation fails to comply." That was intended to mean, we think, that no action on such a contract can be maintained, or remedy had for the breach of it, until there is a compliance with the statute.

We discover no intention that this statute should apply to remedies for wrongs committed against the property in this State of a delinquent foreign corporation. The conversion complained of in this action did not grow out of any contract the plaintiff had made. It did not grow out of the plaintiff's business in this State. If it owned property here which was attached as the property of another party and thereby converted, we think it has a right to maintain an action for that wrong, irrespective of the statute. It is not for the court, but for the Legislature, to broaden the statute, if the public welfare requires it.

The direction of a verdict for the defendant on the ground of non-compliance with the statute was error.

Exceptions sustained.

E. M. THOMPSON AND C. A. SIMMONS *vs.* HAMLIN B. BOWES.

Knox. Opinion April 3, 1916.

Easement or right of way over private property, as distinguished from easement or right of way over public property. Presumptions as to use of way. Private and public property defined. Trespass on the case.

1. Property held for pious or charitable uses, not for the whole public, but for a limited portion of the public, as for example, church property, is private property, and as such, is subject to the application of the doctrine of prescriptive easements.
2. Where a claimant has shown an open, visible, continuous and unmolested use of land for twenty years or more, inconsistent with the owner's rights, and under circumstances from which may be inferred the knowledge and acquiescence of the owner, the rule ordinarily is that the use will be presumed to be under a claim of right, and adverse to the owner; and the burden is on the owner to rebut the presumption by showing that the use was permissive. But when a tract of land, attached to a public building, is designedly left open and unenclosed, for convenience or ornament, the rule is otherwise, and the passage of persons over it is presumed to be permissive under an implied license.
3. In this case, the admission that "the way in question has been so used by the owners of the block as would give them a right of way if the property over which it is claimed were private property" is an admission necessarily that the use has been adverse, and, hence, no presumption of permissive use can be applied.
4. A prescriptive easement of a right of way is not defeated by the fact that others than the claimant have used the way.
5. When it is stipulated in the report of a case involving a prescriptive easement of a right of way that "if the plaintiffs have a right of way, judgment is to be awarded for them," the question of the indefiniteness of the description of the way in the declaration is not open to consideration.

Action on the case by plaintiffs to recover damages from the defendant for obstructing an alleged right of way around the easterly end of the block, or building, owned by plaintiffs. The right of way claimed by plaintiff was over and across a certain part

of a lot belonging to the Free Church, so called, in the town of Union. It was admitted by counsel that the use of said strip, or parcel of land, by the plaintiff was such use and for such length of time as would give the plaintiff a prescriptive right of way, if the land over which the right of way was claimed had been "private property." The defendant contended that no right of way could be acquired across said church property.

Case reported to Law Court upon agreed statement. Judgment for plaintiffs.

Case stated in opinion.

A. S. Littlefield, for plaintiffs.

E. C. Payson, and R. I. Thompson, for defendant.

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

SAVAGE, C. J. This case comes before this court upon the following report: This is an action on the case by the owners of Moneka block in Union to recover against the defendant for obstructing an alleged right of way. The defendant has built a building over the right of way claimed. The way claimed is around the east end of Moneka block. The southerly line of said block faces Union Common. Said way claimed is across land which is a part of the Free Church lot, so called, which church is a duly organized and a regular parish under the laws of this State. The block, church, surroundng land and buildings are as shown on the plan. The said church was built in 1839, and that and the lot have, up to within less than twenty years, been used for the church purposes. Moneka block was built in 1857, and since that time the way in question has been so used by the owners of said block as would give them a right of way if the property over which it is claimed were private property, unless the fact that others used it would prevent the acquisition of that right, it being admitted that the use by the plaintiff was not exclusive, but that others having occasion used it. The defendant contends that no right of way could be acquired across said church property. If the plaintiffs have a right of way, judgment is to be awarded for them for an

amount sufficient to carry costs. Otherwise judgment is to be entered for the defendant.

The defendant objects in the first place that plaintiffs in their writ have not set out any right of way by limits and bounds, and have left the location of the claimed right indefinite and uncertain. But that question is not before us. The parties have stipulated in the report that "if the plaintiffs have a right of way" judgment is to be awarded for them. The existence of a right of way is the only question submitted to the court; not its location.

It is admitted that the plaintiffs have used the way in such manner and for such length of time, as would have gained for them a prescriptive right of way, if the land over which the right is claimed had been private property. By the phrase "private property" we understand is meant property belonging to a private individual; church property is private property as distinguished from the property of the State or of a municipality, which is public property. Property held for pious or charitable uses, not for the whole public, but for a limited portion of the public, is private property, and as such, we have no doubt, is subject to the application of the doctrine of prescriptive easements. *Kinsell* v. *Daggett,* 11 Maine, 309; *Kilburn* v. *Adams,* 7 Met., 33; *Burnham* v. *McQuestion,* 48 N. H., 446; *Society for the Propagation of the Gospel* v. *Hayden,* 38 Vt., 603; *Mowry* v. *City of Providence,* 10 R. I., 52. Accordingly we hold that a right of way could be acquired by prescription across the church property.

Was such a right of way acquired? Certainly, the fact that others having occasion used it did not prevent the plaintiffs from acquiring the right for themselves. That needs no argument.

The space between the plaintiff's building and the church edifice was about 16 feet wide. The exhibits which are made a part of the report show that the land in front of and about the church edifice, including that at the side of it over which the right of way is claimed, was open and unenclosed. And this being so, the defendant relies largely upon *Kilburn* v. *Adams,* 7 Met., 33, in which case Chief Justice Shaw speaking for the court said, that where a tract of land attached to a public building, such as a meeting house, and occupied with such house, is designedly left open

and unenclosed, for convenience or ornament, the rule is that "the passage of persons over it, in common with those for whose use it is appropriated is in general to be regarded as permissive, and under an implied license, and not adverse. Such a use is not inconsistent with the only use which the proprietors think fit to make of it; and therefore, until they think proper to enclose it, such use is not adverse, and will not preclude them from enclosing it, when other views of the interests of the proprietors render it proper to do so. And though an adjacent proprietor may make such use of the open land more frequently than another, yet the same rule will apply, unless there be some decisive act indicating a separate and exclusive use, under a claim of right. A regularly formed and wrought way across the ground, paved, macadamized, or gravelled and fitted for use as a way, from his own estate to the highway, indicating a use distinct from any use to be made of it by the proprietors, would, in our opinion, be evidence of such exclusive use and claim of right. So would be any plain, unequivocal act, indicating a peculiar and exclusive claim, open and ostensible, and distinguishable from that of others. But the fact that a particular track or line was a little more worn and marked by travel than the general surface of the lot, or, that the adjacent proprietor had occasionally levelled a spot gullied by the rain, could scarcely be regarded, independently of other proof, as indicative of a claim of right." We do not question the soundness of this doctrine.

But it will be noticed that the discussion in *Kilburn* v. *Adams* relates to the evidentiary force of long and uninterrupted user for a way of the unenclosed lands about an academy building which, of course, would be the same in case of a church edifice, as in the present case. It relates to a presumption of a permissive use under an implied license. It points out that evidence of decisive acts of an adverse character are necessary to overcome the presumption of possession. It marks, to a certain extent, a distinction between the use of such lands and those of a private proprietor. The general rule sustained in most jurisdictions is that where the claimant has shown an open, visible, continuous and unmolested use for twenty years or more, inconsistent with the owner's rights, and under circumstances from which may be inferred the knowl-

edge and acquiescense of the owner, the use will be presumed to be under a claim of right, and adverse to the owner, so as to place upon the owner, in order to avoid the acquisition of a prescriptive easement, the burden of rebutting this presumption by showing that the use was permissive. *Barnes* v. *Haynes,* 13 Gray 188; *Blake* v. *Everett,* 1 All., 248; 9 Ruling Case Law, 781. See *Rollins* v. *Blackden,* 112 Maine, 459. But as held in *Kilburn* v. *Adams,* where the use is of the open and unenclosed lands about a quasi public building, as a church or academy, the presumption is otherwise, and the distinctively adverse character of the use must be shown to rebut the presumption of permission.

Now the distinction between *Kilburn* v. *Adams* and the case at bar is this. In this case the presumption, arising from possession is not a factor. It is admitted that the use was of such a character as would give the plaintiffs a right of way as against an individual proprietor. Such a use was necessarily adverse. The admission excludes any inference of permission. No presumption of permissive use is admissible. We must hold therefore that the plaintiff's use of the way has been adverse for the requisite period of time to acquire a prescriptive easement. And since, as we hold, such an easement may be acquired in the land of a church society, it follows that the plaintiffs have a legal right of way, and are entitled to judgment.

Judgment for plaintiffs for $21

ELIZABETH O. FAIRBANKS *vs.* EDGAR E. BARKER, Admr.

Cumberland. Opinion April 8, 1916.

Actions against an administrator. General test as to claim being barred by Statute of Frauds. Statute of Frauds. Statute of Limitations.

Action on account annexed to recover for board, room, washing, mending, care and nursing of defendant's intestate, also for money had and received.

Held:

1. Under Revised Statutes, chapter 83, section 90, the account is alive and suable until there has been a period of at least six years during which there are no items, either debit or credit.
2. The evidence in this case not sufficient to show original promise on part of the defendant's intestate.
3. An obligation or promise is "original" if the promise is made at the time, or before the debt is created and the credit is given solely to the promissor, but "collateral" if the promise is merely super-added to the promise of another, he remaining primarily liable: No precise form of words is necessary to show an original promise, or conclusive as to the evidence of the parties.

Action of assumpsit on an account annexed brought by plaintiff against defendant, as administrator, to recover certain sums alleged to be due plaintiff from defendant's intestate for room, board, nursing and other items. Defendant pleaded general issue and brief statement alleging payment of certain of the items charged in the writ and pleaded also the statute of limitations and statute of frauds as to certain other items. Verdict for plaintiff in sum of $2196.16. Defendant filed general motion for new trial. New trial granted, unless within thirty days after filing of rescript, plaintiff remits all the verdict in excess of $1228.40. Interest on said sum to be allowed from date of writ. If remittitur be made, motion overruled. So ordered.

Case stated in opinion.

Frank H. Haskell, for plaintiff.

John B. Kehoe, Jacob H. Berman, and John T. Fagan, for defendant.

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

PHILBROOK, J. This is an action on an account annexed consisting of several charges for which the defendant's intestate in his lifetime became liable to the plaintiff, as she claims. The verdict being for plaintiff, defendant presents the usual motion for a new trial. No exceptions are urged.

CHARGE FOR BOARD.

By far the larger portion of the account was made up of charges for board, room, washing, mending, care and nursing, from January 1, 1906 to August 13, 1913, the latter date being that of Barker's death. During the last months of his life he was ill and in need of considerable care. It is admitted that Barker lived at plaintiff's house during the period for which he is charged for board, but the defendant contends that plaintiff and Barker were living there together under some arrangement mutually agreeable to both, without expectation of payment other than such as she received from time to time in the way of money or goods, or Barker's assistance in running the farm, and probably with the expectation on plaintiff's part that if she outlived him he would leave her his property since he had no wife or children. In support of this contention the defendant calls attention to the testimony of Albert F. Fairbanks, a gentleman who married the plaintiff about two months after Barker's death. The former wife of Mr. Fairbanks was a sister to Barker. According to his testimony, in the summer of 1910, while his first wife was alive, he and she were visiting Barker at plaintiff's house, and upon Barker's being asked why he did not pay plaintiff for his board he replied that he could pay her any time when she needed it; that she had plenty of money at that time; that she did not know the worth of money; that she was not practical, throwing her money away; that when she got hard up and wanted it he could let her have it, and, quoting Mr. Fairbank's testimony, "He said if he outlived her, and if he didn't I won't say that he said he had made arrangements, or that he was going to, one or the other, that she could have the income of it; but he wouldn't give her the money because she would spend it all, she was so liberal.

That is the drift of it. It may not be word for word, but that is the substance of it." As further supporting this contention of the defendant, he introduced testimony to show that Barker had worked on plaintiff's farm, had exchanged work with a neighbor who, in exchange, worked on her farm, had bought fertilizer which, it was claimed, was used on plaintiff's farm, and had bought grain and groceries which were consumed on her farm and in her family. The defendant also laid stress on the nature, time and amount of payment of moneys from Barker to plaintiff, and especially to an entry in plaintiff's own book account showing that on April 6, 1909, she borrowed ninety dollars from Barker and paid him the loan on May 20, 1909, together with five dollars as interest. He urges that if Barker owed plaintiff, as she claims, she would not borrow from him and pay such large interest.

To meet this contention the plaintiff urges that a fair construction of the testimony of Mr. Fairbanks would go far to prove that she was treating him as a boarder. She points out that, at the time of the conversation quoted from Mr. Fairbanks, the former wife of Mr. Fairbanks, a sister of Barker, as we have already said, was present and began the conversation by saying, "Frank, Lizzie tells me that you haven't paid her any board for a long time, and that if she says anything to you about it you get mad. Why don't you pay?" In the middle of April, 1909, apparently about the time of the borrowed money referred to, William M. Ross, a nephew of the plaintiff, was at the Fairbanks house, in the presence of plaintiff and Barker, and testified that "she was telling how much expense she had to go to lately and she said she would be all right if Mr. Barker would pay her. And then she asked him and says, 'Won't you pay me, Frank?' And he says, 'I will make it all right; that is all right,' he says." In the fall of 1912, Miss Eva B. Crockett heard plaintiff ask Barker for money, and on being told he didn't have it, the plaintiff said, "Well, Frank, I should think you might pay me something, some money." The same witness testified to hearing plaintiff ask Barker for money during the following winter and his reply again was that he didn't have it. A few moments afterward Barker gave some money to one Johnson and the plaintiff then said "I should think you might let me have some money, you

owe it to me." To this the witness says Barker did not make much reply but acted as though he didn't like it. The plaintiff also presented her account book, accompanied by her suppletory oath, containing charges against the defendant's intestate for the periods and amounts which appeared in the account annexed to the writ. The defendant argues that this book contains strong internal evidence that the charges are not genuine. Under proper instruction from the court it became a question of fact for the jury to determine whether the book was or was not genuine. No exceptions to such instruction are here presented and we must assume that the instruction given was correct. The jury must have favorably entertained the plaintiff's claim as to the book and we are not convinced that they were so manifestly in error upon this element in the case as to require us to disturb the verdict so far as it depends upon this account book. From all this testimony and all other evidential facts in the case from which inferences may be properly drawn, the court is of opinion that the jury was justified in believing that Barker was living in the plaintiff's home with an expectation and understanding on her part that he was to pay board, and on his part that he was to so pay. The rate of board, if any were due, was not seriously questioned and may be considered fair and reasonable.

STATUTE OF LIMITATIONS.

The defendant further contends that the charges for board prior to August 12, 1907, are barred by the statute of limitations. Upon the account filed in the probate court, a copy of which was attached to the writ, no credits appeared, but before going to trial the plaintiff was allowed to amend her account by adding credits of cash payments in January, March, May, August and December in the year 1906, and like payments in January, April, September and December in the year 1907. If these payments were actually made then under the statute, R. S., chap. 83, sect. 90, the entire account is unaffected by the statute of limitations, for "Until there has been a period of at least six years during which there are no items, either debit or credit, the account is alive and suable." *Rogers* v. *Davis,* 103 Maine, 405. The only testimony as to these particular payments is found in plaintiff's book account, to which we have already alluded as having been submitted to and considered by the

jury. As to their finding, whatever might have been the finding by this court as a matter of primal impression, we must hold that we are not convinced of such manifest error as to require us to set that finding aside.

STATUTE OF FRAUDS.

Charges for board, room, laundry and stabling of horses for Leon L. Jordan, which plaintiff says Barker promised to pay, the defendant says are barred by the statute of frauds. It appears from the testimony that Jordan, a colored man, was a more or less intimate friend of Barker's and was in some way associated with him in certain trades and deals. No contention is raised as to the fact that Jordan boarded with plaintiff during the time charged for, nor was there contention as to the rate charged. The same may be said as to stabling of Jordan's horse. As to whether Barker was an original promisor to pay Jordan's bill, and so considered himself, the plaintiff calls attention to the fact that Jordan came there November 20, 1911, and after he had been there two or three weeks, according to the testimony of Charles H. Skillin, apparently a disinterested witness, the plaintiff complained to Barker, saying she could not board Jordan any longer and did not want him around there. Whereupon Barker said "I will pay his board," and from that time, somewhere in November or December, 1911, to May 13, 1913, Jordan continued to board with plaintiff, paying nothing on his own account. An exhibit was also introduced, dated June 2, 1913, some two weeks after Jordan left plaintiff's house, in the hand writing of Barker and in the form of a bill in which Barker charges Jordan for boarding him and stabling his horse during the time set out in plaintiff's account. It is admitted that Barker left this bill with an attorney for collection against Jordan. Not as showing an original promise, but as confirmatory of that theory, Mrs. Crockett testified that after Jordan went away plaintiff asked Barker who was to pay Jordan's unpaid bill and the reply was that he would. On the other hand the defendant calls attention to the further testimony of Mrs. Crockett, who says that after Jordan had left plaintiff's home as a boarder "she was kind of fretty about his board and at last says 'I would like to know how I am going to get my pay out of this' and he says 'Well, if you don't get it any

other way, I will pay it.'" From this the defendant argues that no original promise had been made by Barker to pay Jordan's board, but that if any promise was made it was a collateral one and so within the statute of frauds and void. A significant piece of testimony is found in the plaintiff's account book where is to be found an account charging Jordan with his board and stabling down to the day of his final departure.

"The provision of the statute of frauds requiring a promise to answer for the debt, default, or miscarriage of another to be in writing in order to fix liability on the promisor, has been a fruitful source of litigation. The general rule, of course, is well recognized that it is a collateral and not an original promise that is within the statute. It is well understood, also, that the obligation is original if the promise is made at the time or before the debt is created and the credit is given solely to the promisor, but collateral if the promise is merely super-added to the promise of another to pay the debt, he remaining primarily liable." . . . "No precise form of words is necessary to show an original promise, or conclusive as to the intention of the parties." Note to *Security Bank Note Co.* v. *Shrader, Ann. Cas.,* 1914, A, p. 490, and cases there cited. In *Reed* v. *Holcomb,* 31 Conn., 360, the court says that in cases difficult to determine "courts must rely upon the circumstances of each particular case, and its general features, in order to ascertain the intention of the parties, and how they viewed it, where it is doubtful whether it was a contract of suretyship or guaranty, or an original undertaking." Our own court in *Doyle* v. *White,* 26 Maine, 341, says that the test to decide whether one promising is an original debtor or a guarantor is whether the credit was given to the person receiving the goods. The account book, upon which plaintiff confidently relies to prove her charge against the defendant for Barker's board, with equal force shows that she continued to charge Jordan and not Barker, for Jordan's board down to the time of his departure. Would she have done this if credit had been primarily given to Barker for Jordan's board during all those months? If Barker was slow about paying his own board would the plaintiff take him as paymaster for Jordan also? If she had given credit to Barker, and he was as able financially at last to pay as counsel says she knew him to be, why was she "fretty"

after Jordan went away, and why did she say that "I would like to know how I am going to get my pay out of this?" While it is true, as a general rule, that the question as to whether the promise is original or collateral is one of fact for the jury to determine, yet from a careful study of all the testimony we are of opinion that there was no promise to pay Jordan's board which was legally binding upon Barker or upon his estate.

The other charges in plaintiff's account, except certain small ones which the court instructed the jury could not be considered, seem to be sufficiently sustained by the evidence.

PAYMENT.

The defendant stoutly claims as a final defense that whatever the charges may be which plaintiff has against the estate, they were wholly or largely paid in the lifetime of Barker, and that at best the verdict of the jury was greatly in excess of what is lawfully due the plaintiff. Exclusive of interest the total bill of the plaintiff was two thousand two hundred twenty-nine dollars and ninety cents. With interest the bill amounts to two thousand three hundred eighty-nine dollars and seventy-one cents. The verdict was for two thousand one hundred ninety-six dollars and sixteen cents. The defendant shows orders on the Portland Savings Bank, amounting to $630.00 drawn payable to the plaintiff and while they do not bear her endorsement yet the teller of the bank testifies that the money drawn on them was paid to her. He also shows orders on Maine Savings Bank, amounting to $555.00 drawn payable to the plaintiff and bearing her endorsement. He also shows a check on Casco National Bank, amounting to $25.00, drawn payable to the plaintiff and bearing her endorsement. The defendant claims that these several amounts, the credits of $60.00 given on her bill, Jordan's board amounting to $248.50, together with the small items before referred to, should all be deducted from plaintiff's account. As to the orders drawn on the two Savings banks, the plaintiff claims that the regular employment of Barker as station agent for the Grand Trunk Railway prevented him from visiting the banks during banking hours and that these orders were given to the defendant in order that she might draw the money and deposit the same to the credit of Barker in the

Casco National Bank. Her counsel argues that Barker's deposit in each Savings bank had reached the sum of two thousand dollars, the limit under the statute on which such banks could pay interest, and that these orders corresponded in amount to the accrued interest. Hence he argues that she only acted as his agent in drawing and depositing the money represented by these orders. In support of this argument attention is called to the fact that in many instances there was deposited the same amount or approximately the same in the Casco National Bank as was drawn from the Savings banks, and that the date of drawing and that of deposit was the same in many instances. As to the Portland Savings Bank orders this argument holds true as to seven but as to the other seven there is no deposit in the Casco Bank to correspond with orders drawn on the Savings bank. As to the Maine Savings Bank orders the argument holds true as to seven but not as to the other seven. In other words the testimony shows that the plaintiff drew $385.00 from the Portland Savings Bank and $275.00 from the Maine Savings Bank which she has not accounted for. Through argument of counsel, she says that as agent she delivered these sums, or paid them to Barker, her principal. These sums having been shown to be in her possession if she would relieve herself from responsibility upon the ground of payment then the burden is upon her to show such payment. This principle is too elementary to require citation of authorities. There is no direct evidence to prove her contention as to payment of these sums to Barker or deposit to Barker's credit, and the presumption upon which she leans, namely that she deposited to his credit some of the proceeds of orders, does not satisfy the burden laid upon her.

We therefore deduct from the plaintiff's bill

Amount drawn from Portland Savings Bank and not accounted for	$385.00
Amount drawn from Maine Savings Bank and not accounted for	275.00
Check on Casco National Bank	25.00
Credits on amended bill	60.00
Jordan's board	248.50
Small items, teams, etc.	8.00
	$1,001.50

Total charges without interest.....	$2,229.90
Deductions to be made.....	1,001.50
Balance	$1,228.40

As to claims for grain and fertilizer furnished, labor performed and other minor claims made by defendant, we leave them without comment as within the undisturbed province of the jury.

The entry will be,

New trial granted unless within thirty days after filing of rescript plaintiff remits all the verdict in excess of $1228.40. Interest on said sum to be allowed from date of writ. If remittitur be made, motion overruled.

MYER BERMAN *vs.* WILLIAM ROSENBERG.

Androscoggin. Opinion April 10, 1916.

Breach of Contract. Meeting of minds of parties to contract.

Action for breach of contract, reported for the determination of this court. *Held:*

1. That the document executed on June 4, 1915, was binding upon the parties thereto, and that the reasons offered to excuse performance on the part of the defendant are not valid. Every reason stated by the defendant was known to him before the first document was written, and from his own testimony these very reasons were the foundation of his dissatisfaction with the plaintiff, and the testimony in support of the plaintiff's contention is overwhelming. The case is one of perfect negotiation resulting in a completed contract on June 4, 1915.
2. That the mere fact that the parties have expressly stipulated that there shall afterwards be a formal agreement prepared, embodying the terms, which shall be signed by the parties, does not by itself show that they continue merely in negotiation. It is a matter to be taken into account in construing the evidence and determining whether the parties have really come to a final agreement, or not. But as soon as the final mutual assent of the parties is established, so that those who draw up the formal agreement have not the power to vary the terms already settled, the contract is completed.

Action on the case to recover damages for the failure of defendant to perform and carry out the terms of an alleged contract entered into by said plaintiff and defendant. Defendant pleaded general issue. At the close of the testimony, the parties agreeing thereto, the case was reported to the Law Court, upon so much of the evidence as is legally admissible, to render judgment as the law and evidence require. Judgment for plaintiff.

The case is stated in the opinion.

Benjamin L. Berman, and Jacob H. Berman, for plaintiff.

Ralph W. Crockett, for defendant.

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

HANSON, J. Action for breach of contract, reported for the determination of this court.

The plaintiff and defendant were copartners in the shoe and clothing trade in the city of Lewiston, and began business in February, 1915. The plaintiff was manager of the business. Disagreement arose in relation to the appropriation by the plaintiff of $150 from the partnership funds for the purpose of paying a personal note; and being unable to adjust their difference, the partners talked of dissolving the partnership. In the absence of the plaintiff, the defendant invited Mark Berman, the plaintiff's father, to come to their store, and there discussed with him the affairs of the partnership, with the result that the defendant agreed to a dissolution of the copartnership, and to continue the business, assume its obligations, and pay the plaintiff four hundred dollars for his interest in the firm. The plaintiff later in the day, in the presence of his father, assented to the arrangement so made by his father and the defendant, and on request of the defendant sent for an attorney to come to their store, and, after consultation with all the parties involved, the following agreement was written by the attorney and signed by the parties:

"LEWISTON, ME., June 4, 1915.

Dissolution agreement by and between Myer Berman and William Rosenberg.

(I) In consideration of $400 My Berman transfers all his right title and interest in the business formerly cōnducted by them jointly, including book of accounts and stock etc.

(II) Wm. Rosenberg is to assume all outstanding indebtedness and to save the said Berman harmless by reason thereof.

(III) William Rosenberg is to collect all outstanding bills owing to said firm at his own expense and for his benefit.

(IIII) Said consideration of $400.00 to be in full satisfaction of all claims and demands which the said Rosenberg has against the said Berman.

WM ROSENBERG
MYER BERMAN."

The above document, which was written at the store on the firm's letter-head, was retained by the attorney and taken to his office for the purpose, as the plaintiff claims, of making a copy of the same for the use of one of the parties, while the first copy would be kept by the other, or a copy, for the use of each; that the document represented and included all that was agreed to, and was the completed contract between the parties.

The defendant denies this, and says that the agreement was not completed on June 4th, and never was perfected; that the first paper was a memorandum merely from which the contract was to be drawn, and he says that the attorney remarked: "I am going to scribble it off here, it is only a temporary agreement, a temporary paper. I will make the real papers out tomorrow," and continues:

"Q. What was said about the paper he was going to draw the next day?

A. Well, it was stated that the paper that was going to be drawn the next day is going to be a binding paper. This is only a temporary agreement.

Q. Was anything said about your having a chance to look over the paper that was to be made the next day?

A. Yes, sir.

Q. What was said about that?

A. Well, after I am satisfied with the papers that I could sign it."

The attorney prepared the following document:

"KNOW ALL MEN BY THESE PRESENTS THAT WILLIAM ROSENBERG, OF LISBON FALLS, IN THE COUNTY OF ANDROSCOGGIN, AND MYER BERMAN, OF LEWISTON, IN SAID COUNTY, AGREE AS FOLLOWS:—

1. The partnership existing between the said parties under the firm name of MYER BERMAN & Co., is hereby dissolved by mutual consent. Said MYER BERMAN in consideration of FOUR HUNDRED DOLLARS ($400.00) paid to him by the said WILLIAM ROSENBERG, grants and assigns to the said WILLIAM ROSENBERG, all his right, title and interest in and to all the goods, stock, fixtures and good will of said firm, and in all the debts, demands and accounts, due said firm, with full power to the said WILLIAM ROSENBERG, to collect the same by suit, or otherwise, in the name of said firm, for his own use and benefit, but without expense to the said MYER BERMAN.

2. The said MYER BERMAN agrees that he will not do any act by which the said WILLIAM ROSENBERG may be delayed or hindered from collecting any of said debts or demands, and that he will, at any time, on request, execute any proper instrument and give any information for enabling the said WILLIAM ROSENBERG to collect the same.

3. The said WILLIAM ROSENBERG agrees to pay all the debts and demands existing against said firm, and to indemnify and to save the said MYER BERMAN harmless from all loss, damage or expense, to which he may be subjected by reason of the same.

4. It is hereby agreed by and between the parties hereto, that the said consideration of FOUR HUNDRED DOLLARS ($400.00) is in full satisfaction of whatever claim or demand the said WILLIAM ROSENBERG has, or might have against the said MYER BERMAN, arising out of the business formerly conducted by them jointly.

5. It is hereby further agreed by and between the aforementioned parties that the said WILLIAM ROSENBERG shall not be holden for any account contracted by the said MYER BERMAN in his private capacity and for his personal interest.

WITNESS OUR HANDS AND SEALS, THIS FIFTH DAY OF JUNE, A. D., NINETEEN HUNDRED AND FIFTEEN.

SIGNED AND SEALED

IN THE PRESENCE OF

....(SEAL)

....(SEAL)"

The defendant in his direct examination says simply that he declined to sign the new draft, without stating any reason, but on cross-examination says, "I told him he didn't deserve it, the whole transaction between him and I; he miscalculated the whole affair. He did business with mismanage, and I am the loser of about $2,000 in this affair, and I thought myself I hadn't ought to pay another cent. In fact he ought to pay for the damages himself."

"Q. That was the reason you didn't sign the draft in the morning?

A. That is one of the reasons. Then I got this check here, which he drew in the bank. He had no business to do that.

Q. That was a reason, too?

A. That is another reason. I thought I was losing enough without paying any more money.

Q. Did you offer Mr. Berman $225?

A. I thought I would do it rather than go to law about it. It is a disgraceful affair anyway to me. . . . so I thought I rather pay him less to get rid of him."

At the trial the defendant's counsel contended (1) that neither party was bound by the terms of the contract, and (2) that "the defendant was excused from performing because the plaintiff had drawn out money he had not accounted for."

From a careful reading and consideration of the testimony, we are of the opinion that the document executed on June 4, 1915, was binding upon the parties thereto, and that the reasons offered to excuse performance on the part of the defendant are not valid. Every reason stated by the defendant was known to him before the first document was written, and from his own testimony these very reasons were at the foundation of his dissatisfaction with the plaintiff, and the testimony in support of the plaintiff's contention is overwhelming. The case is one of perfect negotiation resulting in a completed contract on June 4, 1915. Both counsel cite and rely upon *Steamship Co.* v. *Swift,* 86 Maine, 248. The rules laid down in that case are universal, and its doctrine is controlling in the case at bar. These parties arrived at a point when they could no longer do business together. They desired to separate, and after agreeing between themselves, they sent for an attorney, whose

services at their conference resulted in an agreement in writing which both parties signed, and which from the testimony embodied just what both parties wanted to do, and what their deliberate intentions were. Nothing can be plainer than the statements made by the writer; nothing simpler or more single in purpose, and withal there is no suggestion of ambiguity. These parties desired to dissolve their relation as copartners. The agreement provided for that, and for payment of $400 to the retiring partner, and the usual stipulation as to collection of debts and paying liabilities. That is all. If, as the defendant claims, the document of June 4, 1915, was not a contract, because the last was to be effective if satisfactory to him, what is there in the last one to justify his refusal to sign? If not satisfactory to him, why not? A comparison of the documents shows that the attorney made a longer document, using more words to express his meaning, but to all intents and purposes covering the same ground as the first down to the last clause, with which the parties having signed the first must necessarily be satisfied. The attorney added paragraph 5, which makes a provision not in the first document, and so manifestly in the interest of the defendant that the conclusion is irresistible that the defendant, having signed the first, had no reasonable excuse for refusing to sign the latter. There was a contract made on June 4, 1915. The minds of the parties met, and, although the document was written hastily, outside the office of the attorney, yet it expresses all that they desired to do, and they signed it. If it were not their intention to be bound by it, why did they sign it? The evidence does not furnish any reason to assail the validity of the first mentioned agreement.

In *Steamship Company* v. *Swift,* 86 Maine, 248, cited by both parties, a different state of facts is presented. There the parties were in correspondence for nearly a year in relation to a certain space on three steamboats, to be fitted with refrigerators and used by the defendants for shipping meat. The plaintiff claimed that the contract was completed in April, 1890. The defendants denied that any contract was made or signed. The case shows that after prolonged correspondence and many delays and requests for a contract, the plaintiff finally sent a form of contract which was not

signed. In finding for the defendant, the court say: "The case is by no means free from doubt and difficulty, but due reflection and study of the evidence have at the last brought us to the conclusion, that what the plaintiff claims to have become a perfected contract on April 5, 1890, by the defendant's letter of that date, was at the most only the acceptance of the proposed basis of a contract, which was yet to be perfected as to details, and put in writing; and that the defendants did not have, nor signify, any intention to be bound until the written draft had been made and signed."

It was further held, "that if the written draft is viewed by the parties merely as a convenient memorial, or record of their previous contract, its absence does not affect the binding force of the contract; if, however, it is viewed as the consummation of the negotiations, there is no contract until the written draft is finally signed." Both rules are then emphasized and illustrated, and the decision is a leading authority, widely cited.

It is settled that the mere fact that the parties have expressly stipulated that there shall afterwards be a formal agreement prepared, embodying the terms, which shall be signed by the parties, does not by itself show that they continue merely in negotiation. It is a matter to be taken into account in construing the evidence and determining whether the parties have really come to a final agreement, or not. But as soon as the final mutual assent of the parties is established, so that those who draw up the formal agreement have not the power to vary the terms already settled, the contract is completed. 6 R. C. L., 619.

These authorities hold that the burden of proof is on the party claiming that the contract was completed before the draft was signed; and the authority last cited holds, too, that, if the parties act under the preliminary agreement, or receive benefits thereunder they will be held bound notwithstanding the fact that a formal contract has never been executed. Idem, 620, citing 29 L. R. A., 436, note; *Sanders* v. *Pattlitzer Brothers Fruit Co.,* 144 N. Y., 209. See *Miller* v. *McManus,* 57 Ill., 127.

It is settled that the fact that parties negotiating a contract contemplate that a formal agreement shall be made and signed is some evidence that they do not intend to bind themselves until the agree-

ment is reduced to writing and signed. But, nevertheless, it is always a question of fact, depending upon the circumstances of the particular case, whether the parties had not completed their negotiations and concluded a contract definitely complete in all its terms which they intended should be binding upon them, and which for greater certainty, or to answer some requirement of the law, they designed to have expressed in a formal written agreement. *Wharton* v. *Stoutenburg,* 35 N. J. Eq., 266.

There is conflict as to the real purpose of making another draft of the agreement on the following day, but no suggestion was made by either party that there was to be a change in the stipulations. A careful reading of the testimony leads to the conclusion that the suggestion of making another, or more formal draft of the agreement came from the attorney, for his own purposes or convenience, on his own motion, without protest from the parties, or expectation on their part that the agreement so made should be changed.

The entry will be,

Judgment for plaintiff.

ALICE P. PREBLE, Guardian of Albert M. Preble,

vs.

HARVEY M. PREBLE.

Sagadahoc. Opinion April 10, 1916.

Nature of action when contract cannot be legally performed, or performance is prevented by sickness or death. Prima facie case. Quantum meruit.

This is an action of assumpsit, containing a quantum meruit count, brought by the plaintiff as guardian of Albert M. Preble, son of the defendant. At the conclusion of the plaintiff's testimony, counsel for the defense moved a nonsuit, which was ordered, and the plaintiff excepted.

Held:

1. That quantum meruit is a proper count in such cases is maintained by almost universal acceptance in modern decisions, and the decided weight of authority supports the rule that recovery may be had for the value of the services actually rendered where the performance of an entire contract for personal services if prevented by sickness or death. A circumstance that has had a decisive influence is the fact that in such case the other party has received and retains the benefit of the services.
2. At the same time the rights of the defendant are guarded with equal care, and the rule in his behalf is, that if the failure of Albert M. Preble to fulfill the contract was not caused by the fault or default of the defendant, and any damages have resulted, they may be offered by way of recoupment to reduce the compensation to which Albert M. Preble would otherwise be entitled.
3. To recover, the plaintiff assumes the burden of showing (1) that Albert M. Preble performed services which were of benefit to the defendant, beyond the amount received from the division of the proceeds of the farm; (2) that Albert M. Preble had not been paid therefor, and (3) that the benefits therefrom are still retained by the defendant. These important elements are necessary in order to establish facts from which a just and impartial verdict might be reached by the jury, and must be proved in order to justify submission of the case to a jury. In other words, the plaintiff must at least make out a prima facie case, before the adverse party may properly be called upon to answer.

The plaintiff's case is far too deficient in each of the necessary requirements to warrant submission of the same to the jury.

4. There was no evidence to support a finding for the plaintiff, and it is not shown that the order of nonsuit was erroneous and prejudicial to the plaintiff. The nonsuit was therefore correctly ordered.

Action of assumpsit containing a quantum meruit count brought by plaintiff, as guardian of her husband, to recover for certain work and labor rendered and performed for defendant. Defendant pleaded the general issue and brief statement. At close of plaintiff's testimony, counsel for defendant made a motion for a nonsuit, which was granted. Plaintiff filed exceptions. Exceptions overruled.

The case is stated in the opinion.

Williamson, Burleigh & McLean, for plaintiff.

Clarence E. Sawyer, for defendant.

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

HANSON, J. This is an action of assumpsit, containing a quantum meruit count, brought by the plaintiff as guardian of Albert M. Preble, son of the defendant. At the conclusion of the plaintiff's testimony, counsel for the defense moved a nonsuit, which was ordered, and the plaintiff excepted.

The case shows that on February 5, 1905, Albert M. Preble entered into an agreement with his father to operate the homestead farm and divide the proceeds between them, and on the father's death Albert M. Preble was to have the farm. From the date of the agreement until November, 1914, it was carried out to the satisfaction of both parties, each doing his part of the work, and receiving his share of the proceeds.

In November, 1914, Albert M. Preble became seriously ill, and in consequence wholly incapacitated for the performance of labor. Since that date, his wife, the guardian, has performed for him the conditions of the agreement, and has received the income from the farm as Albert M. Preble received it before he was incapacitated.

Such was the situation at the date of the writ. The suit was brought without notice to the defendant, or demand for payment, other than the service of the writ. It is claimed by the plaintiff that he is entitled to a further payment of thirty or forty dollars per month during the entire nine years. and the aggregate of his claim, is nearly, if not fully, double the value of the defendant's farm. The father is seventy years old and in fair health.

From the evidence in the case it appears that Albert M. Preble, his wife and daughter were, at the time of the trial, and are so far as known, at the present moment, on the farm, living as they have lived for years as one family, doing such work as they chose to do, and each receiving his part of the products of the farm. So far as the case discloses, the defendant was willing to carry out the contract. The plaintiff shows no refusal on the part of the defendant to accommodate himself to the changed conditions during his son's illness. On the contrary, the defendant accepted the situation and was observing the agreement as he had during the period of his son's good health, and was working as he had from the first. What more could he do? If the plaintiff's testimony is true, and we must assume that it is, all that the defendant agreed to do was to give

Albert M. Preble one-half of the proceeds of the farm during his life, and the farm at his death. The first part of the consideration has been paid. The amount is unknown, but it is paid. The plaintiff admits it. The other part of the consideration cannot well be paid or delivered until the time agreed upon expires. The agreement was that the farm was to be the property of Albert M. Preble on the death of the defendant.

The amount sought to be recovered is far in excess of the value of the farm. The claim set up by the plaintiff would therefore operate to do indirectly that which from the nature of things could not be done directly. If the plaintiff were to recover what she has sued for, she would take the farm on execution and dispossess the defendant, when the latter may have many years to live. The law will not do this service for the plaintiff, especially when it does not appear that the defendant has received and retains benefit for which he has not rendered full payment.

Counsel have devoted much space to a discussion of the form of action and whether or not the suit is prematurely brought. We think the action, sustained by the necessary facts may be maintained, and given the necessary facts, such action would not be premature. That quantum meruit is a proper count in such cases is maintained by almost universal acceptance in modern decisions, and the decided weight of authority supports the rule that recovery may be had for the value of the services actually rendered where the performance of an entire contract for personal services is prevented by sickness or death. A circumstance that has had a decisive influence is the fact that in such case the other party has received and retains the benefit of the services. 6 R. C. L., 979; *Parker* v. *Macomber,* 16 L. R. A., 858 (R. I.); *O'Connor* v. *Briggs,* 182 Mass., 389; *Water Co.* v. *Skowhegan Village Corp.,* 102 Maine, 323; Parsons on Contracts, 9th ed., Vol. 2, page 831; 6 R. C. L., 348; *Steeples* v. *Newton,* 33 Am. Rep., 705; *Lakeman* v. *Pollard,* 43 Maine, 463; *McMillan* v. *Malloy,* 35 Am. Rep., 471; *Knight* v. *Bean,* 22 Maine, 531.

At the same time the rights of the defendant are guarded with equal care, and the rule in his behalf is, that if the failure of Albert M. Preble to fulfill the contract was not caused by the fault or default

of the defendant, and any damages have resulted, they may be offered by way of recoupment to reduce the compensation to which Albert M. Preble would otherwise be entitled. 9 Cyc., 686: *Seretto* v. *Railway,* 101 Maine, 140. See *Veazie* v. *Bangor,* 51 Maine, 509.

It is evident that the contract was made in good faith, each intending to carry out his promises, and it is conceded that the defendant had performed his part, and was ready so to continue. The serious illness of Albert M. Preble intervened. Suit was brought and presents the question of the liability and rights of both parties.

To recover, the plaintiff assumes the burden of showing (1) that Albert M. Preble performed services which were of benefit to the defendant, beyond the amount received from the division of the proceeds of the farm, (2) that Albert M. Preble has not been paid therefor, and (3) that the benefits therefrom are still retained by the defendant. These important elements are necessary in order to establish facts from which a just and impartial verdict might be reached by the jury, and must be proved in order to justify submission of the case to a jury. In other words, the plaintiff must at least make out a prima facie case, before the adverse party may properly be called upon to answer.

The plaintiff's case is far too deficient in each of the necessary requirements to warrant submission of the same to the jury. Receipt of one-half of the proceeds of the farm which were the result of the combined work of Albert M. Preble and defendant is admitted, but the value of such proceeds is not shown.

This fact alone is sufficient to authorize the withdrawal of the case from the jury, especially in view of the unsatisfactory evidence tending to show the value of Albert M. Preble's services, where the witnesses called did not know, and the case does not show the amount received by Albert M. Preble under the contract, or the value of the defendant's services.

To add to the uncertainty of the case presented, it appears that Albert M. Preble had no property at the date of the contract, but now claims practically all the stock, horses, farming machinery and tools on the farm, and from the first did much work personally, and with his teams, for other parties, and received and retained the proceeds, while in much of the work he was assisted by the

defendant. Here again the amount and value of such service, and income, were not shown, a fact which gives added weight to the uncertainties attending the entire transaction, and emphasizes the fact that in the case presented there was nothing for the jury. There was no evidence to support a finding for the plaintiff, and it is not shown that the order of nonsuit was erroneous and prejudicial to the plaintiff. The nonsuit was therefore correctly ordered. *Bank* v. *Nickerson,* 108 Maine, 341.

"In making such an order the Justice does not determine any disputed questions of fact, nor does he pass upon the credibility of the witnesses, nor upon the weight of the evidence. He rules that there is no evidence to support the action. This is a ruling upon a question of law. Whether the evidence is sufficient is a question of fact. Whether there is any evidence is a question of law." *Brooks* v. *Libby,* 89 Maine, 151.

"A nonsuit is properly ordered when there is no evidence to support a finding which is essential to the plaintiff's right to recover." 109 Maine, 40; *Bryant* v. *Paper Co.,* 103 Maine, 32.

The entry will be,

Exceptions overruled.

HARRY H. DONNELL, et als., Admrs., *vs.* G. G. DEERING COMPANY.

Sagadahoc. Opinion April 17, 1916.

Evidence of custom. Rights of mortgagees of shares of vessel property. Rights of mortgagor and mortgagee as to recovering for damage done to mortgaged property. Rule as to dividends earned by vessel property. Usage or custom in transferring shares of vessels.

1. A chattel mortgage carries the whole legal title to the property mortgaged to the mortgagee conditionally, and if the condition is not performed the mortgagee's title becomes absolute at law. The only right remaining to such a mortgagor is the equity of redemption.
2. If while the property is in the permissive possession of the mortgagor it is damaged by a third party the mortgagee is entitled to the damages.
3. The right of a mortgagee to have the damages for injuries to the mortgaged property itself is incident to his title to the property; it does not depend upon his possession, or right to the possession of the property at the time of the injuries.
4. A general and well recognized custom and usage in the sale and purchase of vessel property, that when shares in a vessel are sold and the ordinary bill of sale thereof is given without any condition or reservation the buyer takes the shares "debits and credits," is neither contrary to established principles of law, nor repugnant to the contract of the parties, and is not unreasonable.
5. While a mortgagor of 71-128th. of a vessel still held the right to redeem those shares the vessel was materially damaged in a collision. After the mortgages had been fully foreclosed and the mortgagees had sold and transferred the shares to other parties, the then agent for the vessel compromised the collision matter receiving substantial damages which he distributed to the then owners of the vessel. *Held,* that, in an action by the administrators of the estate of the mortgagor against the agent of the vessel to recover 71-128th. of the net amount received by the agent in settlement of the collision matter, the plaintiffs are not entitled to recover.

Action of assumpsit under a count for money had and received to recover certain money claimed as due the plaintiffs. Defendant filed general issue and brief statement. Case reported to Law Court for final determination upon so much of evidence as legally admissible. Judgment for defendant.

Case stated in opinion.

Joseph M. Trott, for plaintiffs.

McGillicuddy & Morey, for defendant.

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

KING, J. This action for money had and received comes up on report. The material facts are these:

William T. Donnell in his lifetime was the owner of 73-128ths of the schooner Alice M. Colburn, and on December 1, 1905, he mortgaged 65-128ths of said schooner to the Lincoln National Bank of Bath, Maine, to secure $16,000. That mortgage was transferred to the First National Bank of Bath. Mr. Donnell, the mortgagor, acted as agent for the vessel until his death. He died in October, 1910, and the plaintiffs are the administrators of his estate. In the early part of March, 1911, the Colburn was materially injured in a collision with the steamer Trafalgar. March 8, 1911, the bank began foreclosure proceedings of its mortgage and the foreclosure became complete May 9, 1911. Soon after that the defendant became agent for the Colburn, succeeding the plaintiffs who had acted as agent since the death of the mortgagor. June 30, 1911, the administrators of the estate of Wm. T. Donnell (the mortgagor) executed a bill of sale to the bank of the 65-128ths of the schooner. They claim it was not delivered until November following. It was given apparently to perfect, if necessary, the bank's title under the foreclosure.

At the time the defendant became agent for the Colburn she was in debt $3127.83 including a balance of $1500 on the repair bill of $2500 occasioned by the collision. September 14, 1911, the defendant rendered an account showing the net indebtedness then to be $1696, and asked the owners to send checks for their respective portions of that deficit. The bank paid the assessment on its 65-128ths. The plaintiffs did not remit for the assessment on the remaining 8-128ths, but that was liquidated by the application of subsequent dividends. October 18, 1911, the bank sold at auction the 65-128ths to the defendant for $11,200. The bill of sale of the same was dated November 29, 1911.

Of the other 8-128ths of said vessel, owned at one time by Wm. T. Donnell, 6-128ths were mortgaged to the Peoples Safe Deposit and Savings Bank of Bath. That mortgage was foreclosed by proceedings commenced November 22, 1911, and the foreclosure became complete January 22, 1912. On February 13, 1912, the Bath Trust Company, receiver of the Peoples Safe Deposit and Savings Bank, sold and conveyed those 6-128ths to G. G. Deering. The estate of Wm. T. Donnell then had left 2-128ths of said vessel. On or before August 1, 1912, the defendant as agent for said vessel settled by compromise the Trafalgar collision matter receiving in gross $4600, and gave credit to the vessel for the same in its dividend statement of August 1, 1912. It sent the plaintiffs such a statement with a check for the dividend on their 2-128ths.

In this action the plaintiffs claim to recover 71-128ths of the net amount which the defendant received in settlement of the collision matter, which net amount they claim is $3211.50, being the difference between the $4600 received and $1388.50 paid out for fees and expenses in that particular matter. They base their claim to recover on the contention that inasmuch as the collision occurred while the estate of Wm. T. Donnell owned the equity to redeem said 71-128ths from said mortgages, that estate is entited to 71-128ths of whatever net sum was subsequently received by the defendant in settlement of the collision matter.

A chattel mortgage carries the whole legal title to the property mortgaged to the mortgagee conditionally, and if the condition is not performed the mortgagee's title becomes absolute at law. *Stewart* v. *Hanson,* 35 Maine, 506. The only right remaining to such a mortgagor is the equity of redemption. He has no title to the property, and, therefore, has no rights in it incident to ownership. If the mortgagee permits him to have the possession and use of it, such permissive possession and use, unless otherwise agreed, does not entitle him as against the mortgagee to have the benefit of damages for wrongful injuries to the property itself. If while the property is in the permissive possession of the mortgagor it is damaged by a third party the mortgagee may recover the damages of him who is legally liable therefor. Such right in a mortgagee to recover damages for injuries to the mortgaged property is incident

to his title to the property; it does not depend upon possession, or right to present possession, of the property. The right of present possession is essential to maintain an action for an injury to the possession, but is not an essential to maintain an action for damages to the property itself. Although a mortgagor in possession may maintain trespass for an injury to his right of possession, and in such action he may be permitted to recover, by way of aggravation, damages for injuries to the property itself by the defendant's acts, yet the right to recover such damages to the property itself in such an action by the mortgagor is only incidental to his right of action for the injury to his possession. It is subordinate to the mortgagee's right to recover for the damages to the property itself. When the injury affects the estate it may be redressed in an action by him in whom the legal title to the estate is vested. Even though one who has wrongfully injured the mortgaged property itself may thus be liable to an action by the mortgagor, as well as to an action by the mortgagee, yet the principle remains the same, that the superior right of action for injuries to the estate is in the mortgagee by virtue of his title. *Gooding* v. *Shea,* 103 Mass., 360.

Applying these fundamental and familiar principles of law to the facts in the present case we think the plaintiffs' contention is not sustainable.

At the time of the collision and of the injuries thereby occasioned to the Colburn, these 71-128ths of the vessel were under mortgages, and the mortgagees thereof, having the legal title to the estate represented by those shares, had the right to receive and to recover the damages resulting from the collision to the property mortgaged. They had that right by virtue of their title to the property injured. As between them and the mortgagor their right to the damages for injuries to the mortgaged property itself was the controlling right. Had the damages been received by the agent for the vessel before the foreclosures of the mortgages were complete the mortgagees would have then been entitled to them by virtue of their title as mortgagees. And certainly they could not be less entitled to those damages by reason of the fact that when they were received by the agent their title by mortgage to the property when damaged had then become absolute under the foreclosures.

It is suggested in behalf of the plaintiffs that some portion of the amount recovered by the defendant in the compromise settlement of the collision should be regarded as compensation for the delay of the vessel, and therefore belonged to the estate of the mortgagor which then had the possession and use of the vessel. But it is a sufficient answer to that suggestion, that there is no proof that any part of the money received by the defendant was compensation for the vessel's lost time. The matter of damages for the delay of the vessel may or may not have been taken into account in the compromise. We cannot determine whether it was or not, for the evidence is silent on that point.

But there is another adequate defense we think to the plaintiffs' claim, at least so far as the 65-128ths of the vessel are involved. There is ample proof in the case of a general and universally well known and recognized usage pertaining to sales and transfers of shares in vessels, which is, that when such shares are sold and the ordinary bill of sale therefor is given without any condition or reservation, the buyer takes the shares, debits and credits, or in other words, that all debts follow the vessel, and all credits due the vessel, if any, go to the buyer. Such usage, we think, is neither contrary to established principles of law, nor repugnant to the contract of the parties, and it is not unreasonable. Indeed it seems necessary that transfers of shares in a vessel should be governed by such an usage, for it is impracticable at least, if not quite impossible, for vendor and vendee of vessel property to determine with any degree of accuracy the financial standing of the vessel at the time of the sale. Even the agent for the vessel cannot know with certainty, at all times, the extent of her debts and credits. Moreover, the lien for a maritime tort accompanies the vessel into the hands of even a bona fide purchaser. *Vanderwater* v. *Mills,* 60 U. S., 89. And the purchaser of a vessel, unless it is otherwise provided, on taking possession takes the right to all freight then accruing, and succeeds to any lien which the seller had to enforce payment of such accruing freight. *Merchant's Banking Co.* v. *Cargo of the Afton,* 143 Fed., 727. We think the usage proved was so general and so universally recognized that the parties to the sales and purchases and transfers of the shares of the Colburn involved in this case must be held to

have made those sales and purchases and transfers with reference to the usage.

Giving effect to the usage proved in considering the transfer of the 65-128ths of the vessel, by the bills of sale already mentioned. from the plaintiffs to the First National Bank of Bath, and from that bank to the defendant, which transfers were without qualification or reservation, we can entertain no doubt that the shares so sold and transferred passed to the defendant subject to debits and credits—that is, the debts against the vessel following her, and her accruing and uncollected credits going to the new owner in proportion to its ownership.

If this last mentioned defense is not fully applicable so far as the 6-128ths of the vessel may be involved, because no voluntary transfer and bill of sale thereof was made by the plaintiffs after the collision, the title to those shares having passed from the Donnell estate by the mortgage to the Peoples Safe Deposit and Savings Bank and its foreclosure, we need only add that the defense first mentioned and considered is ample.

The court is therefore of opinion that the plaintiffs are not entitled to recover.

Judgment for defendant.

HAROLD E. COOK, Judge of Probate *vs.* IDA S. C. TITCOMB, et al.

Kennebec. Opinion April 17, 1916.

Duties of personal representatives of a deceased executor or administrator. Findings of facts as to amount due by judge of probate, no appeal being entered. General rule as to liability of sureties on probate bonds. Judgment on probate bond. Execution to issue thereon for what sum. Statute of limitations as to probate bonds.

1. When an executor has taken into his control the property of the estate, the sureties on his official bond are holden for the lawful administration of that property by their principal, and for a just and true account thereof to the judge of probate having jurisdiction of the estate.
2. If the executor dies before he has fully discharged his trust, his sureties continue responsible for a just and true accounting of the property which their principal received as executor, and for the payment and turning over to the estate of any balance of that property not found to have been lawfully disposed of by him in his lifetime.
3. The personal representative of a deceased executor has the right and is the proper party to present to the probate court for settlement the administration-account of the deceased executor.
4. In the presenting and settlement of an executor's administration-account by his personal representative, the sureties on the official bond of the deceased executor are fully and effectually represented in the probate court by the personal representative of their principal. They cannot be heard to question the validity of a decree regularly passed by the probate court against their principal in matters covered by the bond.
5. If in the settlement of the deceased executor's administration-account the judge of probate determines and decrees that a certain balance is due from the estate of the deceased executor to the estate he represented, from which decree no appeal is taken, it is then the duty of the personal representative of the deceased executor to pay that sum on demand to the administrator de bonis non of the estate to which it is due and payable. And the refusal of such personal representative to make such payment is a breach of the official bond of the deceased executor for which his sureties thereon then become liable.
6. In an action in the name of the judge of probate against a surety on the official bond of a deceased executor for breach of the bond, upon proof of the breach, judgment must be entered for the penalty of the bond. But execution is to issue under such judgment for so much only as the court

finds to be due from the estate of the deceased executor to the estate he represented, with interest and costs.

7. Lendall Titcomb, the executor of the will of Nancy W. Cushman, died April 23, 1908. Thereafter his executrix, Ida S. C. Titcomb, filed in the probate court having jurisdiction of the Cushman estate her testator's administration-account in that estate, and after hearings thereon the judge of probate, on January 25, 1915, decreed that the balance due from the estate of said Lendall Titcomb to the Cushman estate is $6643.27, from which decree no appeal was taken. March 20, 1915, the administrator de bonis non of the Cushman estate demanded of Ida S. C. Titcomb, as executrix, payment of the amount so decreed which demand was refused. Thereupon the judge of probate authorized this action to be brought in his name for the benefit of the Cushman estate against said Ida S. C. Titcomb, the surviving surety, upon the official bond of said Lendall Titcomb. *Held,* that the refusal of said Ida S. C. Titcomb, the personal representative of Lendall Titcomb, to pay the amount found and decreed by the judge of probate to be due from the Lendall Titcomb estate to the Cushman estate was a breach of the bond in suit for which breach the defendant as surety on said bond is liable; that judgment is to be entered in this action against the defendant for the penalty of the bond, and that execution is to issue thereunder for $6643.27 with interest thereon from March 20, 1915, and costs.

Action of debt on probate bond. Plea of general issue and brief statement filed by defendant. Case reported to Law Court upon agreed statement of facts, Law Court to render such decision as law and facts require. Judgment for plaintiff.

Case stated in opinion.

George W. Heselton and Herbert E. Foster, for plaintiff.

Andrews & Nelson, for defendants.

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

KING, J. This case is reported to the Law Court on an agreed statement.

Nancy W. Cushman, a resident of Augusta, Maine, died testate March 20, 1892. Her will was proved and allowed April 25, 1892, and Lendall Titcomb was appointed and qualified executor, giving bond with the defendant as one of the sureties thereon. The testatrix gave her property, after the payment of her debts, funeral

expenses and expenses of administration, to her sister Mary Waugh in trust, she to have the income thereof and such portions of the principal as should be necessary for her comfortable support during life, and at her death any portion of the estate remaining unexpended was to be distributed by the executor to certain persons named in the will.

Lendall Titcomb, the executor, took possession of the estate and retained the management of it during the lifetime of Mary Waugh, who died April 22, 1908. He died the following day, April 23, 1908, never having filled an inventory or rendered any account in said estate. Ida S. C. Titcomb, his wife, is his sole beneficiary and the executrix of his will. As such executrix, on June 11, 1909, she filed in the probate court having jurisdiction of the Cushman estate her testator's administration-account in that estate showing a balance due the estate of $2619.83. The allowance of that account was contested and after hearings thereon, the judge of probate, on January 25, 1915, decreed that the balance due from the estate of said Lendall Titcomb to the Cushman estate is $6643.27, from which decree no appeal was taken. On March 20, 1915, the administrator de bonis non of the Cushman estate demanded of Ida S. C. Titcomb, executrix, payment of the amount so decreed to be due from the Lendall Titcomb estate to the Cushman estate, which demand was refused.

Thereupon the judge of probate authorized this action to be brought in his name against said Ida S. C. Titcomb as the surviving surety upon the official bond given by Lendall Titcomb as such executor.

It is urged in defense that inasmuch as the action was not commenced within six years after the death of Lendall Titcomb it is barred by the provisions of sec. 8 of c. 74, R. S., which reads: "Every action against sureties on an administrator's or executor's bond must be commenced within six years after such administrator or executor has been cited to appear to settle his account in the probate court where administration is granted on the estate, or if not so cited, within six years from the time of the breach of his bond, unless such breach is fraudulently concealed by the administrator or executor from the heirs, legatees or persons pecuniarily

interested, who are parties to the suit, and in such case within three years from the time such breach is discovered." The exact point urged in defense is, that there was not, and could not be, any breach of the bond after the death of the executor, for which the sureties on his official bond can be held liable. There is no merit we think in that contention.

The sureties on the official bond of an executor undertake and guarantee that their principal shall faithfully discharge the duties of his trust, and shall administer the estate committeed to him according to law and the will of the deceased. The bond is given to the judge of probate in his official capacity, and at his death passes to his successor in office. It is given for the benefit of the estate, and for all persons who may be interested therein. The condition of the bond, though expressed briefly and in general terms, from its very generality embraces a great variety of acts, to continue for considerable time. Such bond is obviously a continuing obligation, of which there may be various and successive breaches. *Loring* v. *Kimball,* 1 Gray, 305, 312. When an executor has taken into his control property of the estate, the sureties on his official bond stand sponsors for the lawful administration of that property by their principal, and for a just and true account thereof to the judge of probate having jurisdiction of the estate. If the executor dies before he has fully discharged his trust, his sureties continue responsible for a just and true accounting of the property which their principal received as executor, and for the payment and turning over to the estate of any balance of that property not found to have been lawfully disposed of by him during his lifetime. That such responsibility rests upon the sureties on the official bond of an executor or administrator seems beyond dispute. We know of no authority to the contrary. It has always been so recognized.

In the case at bar it appears that the executor did not return an inventory of the estate, nor file an account, within the times required by law. But those breaches of his bond are not relied upon in this action. They probably occasioned the estate but nominal damages, and they happened more than twenty years before this action was brought. It does not appear that the property received by the executor was not administered according to the will, during

the lifetime of Mary Waugh, the cestui que trust. No claim is made for a breach of the bond in that respect. Nor could it be reasonably claimed that the executor committed a breach of his bond because he did not distribute the balance of the estate according to the will after the death of Mary Waugh, for he died the following day.

But at the death of Lendall Titcomb there was in his hands a balance of the Cushman estate, the amount of which could be authoritatively determined only by the judge of probate after an examination and adjustment of the administration-account of the deceased executor. Until that balance was ascertained the liability of the sureties on the executor's official bond, if any, could not be determined. The executrix of Lendall Titcomb's will presented to the probate court for examination and allowance such an account. She had the right to do that, and she was the proper party to do it. In *Nowell* v. *Nowell,* 2 Maine, 75, the court said: "For the performance of all the duties and responsibilities of such administrator, he, in his lifetime, is personally bound, and his representative is answerable upon his decease; it therefore becomes necessarily incident to the power, duty, and authority of the representative to be permitted to show that these duties and responsibilities have been faithfully discharged. To refuse him this privilege, would be to hold him accountable for the doings of the party he represents and, at the same time, to withhold from him the means of showing that such party had conducted with the most perfect fidelity."

In the presenting and settlement of an executor's administration-account by his personal representative, the sureties on the official bond of the deceased executor are fully and effectually represented in the probate court by the personal representative of their principal. And they cannot be heard to question the validity of a decree regularly passed by the probate court against their principal in matters covered by the bond. *Judge of Probate* v. *Quimby,* 89 Maine, 574. The contingency that their principal may die before his trust is fully discharged, leaving funds in his hands belonging to the estate he represented, which his personal representative may neglect and refuse to pay over to that estate on demand, is a continuing liability assumed by the sureties on the official bond of an executor or administrator. And when such a contingency arises a breach of the bond then occurs for which the sureties become liable.

In the instant case the julge of probate, after hearings in the matter of settlement of the administration-account of Lendall Titcomb as the executor of the Cushman will, determined and decreed that there was due the Cushman estate from the Titcomb estate $6643.27. It was then the duty of the executrix of the will of Lendall Titcomb, as his personal representative, to pay that sum to the administrator de bonis non of the Cushman estate. She lawfully represented Lendall Titcomb in the settlement of his administration-account in the Cushman estate; and she was just as much bound to pay the amount found due the Cushman estate in the settlement of that account, as Lendall Titcomb would have been bound to pay it if alive. On her refusal to make such payment there was a breach of the official bond of Lendall Titcomb for which breach his sureties thereon became liable, just the same as there would have been a breach of his bond, for which his sureties thereon would have become liable, had the decree of the judge of probate been made in the lifetime of Lendall Titcomb and he had refused to pay the amount so decreed.

This action against the defendant as the surviving surety on Lendall Titcomb's official bond as executor having been commenced almost immediately after the breach of the bond relied upon and proved, as we have indicated, it is apparent that the alleged defense of the statute of limitation does not apply, and must be overruled.

The defendant's situation in this action is unusual. She is the personal representative of Lendall Titcomb, the principal in the bond, and as such personal representative it was her duty to pay to the Cushman estate the amount decreed by the judge of probate. She is also the surviving surety on the bond, and as such she is liable for the payment of the amount decreed, because of the default of the Titcomb estate to pay it. And, moreover, she is the sole beneficiary of the Titcomb estate. She had, therefore, the fullest right and opportunity to be, and undoubtedly was, personally represented in the proceedings in the probate court under which the decree was made fixing the amount due from the Lendall Titcomb estate to the Cushman estate, and for the payment of which she was responsible as surety.

Her obligation as surety on the bond being joint and several she is suable thereon alone. There is no suggestion of any infirmity or irregularity in bringing this action against her as surety. It was properly bought in the name of the judge of probate for the benefit of the Cushman estate and all persons interested therein.

A breach of the bond in suit having been shown for which the defendant Ida S. C. Titcomb as surety on said bond is liable, judgment must be entered in this action against her for the penalty of the bond. R. S., c. 74, sec. 9. *Lewis* v. *Warren,* 49 Maine, 322.

But execution is to issue under said judgment for so much only of the penalty of said bond as equals the amount which the court finds to be due the estate of Nancy W. Cushman from the estate of Lendall Titcomb, with interest thereon and costs; and the court finds that amount to be the same amount which the judge of probate found to be due from the estate of Lendall Titcomb to the estate of Nancy W. Cushman, to wit, the sum of $6643.27, to which is to be added interest thereon from March 20, 1915, the time when payment thereof was demanded of said Ida S. C. Titcomb, and costs.

So ordered.

ASHE, NOYES & SMALL COMPANY *vs.* N. F. WOODBURY.

Androscoggin. Opinion April 17, 1916.

How far may rights of way or easements be changed or altered without infringement of rights of parties thereto. Rights of way or easements in common.

The plaintiff acquired by deed the south section of a certain building in Auburn, Maine, used as a shoe factory, together with the following right or easement in the north section: "And for the consideration aforesaid I do also convey to said grantee and its assigns the right to use in common with myself, my heirs and assigns, the common entrance to the first floor of the building on the premises hereby conveyed on the premises adjoining the same on the north, which common entrance is located on said adjoining premises near the southerly line thereof, such common use thereof to extend only so far as the first floor of said building." The common entrance was then existing of definite and fixed limits and consisted of a stairway and hallway. Upon a motion for a new trial by the defendant in an action on the case for an alleged infringement of the plaintiff's right to use the common entrance, *Held:*

1. Assuming, though not so deciding, that the easement granted gave the plaintiff only the right to a suitable and convenient passageway through the common entrance, and that was the defendant's contention, there was sufficient evidence to justify the jury in finding that the defendant had by narrowing the hallway of the entrance infringed the plaintiff's rights even as so limited. The jury may have based their verdict for the plaintiff on such a finding. It cannot be determined from the record that they did not.
2. That considering the motion in the most favorable aspect for the defendant it is not made to appear that the verdict is clearly wrong.

Action on the case for an alleged infringement of the plaintiff's right to use a common entrance to a certain building owned by defendant. Defendant pleaded general issue and brief statement, alleging that the acts of the defendant were legal and lawful. Evidence on part of the plaintiff tended to show that the right of way, or easement originally granted to plaintiff had been materially changed by defendant. Verdict for plaintiff in the sum of one dollar. Defendant filed motion for new trial. Motion overruled.

Case stated in opinion.
Oakes, Pulsifer & Ludden, for plaintiff.
Harry Mansur, for defendant.

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

KING, J. This case comes up on a motion for a new trial by the defendant. It is an action on the case for an alleged infringement of the plaintiff's right to use a common entrance to a certain brick building in Auburn, Maine. The building was formerly owned by one Horace C. Day and used as a shoe factory. A divisional brick wall extending through the building from west to east divided it into two sections. On April 2, 1904, Day sold and conveyed to the plaintiff the south section of the building together with the following right or easement in the north section: "and for the consideration aforesaid I do also convey to said grantee and its assigns the right to use in common with myself my heirs and assigns the common entrance to the first floor of the building on the premises hereby conveyed and on the premises adjoining the same on the north, which common entrance is located on said adjoining premises near the southerly line thereof,—such common use thereof to extend only so far as the first floor of said building."

The entrance referred to in the deed consisted of a flight of several steps, parallel with and about five feet north of the divisional wall, leading into the building from the ground on the westerly side and up to the first floor. There was at the top of the steps a narrow hallway extending from in front of the steps south to the divisional wall. The then existing east side wall of the hallway was a wooden partition extending north from the brick wall and at right angles to it. After the plaintiff acquired its title a doorway was cut through the divisional wall at the south end of the hallway and two doors hung in it, one of wood, on the south side, to swing from east to west, and the other of iron, on the north side, to swing from west to east.

The defendant on January 20, 1910, acquired title by deed to the north section of the building subject to the plaintiff's right to use

the common entrance as specified in its deed from Day. From the time the plaintiff acquired its title to the time of the defendant's deed and his occupation thereunder, the easterly side wall of the hallway remained as it was at the time of the plaintiff's purchase, and the plaintiff constantly used the hallway in passing to and from its premises, maintaining the iron door as it was originally hung.

The plaintiff alleged that the defendant wrongfully removed the iron door and refused to replace it or permit it to be replaced. The defendant admitted the act, but claimed that the plaintiff had no right to use the iron door as it was used, swinging in over the hallway, and that such use materially interfered with his rightful enjoyment of his own property. The plaintiff also alleged, and introduced evidence tending to show, that the defendant had moved the eastern side wall of the hallway westerly about twenty-eight inches, narrowing the hallway that much, and thereby infringing on the plaintiff's rights to the use of the common entrance. This the defendant strenuously denied. He contended, that soon after he purchased the north section he moved the easterly wall of the hallway twenty inches *east* of where it was when he bought; that about two years after that he moved it back to its former place; and that the last change he made, just prior to this action, was to rebuild the partition, in doing which he placed the new partition against the westerly side of the old one, so that in fact the westerly face of the new wall or partition is about seven inches west of the face of the old one; he claims, however, that the hallway has been actually narrowed only three inches, since a steam coil or radiator was removed from the west side of the old partition, which occupied about four inches of the space now taken by the new partition.

It appears from an examination of the record that the plaintiff contended at the trial for three propositions, any of which if sustained would entitle it to a verdict.

(1) That the plaintiff was entitled, at least, to a suitable and convenient passage way to and from its premises through the common entrance, and that the defendant had so narrowed the hallway as to interfere with the plaintiff's reasonable and necessary use of the common entrance as such passageway.

(2) That in removing the iron door the defendant has unlawfully interfered with the plaintiff's reasonable and necessary enjoyment of its easement.

(3) That the easement granted gave the plaintiff the right to the use of a particular entrance consisting of a stairway and hallway then existing of definite and fixed limits, and that it was entitled to use, in common with others, all of the common entrance as it existed at the time of the grant of the easement, and not merely a suitable and convenient passage way through the entrance, and, accordingly, that any diminution of the common entrance by the defendant, without the plaintiff's consent, was an infringement of its rights.

The jury found for the plaintiff and assessed damages of one dollar. The court under this motion cannot determine whether the jury found all of the plaintiff's propositions sustained, or only one or more of them. There were no special findings, and it does not appear what instructions were given the jury. In the absence of any exceptions it must be assumed that they were satisfactory to the defendant. The defendant now contends in argument that the plaintiff's third proposition is not sound in law. But it is apparent that that question does not become material, under this motion to set aside the verdict, unless it can be held that the jury were not justified in finding for the plaintiff on either the first or second proposition. Moreover, we have no information that the court did not rule on the third proposition in the defendant's favor thereby limiting the issues to the first two propositions. The defendant's brief seems to indicate that he did so rule.

Substantially all the testimony centered about the issue, whether or not the defendant had narrowed the hallway by moving the easterly wall thereof west, and if so to what extent. The plaintiff introduced much testimony tending to support its contention that the defendant had moved the easterly wall of the hallway west 27 or 29 inches. The defendant, on the other hand, also introduced much testimony tending to show that he had not encroached on the hallway as it existed when the easement was granted, except to the extent of 7 inches in gross, and that the usable hallway had been narrowed only 3 inches. It will serve no useful purpose to com-

ment here on this conflicting testimony. We have examined it with much care and we do not feel that it warrants a conclusion that the jury could not have found, with reasonable justification, that the defendant had moved the easterly wall of the hallway as the plaintiff claimed he had done.

If the easterly wall of the hallway at the time the easement was granted was where the plaintiff contends it was, about 27 inches farther east than it now is, then the original hallway must have been approximately 76 inches wide. The jury viewed the common entrance as it was at the time of the trial and saw the situation. If they found the hallway had been reduced in width by the defendant as claimed by the plaintiff, which would be to the extent of one-third of its original width, then, we think, this court cannot reasonably hold that they plainly erred if they also decided that the defendant, by so narrowing the hallway, had interfered with the plaintiff's reasonable and necessary use of the common entrance. The south section of the building was and is used by the plaintiff as a shoe factory, its employees using the common entrance in passing to and from the factory, and it was also used to some extent in taking freight and express in and out of the factory.

Assuming then, though not so deciding, that the easement granted should be construed as giving the plaintiff only the right to a suitable and convenient passage way through the common entrance, and that is the defendant's contention, still there was sufficient evidence in the opinion of the court to justify the jury in finding that the defendant had by narrowing the hallway of the entrance infringed the plaintiff's rights even as so limited. The jury may have based their verdict on such a finding. We cannot determine that they did not.

It is therefore the opinion of the court, considering the motion in the most favorable aspect for the defendant, that it is not made to appear that the verdict is clearly wrong.

Motion overruled.

ANNIE S. SMITH

vs.

BOOTH BROTHERS & HURRICANE ISLAND GRANITE COMPANY.

Knox. Opinion April 24, 1916.

Burden of proving delivery of deeds. Deeds. Evidence.

In an action to recover stumpage for granite taken from a quarry and pasture in which plaintiff claimed an undivided two-fifths ownership, *held:*

1. That the evidence failed to show that there ever was any delivery of deeds to the property to the plaintiff, or anyone in her behalf.
2. As to the testimony offered to support the question of the delivery of deeds relied upon by plaintiff, the jury, in the opinion of the court, manifestly erred.

Action of assumpsit to recover certain sums of money alleged as due plaintiff for her proportional part of stumpage on granite blocks taken and sold by defendant. Plaintiff claimed to own two-fifths in common and undivided. Verdict for plaintiff. Defendant filed motion for new trial and exceptions to rulings of court. Motion sustained. New trial granted. Exceptions not considered.

Case stated in opinion.

A. S. Littlefield, for plaintiff.

Littlefield & Littlefield, and Frank H. Ingraham, for defendant.

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

PHILBROOK, J. This is an action brought to recover stumpage for granite alleged to have been taken by the defendant from the quarry, and pasture adjoining the quarry, of which the plaintiff claims an undivided two-fifths ownership. The case is before us on motion by the defendant to set aside the verdict obtained by the plaintiff and upon defendant's bill of exceptions.

In 1913 an action was tried before the court below against the same defendant in which the plaintiff was Albert W. Smith, son of this plaintiff and administrator of the estate of James M. Smith, who was the husband of this plaintiff. In that action the plaintiff claimed that the husband's estate was the owner of an undivided fifth of this same quarry privilege. The plaintiff in this case was a witness in that case. In that controversy the defendant claimed that James M. Smith, in his lifetime, by deed dated February 4, 1882, conveyed his interest in the quarry to this plaintiff and hence that his estate owned nothing in the quarry. The plaintiff in that case claimed, this plaintiff testified, and the jury found, that the deed from her husband of February 4, 1882, was never delivered to this plaintiff. This court sustained the finding of the jury.

In order to sustain her title to the undivided two-fifths under which she now claims the plaintiff relies upon a deed of one-fifth from Alvin H. Fogg dated February 3, 1882, and upon a deed of the other fifth from Laurettus E. Fogg, dated February 4, 1882. The former deed was recorded February 7, 1882, and the latter February 9, 1882. These two deeds, as well as the deed from James M. Smith to the plaintiff which was never delivered to this plaintiff, were found by the defendant's attorneys in the files of the Registry of Deeds about thirty-one years after the deeds appear to be executed. The defendant claims that these two last named deeds also were never delivered to this plaintiff, hence the defendant insists that this plaintiff has no ownership in the granite and cannot recover in this action. Much of the testimony which this plaintiff gave in the prior trial, relating to the delivery of deeds to herself, was incorporated into and became a part of the record in this case. In the prior trial she was asked whether she ever saw the deed to her from Laurettus E. Fogg before it was shown to her at that trial and she said she never did. Her testimony was the same as to the deed from Alvin H. Fogg. She was also asked in that trial if she ever received a deed from anybody of an undivided fifth of the granite quarry in controversy and her reply was "No, I never did." On being asked in the other trial whether she ever received two deeds of two undivided fifths of the property her answer was "I never received any deeds." She was also asked

in that trial if she ever claimed to own two undivided fifths of the property and her reply was "I never did." On being asked if she ever made any such claim, her reply was "No sir." In this trial she seeks to evade the force of that testimony by saying that her husband represented her in the quarry business. The conclusion seems irresistible, from a careful study of the testimony, that there was never any delivery of these Fogg deeds to this plaintiff or to any one in her behalf, and that upon this important element in the case the jury must have either misunderstood or misapplied the testimony. In view of this conclusion it becomes unnecessary to consider the exceptions.

Verdict set aside.
Motion for new trial granted.

SANDERS ENGINEERING COMPANY *vs.* FRED C. SMALL.

Cumberland. Opinion April 24, 1916.

Admissions. Effect of letters written by attorney of plaintiff or defendant. Evidence. General rule of admissions.

Motion for new trial and exceptions to a ruling excluding a letter written by plaintiff's attorney.

Held:

1. Anything said by the party may be used against him as an admission, provided it exhibits the quality of inconsistency with the facts now asserted by him in pleadings or in testimony.
2. It is immaterial, when an opponent's statement is offered as an admission, that it was uttered to a third person and not to the other party to the cause.
3. Such admissions made by the attorney of the party are admissible against him if they concern the management of the litigation.

Action of assumpsit to recover certain sums of money claimed as due the plaintiff from defendant for constructing a dam in the town of Cornish. Defendant pleaded general issue. Verdict for

plaintiff. Defendant filed motion for new trial and also exceptions to exclusion of a certain letter written to a person other than the defendant by attorney for plaintiff. Defendant contended that the letter should be admitted on the ground that it was an admission against the plaintiff. Exceptions sustained. New trial granted. Motion not considered.

Case stated in opinion.

P. A. Bowie, for plaintiff.

Walter P. Perkins, and William Lyons, for defendant.

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

PHILBROOK, J. This case comes up from the Superior Court of Cumberland county on motion for new trial by defendant and upon exceptions to the exclusion of evidence. The plaintiff constructed a dam in the town of Cornish and having failed to receive pay for work done and materials furnished brought suit against the defendant, claiming that he became personally liable to the plaintiff and promised to pay for building the dam. It is admitted that the erection of this structure was for the sole purpose of flowing a low and unsightly piece of land and thus beautifying the face of nature in a conspicuous place within the village border. The defendant claimed that this was a public enterprise entered into by several citizens, that the funds were to be raised by subscription, that a subscription paper was circulated, signers thereto obtained, and that the plaintiff well understood when it began this work that this was the plan, and that it was to receive its pay from this subscription fund, looking to the subscribers for such payment. One of the subscribers was Arthur Colcord. In the course of the trial, as tending to show that the contention of the defendant was correct, and that the plaintiff so understood, and as tending to show that plaintiff's claim of personal liability against the defendant was inconsistent with its former attitude and understanding, a letter to Colcord from plaintiff's attorney was offered by the defendant. The letter is as follows:

"Mr. Arthur Colcord,
Cornish, Maine.
Dear Sir:

Sometime ago the Sanders Contracting Co., of this city, built a dam for several subscribers and persons represented by Mr. Fred C. Small. Among the names of the subscribers I find your name. I have communicated with Mr. Small in regard to the matter several times, but have never been able to adjust the claim of the Sanders Contracting Co. for the work done.

Your proportional part of the debt would be about eight and 50/100 dollars ($8.50). In as much as I have been authorized by the Sanders Contracting Co. to commence suit against the subscribers and persons represented by Mr. Small I thought that I would communicate with you in regard to the matter. You and the other subscribers and persons must appreciate the fact that you are responsible for the work done. I should be pleased to know what you intend to do in regard to the matter."

This letter was excluded and to this ruling defendant was allowed exceptions.

This broad and wholesome rule is laid down by *Wigmore on Evidence,* sect. 1048 in his discussion of extrajudicial admissions, that "anything said by the party may be used against him as an admission, provided it exhibits the quality of inconsistency with the facts now asserted by him in pleadings or in testimony." The same author further says "that it is immaterial, when an opponent's statement is offered as an admission, that it was uttered to a third person and not to the other party to the cause." *Wigmore on Evidence,* sect. 1056. Our own court, in *Chapman* v. *Twitchell,* 37 Maine, at page 62, has also announced its adoption of this principle, thus making it a rule of evidence for many years in this State. Moreover such admissions made by the attorney of the party are admissible against him if they concern the management of the litigation. *Wigmore on Evidence,* sect. 1063. In the somewhat recent case of *"Liberty v. Haines,* 101 Maine, 402, the court held that the extrajudicial admissions there made by plaintiff's attorney were made in the management of the litigation and were therefore admissible in evidence against the plaintiff.

It is a fair inference that on March 24, 1915, when Mr. Bowie wrote to Mr. Colcord, he was in fact acting as attorney for the plaintiff, for whom he was assuming to act, in the collection of the claim for constructing the dam in question. He was therefore acting within the scope of his authority in writing this letter and stating the nature of the demand. His statements thus made were, in the eye of the law, the statements of his client, and if they were inconsistent with the client's position taken in the case at bar they are admissible in evidence on that ground. Their weight being for the jury. *Loomis* v. *N. Y., N. H. & H. R. R. Co.,* 159 Mass., 39; *James* v. *B. E. Rwy. Co.,* 201 Mass., 263.

After a careful examination of the entire testimony, to fully ascertain the facts now asserted by the plaintiff, in his pleadings and testimony, it is the opinion of the court that this excluded letter, even though written to a third party, was written by plaintiff's attorney in the management of the litigation, that it exhibits inconsistency with facts now asserted by the plaintiff in his pleadings and testimony, and that its exclusion was prejudicial error. It becomes unnecessary therefore to consider the general motion.

Exceptions sustained.
New trial granted.

STEPHEN E. YOUNG, Trustee in Equity,

vs.

PHILIP S. MOSHER, et als.

Cumberland. Opinion April 25, 1916.

Intention of testator. Rule as to after-acquired property passing under will. Rule as to finding of fact by sitting Justice. Wills.

Appeal from a decree of the sitting Justice in a bill in equity, brought by the trustee under the will of Julia H. W. Mosher, asking for the construction of said will, and especially the sixth clause thereof.

Held:

1. The statute of this State, R. S., chap. 76, sec. 5, providing that "real estate owned by the testator, the title to which was acquired after the will was executed, will pass by it, when such appears to have been his intention," does not affect the issue here. This statute was passed to mitigate the severity of the common law rule that prevented after-acquired real property from passing under a devise, on the theory that a devise of real property was held at common law to be in the nature of a conveyance and to speak imperatively as of the date of its execution. To correct this injustice, statutes have been enacted, both in England and in most, if not all, the states of this country, similar to the statute in this State; but that statute is invoked where the question lies between certain property passing by the will or by descent; in other words between testacy and intestacy.
2. In one aspect, the testatrix could have had no actual intention whatever as to the after-acquired property at the time she executed the will. Not then owning it, she could not then have desired that it pass to her children and grandchildren, and then to the church under item six, nor that it should form a part of the trust fund under item seven. And this absence of specific intention applies to both clauses with equal force. But in a broader sense the general intent as to after-acquired property may be ascertained in a given case, and must be gleaned from the will itself, viewed in the light of facts at the time of its execution within the knowledge of the testator.
3. If the devise is of the whole of a certain class of property, then future acquisitions within that class are embraced as a matter of law; but future acquisitions outside that class are not included.

4. The sitting Justice finds as a fact, as stated in the decree, that the after-acquired parcels "are both included in and constitute the property described in the sixth clause of said will as the property commonly known as the Woodford homestead property." This finding has the force of the verdict of the jury, and must stand unless it is manifestly wrong. A careful study of the testimony justifies the finding and warrants the decree.

Appeal from the decree of a single Justice in a bill in equity, brought by the trustee asking for construction of the will, and especially construction of a certain clause in said will known as the sixth clause. Decree of the sitting Justice affirmed.

The case is stated in the opinion.

Libby, Robinson & Ives, for complainant.

Clifford E. McGlauflin, for Woodford Congregational Church.

Carroll S. Chaplin, for City of Portland.

John F. Dana, for Harris P. and Helen A. Mosher.

Thaxter & Holt, for President and Fellows of Harvard College.

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

HANSON, J. This is an appeal from a decree of the sitting Justice in a bill in equity, brought by the trustee under the will of Julia H. W. Mosher, late of Boston, Massachusetts, asking for the construction of said will and especially of the sixth clause which reads as follows:

6. "I give and devise the property commonly known as the Woodford Homestead property situated in that part of Portland, Maine, formerly known as Deering, to my son Harris P. Mosher for life and on his death to his wife for life and on her death to the children of said son in equal shares as joint tenants for the life of the longest liver. On the death of the survivor of the children of my said son Harris P. Mosher, I give said property to my son Philip S. Mosher for life and on his death to his wife Ella F. Mosher for life or until her marriage, and upon her death or marriage, which ever shall first occur, I give and devise said property to the Woodford Congregational Church in fee simple, but if said church is not then in existence, then to the City of Portland to be used for some public or charitable purpose having the name 'Woodford' attached thereto."

Then follows the seventh or residuary clause, beginning "The rest, residue and remainder of the real and personal estate which I may own or to which I shall be in any way entitled at my death or over which I shall then have any power of appointment or disposition, by my will, including lapsed legacies and devises (hereinafter called my residuary estate) I give, devise and bequeath unto and to the use of my said trustee," etc., for the purposes specifically set forth therein. At the time of the execution of the will, on December 23, 1910, her homestead property at Woodfords consisted of a house and lot on the corner of Forest avenue and Woodford street. Subsequently on December 15, 1913, she purchased a strip of land twenty rods in length by five in width, which had at one time been a part of the original Woodford property, afterwards occupied as a railroad location, and finally abandoned by the railroad company and sold. This strip was cut in two by Woodford street when it was laid out, so that while the strip was formerly a part of the Woodford homestead, by reason of the construction of Woodford street and the various conveyances that had taken place in the course of years, the northerly end of said strip was contiguous on its easterly side to the homestead property owned by the testatrix at the date of the will, while that part of the strip south of Woodford street was separated from that corner lot by said street.

Mrs. Mosher died in 1914 without changing her will. The precise question to be determined by the court is whether these two after-acquired parcels passed under the sixth clause of the will, or under the seventh, the residuary clause. The sitting Justice held that they passed under the sixth clause and from that decree an appeal was taken to this court.

We think the decree below should be affirmed.

The statute of this State, R. S., ch. 76, sec. 5, providing that "real estate owned by the testator the title to which was acquired after the will was executed, will pass by it, when such appears to have been his intention," does not affect the issue here. This statute was passed to mitigate the severity of the common law rule that prevented after-acquired real property from passing under a devise, on the theory that a devise of real property was held at

common law to be in the nature of a conveyance and to speak imperatively as of the date of its execution. 1 Schouler Wills, 5th ed., sec. 486. To correct this injustice, statutes have been enacted both in England and in most if not all the states of this country, similar to the statute in this State. But that statute is invoked where the question lies between certain property passing by the will or by descent; in other words between testacy and intestacy. That is not the question here. Testacy is admitted and the issue is whether this after-acquired property passed under the sixth clause or the residuary clause. The latter is ample to carry it, if it had not already been disposed of.

This brings us, as in all this class of cases, to the pivotal problem of intention. In one aspect the testatrix could have had no actual intention whatever as to this after-acquired property at the time she executed the will. Not then owning it, she could not then have desired that it pass to her children and grandchildren and thence to the church under item six, nor that it should form a part of the trust fund under item seven. And this absence of specific intention applies to both clauses with equal force.

But in a broader sense the general intent as to after-acquired property may be ascertained in a given case and must be gleaned from the will itself, viewed in the light of facts at the time of its execution within the knowledge of the testatrix. These surrounding facts throw some light here. Prior to 1851 Ebenezer D. Woodford, the father of the testatrix, owned a large tract of land at what is now Woodford's Corner, extending easterly from Forest avenue to Back Cove. This was known as the E. D. Woodford homestead property. During the life of Mr. Woodford, and as early as 1840, lots were sold by him from this tract. In 1851, after his death, the Kennebec and Portland R. R. Co. and the York and Cumberland R. R. Co. purchased a right of way through the middle of it, parallel with Forest avenue. Other lots were sold, and Woodford street was laid out across it at right angles to Forest avenue about fifty years ago.

The testatrix by descent and by purchase became the owner of what remained of the Woodford property, the last deed to her bearing date January 13, 1872, and after she acquired title she

conveyed a part of the property, including the fee of the railroad location. Finally the ownership was reduced to a corner lot on which stood the family mansion at the corner of Forest avenue and Woodford street, and here she lived with her family until about 1892, when she moved to Boston, Massachusetts, retaining however the title and renting the property to tenants.

It will thus be seen that the after-acquired property had been at one time a part of the Woodford estate, a fact well known to the testatrix, and so far as appears this is all the real estate that she owned in that vicinity.

The true rule for interpreting the scope of clause six seems to be this; is its language of such a generic character, so broad in its scope, that the property described will pass under the will whether increased or diminished during the lifetime of the testatrix? Whatever comes fairly within the term "the property commonly known as the Woodford Homestead property" should pass by that clause.

The devise should cover whatever would answer to that description. If the devise is of the whole of a certain class of property, then future acquisitions within that class are embraced as a matter of law, but future acquisitions outside that class are not included. The exclusion rule is well illustrated by *Blaisdell* v. *Hight*, 69 Maine, 306, where the words were "I give and devise to my son . . . all my real estate situate in Sidney." Subsequently a parcel of land not situate in Sidney unexpectedly descended to the testator from his brother. The court held that this after-acquired land did not pass by the will. Suppose however that the testator had acquired other land in Sidney before his decease, can there be any doubt that that also would have passed under the will?

Again, in *Pepper's ex'r.* v. *Pepper's Admr.* 115 Ky., 520, 74 S. W., 253, the words were: "I will and bequeath to my brother Enoch S. Pepper the home farm on which I now reside, known as the Drenan farm," etc. Between the date of the will and his death the testator purchased a tract of 111 acres adjoining the Drenan farm. The court held that the devise did not include the tract subsequently purchased, that the words "home farm on which I now reside" limited as well as described the property, but the

court recognized the generic rule in these words: "It is not contended by appellants that any of the lands bought after the date of the will were ever the property of Drenan, or a part of the original tract or were ever known as Drenan lands, but their contention simply is that as accretions to it, and under the statutory rule of construction referred to, the lands passed under the term 'home farm on which I now reside,' but to so hold, the court must entirely disregard the last descriptive clause 'known as the Drenan farm' and regard it as surplusage and without any meaning at all."

So a devise to W of "the residue or remainder of my real estate, being a lot of land adjoining his own" was held not to cover a lot subsequently purchased which adjoined neither W's land nor the lot devised to W. *Wheeler* v. *Brewster,* 68 Conn., 177.

Let us now turn to illustrative cases holding that after-acquired real estate will pass if the descriptive words are sufficiently generic.

A devise of all real estate in W to B was held to cover other land in W afterwards acquired by a foreclosure by the testatrix of a mortgage received from her father's estate, in Dickerson's Appeal, 55 Conn., 223.

A devise of the Cunningham place, of which the testator at the time owned but one-half but subsequently acquired the other half, was held to vest in the devisees title to the entire place. *McRae* v. *Lowery,* 80 Miss., 47, 31 So., 538.

In *Garrison* v. *Garrison,* 29 N. J., Law, 153, a testator devised to H. G. all that part which he then ownel of a certain farm lying on the east side of a specified road. He afterwards purchased half an acre of land, which had before been a part of the farm and was in possession of it when he died. The devise was construed to include the half acre.

In *Kimball* v. *Ellison,* 128 Mass., 41, the language was: "I give, devise and dispose of all my estate real and personal, together with any and all estate, right or interest in lands which I may acquire after the date of this will . . . in the following manner," and after authorizing the executors to sell any of his real estate "not herein specifically bequeathed or appropriated" the testator devises his "mansion house and the other buildings thereon and the privileges thereunto belongong" to B. After the date of his will

the testator purchased an estate adjoining his mansion house, removed the building standing thereon, tore down the fences and incorporated it into his mansion house property. The court held that the after-acquired parcel passed under the devise to B.

In *Wait* v. *Belding,* 24 Pick., 129, the words, "the whole of my lands and buildings lying and being within the town of H" were held to be sufficiently broad to embrace land subsequently purchased, and although the will was made prior to the enactment of the statute removing the common law inhibition as to after-acquired property, and a codicil was executed republishing the will after this property was acquired, Chief Justice Shaw rests his decision on the breadth of the language in the original will and says: "In general a will looks to the future, it has no operation either on real or personal property till the death of the testator. General words, therefore, may as well include what the testator expects to acquire as what he then actually holds. The term, 'all my property,' may as well include all which may be his at his decease as all which is his at the date of the will, and will be construed to be so intended unless there are words in the description which limit and restrain it."

It remains to apply this just and firmly settled rule to the description of the property devised in this case. Is it sufficiently broad to embrace the estate in controvesy? This was a question of fact to be decided by the sitting Justice in the light of the facts within the knowledge of the testatrix at the time of making the will and of the testimony of the witnesses. He finds as a fact, as stated in the decree, that these after-acquired parcels "are both included in and constitute the property described in the sixth clause of said will as the property commonly known as the Woodford Homestead property." This finding has the force of the verdict of a jury and must stand unless it is manifestly wrong. A careful study of the testimony justifies the finding and warrants the decree.

It should be observed that the testatrix did not devise merely her "house and lot at the corner of Forest avenue and Woodford street," but "the property commonly known as the Woodford Homestead property situated in that part of Portland, Maine, formerly known as Deering,"—words of far ampler latitude.

It is significant, too, that under her will this Woodford property which had formerly belonged to her father she desired to keep in the family as long as possible, devising it for life to her son Harris and his family, and then at their decease for life to her other son, Philip and his wife, and at their decease to the Woodford Congregational Church, if in existence, otherwise to the city of Portland "to be used for some public or charitable purpose having the name 'Woodford' attached thereto." Evidently the testatrix was proud of the name and wished the property that bore it to go in the direction that she specified and not under the residuary clause. Sentimental reasons entered into this devise in large measure.

On the whole we have no hesitation in saying that the true construction of the will is as found by the sitting Justice and the entry must be,

Decree below affirmed.

ARTHUR W. STONE, Admr., *vs.* CHARLES W. CURTIS.

Penobscot. Opinion April 25, 1916.

General rule of law as to financial transactions between husband and wife, father and son. Burden of proof to establish that such transactions were gifts, rather than loans.

The plaintiff's intestate was the wife of the defendant. At the date of their marriage, the plaintiff gave his wife two thousand dollars, or more, and it is conceded that some years later he received that sum from her and used the same, with other money, to pay his outstanding debts. They lived together many years after that occurrence, and, so far as the case discloses, the wife never made demand for an accounting, kept no record of the transaction, and at her death in 1913, left no will or memorandum in which the same was mentioned.

Held:

1. The defendant in interposing his defense assumed the burden of showing that the transaction was a gift, and not a loan, and it is the opinion of the court that he has maintained that burden. The letters introduced by the

plaintiff furnish ample proof of the attitude of the parties toward the transaction, and the character in which the defendant received the money. They go further and show that he was willing to relinquish to his wife's heirs any rights he had in her property. There is nothing in the case to justify a finding for the plaintiff.

2. Receipt and appropriation by a husband of the wife's money with her knowledge and consent does not establish between them the relation of debtor and creditor, unless at the time he expressly agreed to repay it. In the first letter, the defendant uses the word "'consent;" in the last word "relinquish," to define the attitude of his wife in the premises. In this case the words have the same meaning, and denote an intention to give, and give willingly and unconditionally.

Action of assumpsit to recover certain sums of money alleged to have been loaned by plaintiff's intestate to defendant, her husband. Defendant filed the general issue and brief statement. At the close of the testimony, by agreement of counsel, the case was reported to the Law Court for determination of questions involved, the Law Court to render final judgment in the case. Judgment for defendant.

The case is stated in the opinion.

Morse & Cook, and F. D. Dearth, for plaintiff.

Harvey D. Eaton, and Carl Jones, for defendant.

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

HANSON, J. On report. The plaintiff's intestate was the wife of the defendant. At the date of their marriage the plaintiff gave his wife two thousand dollars, or more, and it is conceded that some years later he received that sum from her and used the same, with other money, to pay his outstanding debts. They lived together many years after that occurrence, and, so far as the case discloses, the wife never made demand for an accounting, kept no record of the transaction, and at her death in 1913 left no will or memorandum in which the same was mentioned.

The plaintiff upon qualifying as administrator acted upon information received from Charles G. Viele, stepson of the defendant, who had written the letter concerning the transaction, and

had received from him two letters. These letters were introduced by the plaintiff in support of his claim that the transaction was a loan and not a gift.

The action was brought upon the following account annexed:

"DEXTER, MAINE, March 23rd, 1915.

Charles W. Curtis

To Estate of Annie V. Curtis, Dr.

1888 July 1st.	To money lent at his request,	$2,000.00
	To interest on same from July 1st, 1888, to March 23rd, 1915, at six per cent per annum,	3,207.20
		$5,207.20
	CREDIT	
	By interest paid from July 1st, 1888, to July 1st, 1899,	120.00
	Balance due,	$5,087.20"

There was also a count for money lent and accommodated by intestate, etc.

The defendant, with the general issue, filed a brief statement in which he set up as a further defense, "that if any sum was ever due the plaintiff's intestate, the same has been paid by the transfer of certain bank stock, to wit, two shares of the Continental National Bank of St. Louis, Missouri, valued at $600, and ten shares of the First National Bank of Dexter valued at $1500."

The defendant offered no evidence as to the transfer of stock, but the plaintiff's attorney introduced testimony which he says proves that while the latter stock was so transferred, it was again used by the plaintiff's intestate, and by her voluntarily assigned as security for a further loan by the defendant at a local bank.

The testimony in relation to the last named transaction when considered alone adds little, if any, weight to the claims of either party, and recognizing this counsel have confined themselves largely to a discussion of the legal effect of the letters in the case, and rightly so. The letters follow:

"PLAINTIFF'S EXHIBIT 1, Charles W. Curtis.

DEXTER, MAINE, March 6, 1914.

Mr. Chas. G. Viele,
Taylorsville, N. C.
My Dear Mr. Viele:

Yours of the 2nd inst. is received. I had hoped to find in your expected letter some advice as to how the packages Ada had sent you by express stood the racket of transportation. I have been a little anxious as to the glass reaching you without breakage. Five pkgs. went to Omaha by freight, one of them having frames with the glass in them. Don't expect to hear from these for some weeks yet.

The point in your letter which seems to call for special reply is the postscript pertaining to the $2,000. You probably may not have been fully advised as to my losing my fortune along about '98? In helping to finance a Loan and Investment Company in St. Paul, in which I had some interest, in common with five or six others in Dexter and vicinity, I allowed myself to become guarantor on $8,000 of the Company's paper, just before the panic of '93. Too long a story to this matter to be recited here. I could have avoided paying this $8,000 through insolvency provisions; but I decided to pay it all; taking all I had given your mother with her consent of course, which included the $2,000. It was too humiliating a thought to me to avoid paying all my debts, legal and moral, direct and indirect. By getting credit for $2,000 to be earned later I accomplished my ambition in the matter. At no time however, in my darkest financial days, had I died would your mother have been left without sufficient means for an independent living. Four of our bank directors, all being the most wealthy in the place, lost their fortune at the same time or about same time, that I did mine, and none of them regained any part of the loss.

It required some nerve to put away every dollar and begin at 70 to rebuild one's fortune? I shall need the deed that Ada took to refer to in making quitclaim deed. I asked her to let me take it that I might take such data as I would need for the purpose, but she had it packed in her trunk, and was in a hurry to get ready for an unexpected leaving. Hope I have made the matter plain.

C. W. CURTIS."

"I found some difficulty in getting the money for your mother's last visit south. She proposed to sell her curios for the purpose, she was so much determined to make that visit. I was very fortunate in having a good influential friend. 'A power behind the throne,' who secured me the comparatively good job of Bank Examiner, by holding which till I was near 80 I saved enough to make a respectable patch on my broken fortune. Of the $600 your mother received for bank stock I gave her, she gave a poor widow $100 to enable her to get to the Old Ladies Home in Bangor. She gave freely of her means in other directions.

Very truly,

C. W. C."

"PLAINTIFF'S EXHIBIT 2, Charles W. Curtis.

DEXTER, MAINE, March 9, 1914.

Dear Mr. Viele:

I have yours of the 5th inst. enclosing copy of deed, and making inquiry as to consideration for same. As far as my memory goes there was no real consideration passed in the matter. The consideration named in deed seems to be the usual conventional phraseology of lawyers where the consideration is only nominal. There were no conditions made when your mother relinquished what I had previously given her, and this deed was a voluntary act on my part, with the purpose to protect her as far as possible in the event of my passing away first. As the equity which this deed stood for at first gradually lessened, that protection came in another way, and was more definitely provided for in my will made some eight years ago of which the mother was familiar.

I shall be pleased to give you any further information, or details which you may desire. It may interest you to know if you do not already, that I gave your mother a deed of the house soon after her coming to Dexter with the understanding that it should not be recorded during my life time. This deed was destroyed at the time of my liquidating my affairs.

I never regretted the sacrifice I made, (or *we* made) in order to pay the last dollar of my indebtedness, direct and indirect; legal and moral; and I am quite sure your mother quite agreed with me in the matter; certainly in view of subsequent events.

I do not hear from Ada since her getting home and am much surprised at the delay.

When it comes to using copy of deed the Registry Data will be needed.

Very Truly yours,
C. W. CURTIS."

Plaintiff's counsel contends that "the letter of the defendant to Mr. Charles G. Viele, dated March 6, 1914, was evidently written in reply to a letter from Mr. Viele to him and clearly shows a loan of two thousand dollars from Annie V. Curtis to the defendant in 1898, and that the transaction was not a gift, for the defendant nowhere in the letter claims that it was."

Viewing the letter of March 6 separately, we are unable to sustain the plaintiff in his contention that it amounted to an admission that the money received by the defendant was a loan, or was considered so by him, or by the plaintiff's intestate. We are very clear that no such admission was made or intended. But if the letter of March 6, standing alone, tended to create a doubt as to the nature and effect of the transaction, a perusal of the letter of March 9th, which must be read and considered with it, will remove all doubt as to the real meaning and force of the words used. The letters reveal, too, a home life and companionship characterized by a mutual interest in all that concerned the home, social, domestic and financial, which excluded the possibility of the existence of the relation of debtor and creditor in this instance.

Counsel urges that the use of the words "with her consent" amounts practically to an admission of liability, and argues, "that there is no attempt on the part of the defendant to claim that when he had the $2,000 it was a gift, but on the contrary, he nowhere claims in his letter that it was such. If it had been a gift and not a loan, he would undoubtedly have said so and then and there tried to end the controversy. The letter having been written by the defendant with some understanding of the claim on the part of Mr. Viele, it seems to us that it should be construed most strongly against him." Mr. Viele wrote the defendant on March 2nd, and again on March 5th, before receiving either letter. The letter of

March 5th was in answer to a direct question as to the consideration for a deed from the defendant to plaintiff's intestate. In explaining that no consideration passed to him, he added the significant and fully explanatory words,—"there were no conditions made when your mother relinquished what I had previously given her, and this deed was a voluntary act on my part, with the purpose to protect her as far as possible in the event of my passing away first."

The defendant in interposing his defense assumed the burden of showing that the transaction was a gift, and not a loan, and it is the opinion of the court that he has maintained that burden. The letters introduced by the plaintiff furnish ample proof of the attitude of the parties toward the transaction, and the character in which the defendant received the money. They go further and show that he was willing to relinquish to his wife's heirs any rights he had in her property. There is nothing in the case to justify a finding for the plaintiff.

Receipt and appropriation by a husband of the wife's money with her knowledge and consent does not establish between them the relation of debtor and creditor, unless at the time he expressly agreed to repay it. *Kunn* v. *Stansfield,* 92 Am. Dec., 681; *Farmers and Merchants National Bank* v. *Jenkins,* 65 Md., 249; *Graves and Baker S. M. Co.* v. *Radcliff,* 63 Id., 591. In the first letter the defendant uses the word "consent"; in the last the word "relinquish", to define the attitude of his wife in the premises. In this case the words have the same meaning, and denote an intention to give, and give willingly and unconditionally. See In re Myers' Estate, 93 Atl. Rep., 818. Pa. Supreme Court, 1915.

Judgment for the defendant.

HERBERT E. MORTON, Collector, *vs.* PHILIP WILSON, et als.

Penobscot. Opinion April 25, 1916.

Chapter 140, Public Laws of 1911, interpreted. Meaning of words "employed in trade." Taxing personal property of non-residents.

Action of debt, brought by Herbert E. Morton as tax collector of the town of Etna for the year 1912, against Philip Wilson, of Newport, and Moses J. Dow and George J. Payne, both of Plymouth, copartners doing business at Newport under the firm name of Wilson, Dow & Co., to recover for taxes assessed at $105, upon potatoes kept in a storehouse in the town of Etna. The action is brought under section 17, paragraph 1, of the Revised Statutes, as amended by chapter 140 of the Public Laws of 1911.

Held:

1. The burden was upon the plaintiff to establish the fact that the potatoes were employed in trade in the town of Etna.
2. The testimony does not establish the fact that the potatoes were employed in trade in the town of Etna on the first day of April, 1912, and therefore the plaintiff is not entitled to recover in this action.

Action of debt to recover a personal property tax assessed by the town of Etna against defendants, non-residents. Defendants pleaded the general issue and brief statement, alleging that the property upon which said tax had been assessed was not liable to a personal tax in said town of Etna for said year. At the conclusion of all testimony, the case was reported to the Law Court upon so much of the evidence as is legally admissible, the Law Court to render such judgment as the legal rights of the parties require. Judgment for defendant.

The case is stated in the opinion.

Donald F. Snow, for plaintiff.

William H. Mitchell, and Morse & Cook, for defendants.

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

HANSON, J. On report. Action of debt, brought by Herbert E. Morton as tax collector of the town of Etna for the year 1912, against Philip Wilson of Newport, and Moses J. Dow and George J. Payne, both of Plymouth, copartner's doing business at Newport under the firm name of Wilson, Dow & Co., to recover for taxes assessed at $105 upon potatoes kept in a storehouse in the town of Etna. The action is brought under section 17, paragraph 1, of the Revised Statutes, as amended by chapter 140 of the Public Laws of 1911, which reads as follows:

"All personal property employed in trade, in the erection of buildings or vessels or in the mechanic arts, shall be taxed in the town where so employed on the first day of each April; provided that the owner, his servant, sub-contractor or agent so employing it, occupies any store, storehouse, shop, mill, wharf, landing place or ship yard therein, for the purpose of such employment."

It is admitted that all statutory requirements as to the assessment of this tax in question were complied with; but the defendants contend that the personal property assessed against them was not legally assessable in the town of Etna. No question is raised as to the declaration or the pleadings.

The defendants were engaged in buying potatoes, and on the first day of April, 1912, had in their storehouse in Etna a quantity of potatoes which had been purchased by them in Etna and surrounding towns. That the potatoes were intended for shipment in carload lots outside the town of Etna is conceded, but the plaintiff contends that "during the year 1912 several sales of potatoes were made in small lots to residents of Etna, and that a considerable amount of fertilizer was also sold from this building to residents of Etna and vicinity," and urges that these sales of small lots of potatoes and fertilizer bring the case within the meaning of the statute, because a part of the potatoes and fertilizer so stored, were "employed in trade" in the town of Etna on the first day of April, 1912.

The burden was upon the plaintiff to establish the fact that the potatoes were employed in trade in the town of Etna, and testimony was introduced tending to show that two or three bushels were sold from time to time from the storehouse, or as carload lots were

made up; but the defendants and their agent deny such sales on their part, or that any person had authority to make local sales. It appears that two small lots were sold from the storehouse or cars by an employee of the defendants' agent, or by a local vendor, while delivering a large lot to the defendants, but these transactions were without the knowledge, consent, or sanction of the defendants. The testimony does not establish the fact that the potatoes were employed in trade in the town of Etna on the first day of April, 1912, and therefore the plaintiff is not entitled to recover in this action. *Inhabitants of Peru* v. *Estate of Charles Foster*, 109 Maine, 226.

Judgment for the defendants.

HARRY W. CLARK *vs.* FRANK P. STETSON.

Androscoggin. Opinion April 29, 1916.

Contract. Meeting of minds of parties to contracts. Oral contract for sale of land. Remedies of parties as to alleged breach of contract. Statute of Frauds.

In an action for money had and received, brought to recover the sum of fifteen hundred dollars paid on account of the purchase price of a farm with farming tools and stock, upon motion for new trial by defendant it is *Held:*

1. That it is a fundamental principle of law that the minds of the parties must meet and if an actual and honest misunderstanding is proven to have existed, the contract is not perfected.
2. That the plaintiff's evidence if assumed to be true proves, not a failure to contract because of misunderstanding or misapprehension, but a breach of contract on the defendant's part. The fact that parties vary at the trial as to the terms of the contract in controversy does not convert a breach of contract into a want of contract, nor change the remedy of the parties.
3. That there was nothing confusing, indefinite or ambiguous about the terms of the trade in this case, and the emphatic statements of the plain-

tiff and his witnesses leave no room for doubt that they were clearly understood by both parties at the time the trade was made.

4. That the plaintiff's claim that no contract was in fact made lacks sufficient support in the evidence to warrant the jury in finding a verdict in his favor.

Action of assumpsit to recover the sum of fifteen hundred dollars paid by plaintiff to defendant as part of the purchase price of a certain farm belonging to defendant. Plaintiff claimed that no contract existed because of failure of parties to agree on terms. Certain amendments for plaintiff were filed and allowed. Verdict for plaintiff. Defendant filed general motion for new trial. Exceptions to charge and rulings of presiding Justice were allowed. Motion for new trial sustained. Verdict set aside.

Case stated in opinion.

White & Carter, for plaintiff.

Newell & Skelton, for defendant.

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

CORNISH, J. This case is before the Law Court a second time. It is an action for money had and received brought to recover the sum of fifteen hundred dollars paid on account of the purchase price of a farm with farming tools and stock in the spring of 1913. At the first trial the plaintiff rested his case upon two grounds which were quite inconsistent with each other, first that the minds of the parties never met upon the terms of the contract so that no contract in fact existed; and second, that the contract if made was rendered voidable because of the false representations of the defendant, and was seasonably rescinded by the plaintiff. The plaintiff obtained a verdict at that trial which was set aside by this court, the opinion holding that there was insufficient evidence to sustain it on either ground. *Clark* v. *Stetson,* 113 Maine, 276. At the second trial the plaintiff abandoned the contention of fraud, and relied solely on absence of contract. He filed an amendment to the writ which was allowed, and in which his claim that the terms of the contract were "ambiguous, indefinite and not understood alike by the parties" was set forth in greater detail. The jury

again returned a verdict for the plaintiff and the case is before this court on defendant's motion and exceptions. It is only necessary to consider the motion.

The plaintiff urges that in three particulars the minds of the parties did not meet, viz, on the price, the items of personal property included in the trade, and the terms of the reservation of a right of way, whether continuous or for winter use only. The greatest stress, however, is placed upon the first of these, the alleged misunderstanding as to the contract price.

A painstaking review of the record in this case, which contains much of the testimony of the parties given at the former trial, leaves little room for doubt that a price was agreed upon at the time. From the former evidence the conclusion was almost irresistible that the agreed figure was five thousand dollars, as the defendant claimed and as the opinion held. At this trial, in order to establish his theory of misapprehension more solidly the plaintiff attempts to explain some of his admissions in the former trial that led to that conclusion. He emphasizes more strongly that Mrs. Stetson was the agent of her husband, who was an invalid and physically unable to attend to business details in making this sale, that while her asking price was five thousand dollars her final terms were forty-five hundred dollars. He insists that Mrs. Stetson gave him this figure on several occasions in clear and unequivocal language and he is corroborated by his wife and two other witnesses to whom Mrs. Stetson made the same statement. He further states that the payment of fifteen hundred dollars was made in the presence of both Mr. and Mrs. Stetson and he then asked them if everything was all right as they had talked and Mrs. Stetson said "yes, but they ought to have five thousand dollars for the farm." The plaintiff then said if they were to ask five thousand dollars he would talk no further, because they had asked only forty-five hundred dollars and it was a good price, whereupon Mrs. Stetson "spoke up and says if she told me I was going to have it for forty-five hundred dollars I was going to have it," and Mr. Stetson said "all right." Taking all this at its full value, and assuming the facts and the conversation to be as the plaintiff claims, they by no means prove that the minds of the parties did not meet.

The greater the emphasis laid by the plaintiff upon the authorized and repeated statements of Mrs. Stetson, the stronger he makes his contention that forty-five hundred dollars was agreed upon, and the less opportunity he leaves for misunderstanding between the parties. All the circumstances as well as the conduct of the parties render incredible the contention that the price was not fully understood. The plaintiff was a locomotive engineer living in the city of Lewiston, and was desirous of purchasing a farm in the suburbs of that city. It was a transaction of great moment to him. The price would naturally be a matter of prime importance and would stand at the very threshold of the negotiations. It was of equal importance to the defendant. The parties had various preliminary interviews and on April 22, 1913, the plaintiff paid fifteen hundred dollars on account and took a receipt therefor. It is inconceivable that he would do this unless the price was clearly understood, and according to his own testimony it was. It was then agreed that the balance should be paid on or before May 15th. Two days later, on April 24th, the plaintiff entered into occupation, moved upon the premises with his family, and carried on the place thereafter. On May 15th, the plaintiff and the defendant's wife met at an attorney's office, ostensibly for the payment of the balance of the consideration and the transfer of title. But this was not done. The defendant's wife says the reason given by the plaintiff was that a party from whom he had expected to procure a portion of the money had disappointed him. The plaintiff in the second trial says the reason given was that "the old man had gone back on him," meaning to imply but not saying in express language that the defendant had raised the price from $4500 to $5000. Whichever statement is true it is fair to infer from the memorandum on the receipt "30 days from 15th of May," that an extension for that length of time was granted to the plaintiff. About the middle of May he plowed a portion of the farm. He sold one of the animals he had bought. He continued to occupy the premises for two and one-half months in all or until July 7, when he delivered the keys to the defendant and moved away. No claim of misunderstanding as to price was raised during all that time, and even at this trial the reason assigned by the plaintiff for leaving the place is not

that there was a failure of the parties to contract in the first instance, but that the defendant had "gone back on his word," in other words had broken the contract once made. The defendant contends that the reason why the plaintiff gave up the trade was his inability to raise the required balance, but rejecting this and assuming, without deciding, that the plaintiff's evidence is true, it proves not a want of contract but a breach of contract. In failing to recognize this distinction the jury plainly erred.

Breach of contract is one thing, failure to contract because of misapprehension is quite another. Nor can the different versions given at the time of trial convert the one into the other. The crucial moment was when the contract was made. Did the parties then understand its terms alike? After a controversy has arisen and the trial is on, they differ widely. That is to be expected. If in every such case the subsequent divergence of testimony could be converted into a misunderstanding at the inception, our courts would be filled with actions brought by dissatisfied suitors to recover back what they had paid on contracts unwisely made. That cannot be.

It is of course a fundamental principle of law that the minds of the parties must meet, and if an actual and honest misunderstanding is proven to have existed the contract is not perfected. "If two parties in bargaining do actually misunderstand each other, if their language is equivocal and one is meaning to speak of one subject and the other of another, it is clear that there is no contract for there is not that aggregatio mentium necessary to make one." *Oldham* v. *Kerchum,* 79 N. C., 106, 28 Am. Rep., 302.

Many illustrations may be found. Thus it may be a misunderstanding as to the identity of the person contracting; as when one party thought he was dealing with a corporation formed in South Dakota, when in fact it was a corporation of the same name formed in Maine; *Brighton Packing Co.* v. *Butchers Association,* 211 Mass., 398; or when one party supposed he was dealing with a corporation, instead of with an individual under a corporate name, *Fifer* v. *Clearfield &c. Coal Co.,* 103 Maryland, 1, 62 At., 1122; or contracting with an agent personally instead of with an undisclosed principal, *Winchester* v. *Howard,* 97 Mass., 303. Again the

honest misunderstanding may arise over the subject matter, oftentimes from the ambiguous terms used; as in a written contract for the sale of land on Prospect street in Waltham, when the purchaser thought he was buying a tract on another Prospect street in Waltham, in no way connected with that mentioned in the agreement, and a long way off therefrom. *Kyle* v. *Kavanagh,* 103 Mass., 356; or where one supposed he was buying five car loads and the other supposed he was selling one car load, the misapprehension arising from the confusing and ambiguous language in the seller's price lists and quotations, *Singer* v. *Grand Rapids Match Co.,* 117 Ga., 86, 43 S. E., 755.

This general rule is stated by the Massachusetts court as follows: "There may be cases where a misapprehension, satisfactorily proved, might show that no contract had been made; as for instance where the subject matter of a contract had been mistaken. If, in a negotiation for the sale of property, it should appear that the seller had reference to one article and the buyer to another, or if the parties supposed the property to be in existence when in fact it had been destroyed no contract would grow out of the negotiation." *Rice* v. *Dwight Mfg. Co.,* 2 Cush., 80, 86.

The evidence in the case at bar is clearly not of such a character as to place it in the class with the cases just cited. There was nothing confusing, or indefinite, or ambiguous or equivocal about the price here. It was a simple statement of amount. After all the conversations between the parties there was practically no opportunity for misapprehension. The price agreed upon was either one figure or the other, and whichever it was there was a completed contract. This case falls rather in line with the following where the jury were left to say which contention was correct. As in an action of assumpsit to recover for five hundred and thirty loads of sand, at an agreed price, as the plaintiff said, of fifteen cents per load, while the defendant contended it was ten cents a load, *Copeland* v. *Brockton St. Ry.,* 177 Mass., 186; or in an action to recover for hauling lumber where the plaintiff claimed one price and the defendant another, *Swain* v. *Cheney,* 41 N. H., 232; or for the use of a stationary engine, the agreed terms of rental being in dispute. *Noyes* v. *Cushnoc Paper Co.,* 113 Maine, 565. As well

might the plaintiff in any of these cases have claimed that there was no contract, as can the plaintiff in the case at bar.

Giving then full force to the plaintiff's evidence, and assuming, without deciding, that the consideration was forty-five hundred instead of five thousand dollars, the plaintiff's remedy was not to bring an action to recover back the partial payment, fifteen hundred dollars, on the ground that no contract had been made, but to tender the balance of the purchase price, and if the defendant refused to convey, then seek his remedy for breach of contract in law, or through specific performance in equity. The contract being oral, the statute of frauds might have prevented him from maintaining his action at law, but the remedy in equity would seem to have still been open to him. The remedy pursued is not appropriate.

A word should be added as to the second ground of misapprehension claimed now by the plaintiff, the identity of personal property included in the sale. A careful study of the evidence warrants no such conclusion. Both the plaintiff and defendant agree that the purchase included all the stock on the farm, and all the farming implements and tools with a few exceptions. There is no controversy over the stock. There is controversy over the hens and some of the implements. But the plaintiff himself inspected the premises before purchase, made out a long list of articles to be included in the sale, examined this list with the defendant and they both agreed to its correctness. When the plaintiff took possession several of the articles which he supposed he had purchased had been taken away or were withheld, and the defendant claimed that they were not included. This however did not prove that no contract had been made. If they had been taken by the defendant and belonged to the plaintiff, the plaintiff's legal rights were secure. But these rights grew out of the existence and not out of the nonexistence of the contract itself.

So far as the right of way from a rear wood lot was concerned, the plaintiff claimed that the reservation was for winter use only; the defendant, that it was to be used all the year through. Little stress, however, is laid on this point because the difference in contentions represents little in value, and, whatever the value, it

affects the legal existence of the contract no more than the other points already considered. On none of the grounds can the plaintiff recover.

It is not difficult to see that the jury were moved by sympathy in this case, and naturally so, for the plaintiff had paid fifteen hundred dollars and then had abandoned the farm. They sought to reimburse him for his loss. But this could only be done along legal lines, and the evidence here is of such a character, in view of the conduct of the plaintiff himself, as to absolutely preclude a finding that no contract was in fact made between the parties. Upon no other theory could this verdict have been rendered under the instructions of the presiding Justice, and as that theory falls the verdict must fall with it.

Motion sustained.
Verdict set aside.

STILKEY & WHITNEY REAL ESTATE COMPANY

vs.

JAMES P. RUNDLE, et als.

Cumberland. Opinion May 13, 1916.

Agreement for sale of real estate. Options. Rights and obligations of parties to bond.

Action of debt on bond to recover the sum of $7500 as liquidated damages for the alleged breach of the conditions of the bond.

Held:

1. Upon the vital question of the plaintiff's readiness and ability to perform its obligations, as set out in its declaration, there is not only an entire absence of testimony showing its ability to perform the same, but it admits over and over again that it had neither option nor title to the property, and could not procure the same.

2. The rule is well established that in such cases the plaintiff, on his part, must show that he was able, ready and willing to perform as he has declared in his writ. The plaintiff here has not brought itself within the rule.

Action of debt on bond for conveyance of certain real estate. Plaintiff seeks to recover a certain sum of money named in the bond as liquidated damages. Defendant pleaded the general issue and brief statement, alleging in part that plaintiff was not the owner of the land mentioned therein and had no legal interest therein and was never able to convey said land, or to compel the conveyance of said land to said defendants according to the terms of said bond. At the close of the testimony, the case was reported to the Law Court upon so much of the evidence as is legally admissible. Judgment for defendant.

The case is stated in the opinion.

Howard Davies, and Thomas L. Talbot, for plaintiff.

Robert B. Seidel, for defendant.

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

HANSON, J. On report. Action of debt on bond to recover the sum of $7500 as liquidated damages for the alleged breach of the conditions of the bond, which is substantially set out in the declaration. The declaration follows:

"In a plea of Debt, for that on the twenty-fifth day of November, A. D. 1914, at said Biddeford, to wit, at said Portland, the plaintiff and the defendants entered into an agreement in writing under their hands and seals, whereby the plaintiff in consideration of the sum of Forty-seven Thousand ($47,000) Dollars, to be fully paid as provided in said agreement, agreed to sell, and convey to the said defendants by good and sufficient warranty title the following described lot or parcel of land with buildings thereon, Four story block, situated in Biddeford, Maine, at the corner of Main and Adams streets, known as the Hotel Thatcher . . . free of all incumbrances. The said defendants in consideration as aforesaid agreed to buy and purchase said premises at the said consideration and to pay the same as follows, to wit: Five Hundred Dollars ($500) at the time of signing said agreement and the balance of

said Forty-Seven Thousand ($47,000) Dollars at the time of taking title. The said plaintiff upon payment of the aforesaid consideration in the manner aforesaid, and upon request, agreed at their own proper expense and charge to execute and deliver to the said defendants or their assigns a deed of the aforesaid premises on or before the first day of June, A. D. 1915.

And it was mutually agreed and understood that should either party or parties to said agreement fail or neglect to fulfill his part of said agreement, he should forfeit as damages to the other party the sum of Seven Thousand Five Hundred ($7,500) Dollars. Said plaintiff avers that on the twenty-fifth day of November, A. D. 1914, and on each and every other legal day since that date, up to and including the first day of June, A. D. 1915, or until such time as there was and has been a breach of the conditions of the said agreement on the part of the party of the second part, it was ready and willing at its own proper expense and charge to execute, acknowledge and deliver to said defendants a good and sufficient warranty deed, upon request therefor, and otherwise has performed all the conditions of said agreement on its part.

Said plaintiff avers that the defendants not only failed and neglected to request the plaintiff to execute and deliver a good and sufficient warranty deed of said premises on or before the first day of June, A. D. 1915, but also refused, failed and neglected to comply with the terms of said agreement on their part, to the damage of the plaintiff as it says in the sum of Seven Thousand Five Hundred ($7,500) Dollars.

Yet the said defendants, though requested, have not paid the same, but neglect so to do: To the damage of the said plaintiff (as it says) the sum of Ten Thousand Dollars."

The defendants pleaded the general issue, with the following brief statement:

"First: That said plaintiff, at any of the times mentioned in its writ was not the owner of the land mentioned therein and during all of said times had no legal interest therein, and was never able to convey said land, or to compel the conveyance of said land to said defendants according to the terms of said deed, all of which was known to the defendants;

Second: That said plaintiff, at said Biddeford, on the second day of December, 1915, notified said defendants that it was unable, and would be unable to convey said land according to said deed on or before the first day of June, 1915, unless said defendants would pay said plaintiff the sum of four thousand five hundred dollars in addition to the sum of five hundred dollars which defendants had paid at the time of the execution of said deed, so that plaintiff might secure an option of said land;

Third: That then and there said contract was waived by mutual consent of said parties."

Mr. Stilkey, the president of the plaintiff company, states that he was employed by the defendants to make inquiries concerning a lot of land in the rear of the Cote Opera House in Saco. When Mr. Stilkey reported later, the defendants informed him that they were interested in a better proposition,—the Hotel Thatcher. After ascertaining from the defendants the names of the owners, Mr. Stilkey went to see them, and, as appears in the following testimony of the plaintiff, was successful:

"Q. And whether or not you found from the owners of the property that you could buy it? A. I did.

Q. And whether or not, as a result of that information, this contract was made? A. Yes, sir."

Mr. Stilkey was paid $500 upon the signing of the bond, and in two or three days, after seeing the owners of the property, he called on the defendants and told them the owners of the property wanted $4,500 more, and he says the defendants agreed to furnish the money. The latter statement is denied by the defendants and negatived by the plaintiff's own testimony, where Mr. Stilkey states that Mr. Rundle, one of the defendants, demanded the return of the $500; and for the purpose intended, of introducing testimony to vary the terms of the written contract, it lacks the clearness, strength, and convincing quality requisite to have that effect. On direct examination Mr. Stilkey was asked: "Q. Whether or not you ever had any conversation with them about paying the sum of $4,500 in addition to the $500? A. At one time, with Mr. Whitney, my partner; and I told Mr. Rundle at the time he demanded the $500 that Mr. Whitney and I should pay the $4,500, and he advised

me not to." He admits that he did not advance the $4,500, and that the plaintiff never had title, or an option on the property. It is evident that Mr. Stilkey was led to believe that he could procure an option on the property for a small sum. He says he first offered $100, and finally offered the $500, and was refused.

Mrs. Carrie M. Brown, one of the principal witnesses for the plaintiff, testified, "that Mr. Stilkey repeatedly asked Mr. Boland if it was possible to carry the deal through, and he said positively no."

It is admitted that the defendants made no tender of the purchase price at any time before or on June 1, 1914, and no request was made for a deed of the property.

The case is here for our determination upon so much of the evidence as is legally admissible. We have carefully examined the evidence, and the admissions of counsel, and applying thereto well settled rules of law, we are of the opinion that the plaintiff is not entitled to recover.

Upon the vital question of its own readiness and ability to perform its obligations as set out in its declaration, there is not only an entire absence of testimony showing its ability to perform the same, but it admits over and over again that it had neither option nor title to the property, and could not procure the same. The rule is well established that in such cases the plaintiff, on his part, must show that he was able, ready, and willing to perform as he has declared in his writ. The plaintiff here has not brought itself within the rule, and the entry must therefore be,

Judgment for the defendants.

STATE OF MAINE *vs.* WILLIE O. MATHEWS.

Waldo. Opinion May 31, 1916.

Exceptions. Indictments. Intent of parties in criminal actions. Province of presiding Justice in charging jury.

1. It is the authoritative expression of an opinion by the presiding Justice as to an issue of fact arising in the case which is prohibited by R. S., ch. 84, sec. 97, and not the suggestion of an obvious inference from admitted facts and circumstances, made to assist the jury in coming to a clear understanding of the law and the evidence.
2. A careful examination of the portions of the charge excepted to, as well as the whole charge, fails to disclose any expression of opinion on an issue of fact arising in the case in violation of the statute.
3. An examination of the whole charge clearly shows that the provisions of the statute making the sale of cider unlawful only "when kept or deposited with intent to sell the same for tippling purposes, or as a beverage," were fully explained to the jury.

The respondent was indicted, tried and found guilty of the offense of selling three gallons of cider in violation of the statutes of Maine. The presiding Justice charged the jury in part as follows:

"The government claims here that this man had this cider on hand and sold it to this man with the intent to sell the same as a beverage, that is, to be drank. Not for mince pies, not for pickles, but to be drank; and the government says that on this day this respondent did sell three gallons to this witness who has taken the stand (Mr. Marshall) a three gallon jugful. The question for you to answer upon the evidence is, was the sale made? It is not denied that he got three gallons of something; but the respondent says he did not sell cider but he sold vinegar. Marshall came there and asked him if he had any old cider, and he said, 'No, but he had some vinegar, and Marshall bought three gallons of vinegar and took it off in a jug with him.'"

The presiding Justice further charged the jury as follows:

"Do you think that Marshall would go there to buy vinegar—three gallons of vinegar—and take it away and pay for it and, as

he says, mix it with sugar and soda and drink it, or was it old cider which this respondent may have called vinegar, perhaps with a twinkle in his eye? Was it vinegar or was it cider? You have the testimony as to what was in the cellar there—certain barrels of vinegar and certain barrels of cider—some ten or twelve of what the sheriff called cider. What do you say as to that? Can the ordinary man taste and tell whether when he tastes of the certain contents of a barrel that it is cider or vinegar, or can't he? Can you, or cannot you? Haven't you the slightest idea after you taste of anything like that whether it is cider or whether it is vinegar?"

The presiding Justice further charged the jury:

"Now, then, you have got the whole matter summed up, all thought out, and reasoned over. What do you say? Was that vinegar which Mr. Marshall bought and paid for and carried off, fixed up and drank, or was it old cider? And was it sold by this respondent, with the man going to him with a jug,— and kept by him as the statute says here with the intent to sell the same as a beverage? Did he have reason to think that Mr. Marshall would take that and go off and drink it? If so, he had no right to sell it."

To which respondent's counsel filed exceptions, alleging that the charge of the Justice presiding, and especially the certain parts above set forth, were in violation of chapter 84, section 97, of the Revised Statutes of the State of Maine, which section reads as follows:

"During a jury trial the presiding Justice shall rule and charge the jury, orally or in writing, upon all matters of law, arising in the case, but shall not, during the trial, including the charge, express an opinion upon issues of fact arising in the case, and such expression of opinion is sufficient cause for a new trial, if either party aggrieved thereby and interested desires it; and the same shall be ordered accordingly by the Law Court upon exceptions.

Exceptions overruled.

Case stated in opinion.

Walter A. Cowan, County Attorney, for the State.

Arthur Ritchie, for respondent.

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

KING, J. This case comes up on exceptions. The respondent was found guilty by the jury under an indictment charging him with selling to one Joshua A. Marshall three gallons of cider in violation of the statute.

The sale was not denied, but the respondent contended that what he sold Marshall was vinegar and not old cider. That was the chief issue. The evidence is not printed, but from the charge of the presiding Justice it appears that there was testimony in behalf of the respondent that Marshall came to him and asked if he had any old cider and he replied "No, but he had some vinegar," and Marshall thereupon bought three gallons of the liquor and took it away with him and drank it as a beverage.

1. The respondent complains that the presiding Justice in his charge to the jury expressed an opinion upon an issue of fact arising in the case, in violation of R. S., c. 84, sec. 97, and he recites in his bill of exceptions, printed with the statement of the case, two extracts from the charge upon which his complaint in this regard is based. This court in numerous decisions has had occasion to consider the provisions of statute here invoked, and it has pointed out with clearness the limits of the right and duty of the judge presiding to state to the jury the questions they are called upon to determine, to direct their attention to the contentions of the parties, and to analyze, compare and explain the evidence. In *McLellan* v. *Wheeler,* 70 Maine, 285, the court said: "If a judge is of such a happy temperament as to be indifferent whether the cases tried before him are decided rightly or wrongly, or not at all, the statute will justify him in omitting such statement. But it does not prohibit it. It simply requires him in making it to refrain from expressing an opinion upon any issue of fact arising in the case." And in *York* v. *Railroad Co.,* 84 Maine, 117, 128, the court said: "A judge presiding in a court of justice occupies a far higher position and has vastly more important duties than those of an umpire. . . . He is sworn to 'administer right and justice.' He should make the jury understand the pleadings, positions and contentions of the litigants. He may state, analyze, compare and explain evidence. He may aid the jury by suggesting presumptions and explanations, by pointing out possible reconciliations of seeming

contradictions, and possible solutions of seeming difficulties. He should do all such things as in his judgment will enable the jury to acquire a clear understanding of the law and evidence, and form a correct judgment." See also *Hamlin* v. *Treat,* 87 Maine, 310; *Jameson* v. *Weld,* 93 Maine, 345; *State* v. *Means,* 95 Maine, 364; *State* v. *Lambert,* 104 Maine, 394.

The first excerpt from the charge, recited in the exceptions, is a clear and correct statement by the court to the jury of the respective contentions of the parties as to the issue involved in the case, the contention of the government being, that the respondent kept the cider with intent to sell it to be used as a beverage and not for other purposes for which cider might be used, and that it was sold to Marshall to be used as a beverage, all of which, if proved, would constitute the offense charged; and the contention of the respondent being, that he did not sell cider to Marshall but sold him vinegar. Plainly that statement does not disclose the expression of an opinion on any issue of fact arising in the case.

Having directed the attention of the jury to the testimony of Marshall, that when he asked for old cider he was told by the respondent that he had no cider but had some vinegar, which Marshall thereupon bought and used as a beverage, the presiding Justice then instructed the jury that no offense was committed if it was vinegar that was sold, and admonished them to use their common sense in deciding the question whether the respondent did in fact sell Marshall cider or vinegar; and it was at that point in the instructions that the expressions recited in the second excerpt from the charge were used. The respondent particularly complains of the interrogatory expression used by the court,—"or was it old cider which the respondent may have called vinegar, perhaps with a twinkle in his eye." But we think that expression was nothing more than a suggestion to the jury, for their consideration, of the possibility that even if the respondent, in answer to Marshall's inquiry for old cider, called what he sold him vinegar, nevertheless he did not mean it, and so indicated to Marshall. And was not that suggestion the obvious inference to be drawn from the uncontroverted testimony respecting the sale, considered in the light of the circumstances disclosed? We think it was. There can be no

reasonable doubt that the respondent understood from Marshall's inquiry for old cider, with no other explanation of its intended use, that he wanted it to use as a beverage. If he answered that inquiry, "No," why should he add that he had some "vinegar?" And why should Marshall who was after old cider for a beverage buy three gallons of the respondent's liquor and use it as a beverage if the respondent had really informed him that it was vinegar? Marshall testified that the respondent made that answer to his inquiry. There was no direct testimony to the contrary. But does not the fact that Marshall was after old cider for a beverage, and that he bought of the respondent three gallons of something, which he used as a beverage, at once suggest to the ordinary mind, what the court suggested to the jury as a possibility, that if the respondent's answer to Marshall's inquiry was that he had no old cider but had some vinegar, the answer was an intended evasion and so understood by both parties? It is the authoritative expression of an opinion as to an issue of fact arising in the case which the statute prohibits, and not the suggestion of an obvious inference from admitted facts and circumstances made to assist the jury in coming to a clear understanding of the law and the evidence. A careful examination of the portion of the charge excepted to, as well as the whole charge, fails to disclose, we think, any expression of opinion on an issue of fact arising in the case in violation of the statute.

2. We think there is no merit in the exception with reference to the instructions as to the necessity of the government proving that the respondent kept the cider "with intent to sell the same for tippling purposes, or as a beverage." An examination of the whole charge clearly shows that ample instructions were given on this point. The jury could not have failed to understand from the explicit instruction given that in order to secure a conviction the government must prove not only a sale of cider, but also that the cider was kept by the respondent with intent to sell the same for tippling purposes, or as a beverage. In the very last sentence of the charge the court said, "I have told you on the last point—the intent of the parties, that you must find under the statutes that this cider was kept with the design to be sold as a beverage." And

he had previously quoted the statute which defines what are intoxicating liquors, and clearly explained to them that the sale of cider is prohibited only when kept and deposited with intent to sell the same for tippling purposes or as a beverage.

Exceptions overruled.

BOOTH BROTHERS & HURRICANE ISLAND GRANITE COMPANY

vs.

ALBERT W. SMITH, Admr.

Knox. Opinion June 6, 1916.

Interpretation of Revised Statutes, Chapter 91, Section 1, Paragraph VII. Petition for review.

1. A review may be granted in any case where it appears that through fraud, accident, mistake or misfortune justice has not been done, and that a further hearing would be just and equitable.
2. When a case has been considered and determined by the Law Court, a petition for a review cannot serve the purpose of a re-hearing. It will not lie for the purpose of seeking a revision by the court of its considered conclusions, either of fact or of law.
3. When a case has been considered and determined by the Law Court, a petition for a review will lie only when the court by inadvertence or mistake assumed to be true what the record shows is not true and its decision has been based upon that assumption, or has palpably failed to consider facts and a further hearing would be just and equitable.
4. When evidence is admitted without qualification or restriction, it is in the case for all legitimate probative purposes. Its effect is not to be limited to the precise purpose for which it was stated to be offered.
5. The first count in the declaration in this case is broad enough to cover the claim for which the original plaintiff recovered a verdict.

Petition for review of action *Smith, Administrator* v. *Booth Bros. & Hurricane Island Granite Co.,* reported in Volume 112 Maine

Reports on page 297. Petitioner alleges certain errors in the decision of the Law Court. Petition denied with costs.

Case stated in opinion.

Littlefield & Littlefield, and Frank H. Ingraham, for plaintiff.

A. S. Littlefield, for defendant.

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

SAVAGE, C. J. This is a petition for a review of an action in which the present defendant was plaintiff, and the petitioner was defendant. That action was tried before a jury, and resulted in a verdict for Smith. The case was taken to the Law Court by the Granite Company on a motion for a new trial, and on exceptions. The motion and exceptions were overruled. *Smith, Admr.* v. *Booth Brothers and Hurricane Island Granite Company,* 112 Maine, 297. Thereupon the petitioner filed in this court a motion for a re-hearing on the ground of alleged errors in the decision of the court. That motion was abandoned. In this state, there is no provision by statute or rule for a re-hearing by the Law Court after a decision rendered. Indeed, there can be no re-hearing in cases where motions and exceptions are overruled. Such cases, after decision, go automatically to judgment, as of the preceding nisi prius term. R. S., ch. 79, sect. 49. It is beyond the power of the court to recall them.

By this petition, the petitioner seeks to accomplish the purpose of a re-hearing. The statute provides that "a review may be granted in any case where it appears that through fraud, accident, mistake or misfortune, justice has not been done, and that a further hearing would be just and equitable." R. S., ch. 91, sect. 1, par. VII. The petitioner alleges as its ground for relief, that "by inadvertence or accident an error was committed by said court [the Law Court] in overruling one of the exceptions" of the petitioner.

The right to a review is created by statute, and is limited to the causes specified in the statute. It may be questioned whether the statute, by proper construction, embraces the inadvertences, or accidents, or mistakes of the tribunal which has heard and decided the case. It might, perhaps, properly be held that the words "accident"

and "mistake" relate only to the conduct and understandings or misunderstandings or misfortunes of the parties, to extraneous matters connected with the preparation and trial of the case, and not in any sense to errors in the conclusions of the court, however caused. But for the present we have no occasion to say, and do not say, that there might not be a case of such palpable mistake in apprehending the evidence in a trial at nisi prius, or the record in a case before the Law Court, or such failure to consider them, as would bring it within the meaning of the statute. *Ætna Life Insurance Company* v. *Tremblay,* 101 Maine at p. 590.

But it is certain that a petition for review cannot serve the purpose of a re-hearing. It will not lie for the purpose of seeking a revision by the court of its considered conclusions, either of fact or of law. *Pickering* v. *Cassidy,* 93 Maine, 139. The conclusions of the court upon disputed issues of fact, or controverted questions of law, must be taken as decisive and unreviewable in that case. That courts err sometimes is sufficiently shown by overruled cases in every state. But when a case has been fairly heard and maturely considered and judgment rendered, it is for the public interest that litigation should cease, and that disappointed litigants should not be permitted to try their cases over again, and subject their adversaries to expensive and oppressive litigation. To delay justice is oft times to deny it. In *Pickering* v. *Cassidy,* supra, the court said: "Mere mistakes in opinion and judgment are outside of the statute, where no data were accidentally overlooked. . . . Even if the court of last resort, without overlooking any data before it, draws erroneous conclusions in reasoning, its judgment should not for that reason alone be subject for reversal, after having been deliberately rendered." Interest rei publicae ut sit finis litium. As we conceive it, if there be any ground for holding that an alleged erroneous decision of the Law Court may be cause for review in any case, it is only when the court has by mistake assumed to be true what the record shows is not true, and its decision has been based upon the mistaken assumption, or has palpably failed to consider facts proved. When such a case comes before the court, the question will be considered further. We think no such error appears in this case.

The history out of which this controversy has arisen is fully stated in *Smith* v. *Granite Co.*, 112 Maine, 297, and need not be re-stated here. A brief resume will suffice. The original suit was brought to recover for one-fifth of the stumpage of 12,000,000 blocks taken from a granite quarry in St. George. It was claimed that the defendant took them by trespass, but the action was in assumpsit, the trespass being waived. The court found that the plaintiff's intestate was the owner of a one-fifth interest in the granite on a farm once owned by Archelaus Smalley, and known as the "Smalley farm." The location of the northerly line of the "Smalley farm" was disputed. Smalley conveyed the granite on the farm in 1836. And in 1867, he conveyed by quitclaim deed all that part of the Smalley farm which contained the granite to John M. Fuller. The granite was excepted. In the meantime Smalley had become the owner of other land northerly of, and adjoining, the Smalley farm, and in his deed to Fuller he described the tract conveyed as bounded "on the north by other land of said Archelaus Smalley." Fuller died. And in 1888, one of his two heirs conveyed the tract to the other. And in 1889 John A. Fuller, the other heir, conveyed to the plaintiff's intestate by warranty deed all the land, at least, that was conveyed by Smalley to his father in 1867. And the deed may have included more, for by the description in the deed, the tract conveyed was bounded on the north by the southerly line of the Booth Brothers & Hurricane Island Granite Company's land. At the trial the Granite Company's title deed was not introduced and its southerly line was not shown. Had it been, it might have saved some trouble. In the warranty deed to the plaintiff's intestate the granite was not excepted. This deed gave the grantee a good title as against a trespasser. So that so far as this case is concerned, the intestate owned one-fifth of the granite on the Smalley farm, and all of the granite between the northerly line of the Smalley farm and the southerly line of the Granite Company's land, if there was any land between these lines. And the court was satisfied by the evidence that there may have been some; that is, that the 1889 warranty deed included some land to the north of the Smalley farm, but south of the Granite Company's land.

The deeds from Smalley to Fuller, and from Fuller's heir to the plaintiff's intestate were admitted subject to exception. Exceptions

were taken. The overruling of these exceptions is assigned as cause for review. We do not think it is cause for review. We do not find that the court based its decision upon facts inadvertently assumed to be true, which the record shows were not true, or that it failed to consider any of the facts proved. And without that, the reasoning of the court is not reviewable.

But we go further. We think it is not shown that injustice has been done. This must be shown before a review can be granted. *Donnell* v. *Hodsdon,* 102 Maine, 420. Further consideration leads us to affirm the conclusion we reached in the original case. We did not hold that the deeds were admissible to show the northern boundary of the Smalley farm, but that they were admissible to show the northerly limits of the land owned by the intestate. We said,—"If the deed included no land outside of the Smalley farm, it was harmless, for the undisputed evidence elsewhere shows that Smith [the intestate] had a title as already stated, to an undivided part of the granite on that farm. If the deed included land and granite outside the Smalley farm, the plaintiff may recover for it in this suit." And it was further held that if Smith's deed covered land and granite north of the Smalley farm, the Granite Company was not prejudiced by the introduction of the deeds, because, although Smith owned all of such granite, the plaintiff had sued to recover for only one-fifth of it.

Of the court's conclusions, the petitioner makes two criticisms which may be noticed. First, it says that the court gave an effect to the deeds not stated by counsel as a ground of admissibility when the deeds were offered. Even if it were so, we think there is no merit in the criticism. The deeds having been admitted without qualification were in the case for all legitimate purposes. They were to be considered upon all issues upon which they were legitimately evidential. It is not an uncommon thing to refuse to sustain exceptions to the admission or exclusion of testimony on grounds argued in the Law Court which were not stated to the court at the trial. The court ruling is entitled to know before admission the nature of all objections, and before exclusion, all the grounds of admissibility, that he may rule advisedly. But when evidence has been admitted upon any ground, we know of no rule which forbids its consideration upon any issue to which it is

relevant, and as to which it is probative. If evidence is admissible for any purpose, exceptions to its admission will not be sustained, unless it appears affirmatively that it was admitted for an unauthorized purpose. *Dennen* v. *Haskell,* 45 Maine, 430; *McLaughlin* v. *Joy,* 100 Maine, 517. Moreover the plaintiff was not aggrieved, and for that reason its exceptions could not have been sustained. The introduction of the deeds showed that Smith owned as far north as the Granite Company's land. And his deed from Fuller may have included a strip between the Smalley farm and the company's land. Nevertheless, if the plaintiff was permitted to recover for no more granite than the company had taken, and for no more than was declared for in the writ, it cannot be said that the company was aggrieved.

But, the petitioner urges, secondly, that it was aggrieved because it says the plaintiff was permitted to recover more than was sued for, namely, for granite north of the Smalley farm. It contends that the plaintiff at the most could recover only for granite on the Smalley farm, and that he was limited to the Smalley farm by his declaration. We do not think so. The declaration contained three counts. The first was upon the following account annexed:

"To stumpage or rental of 1-5 int. in quarry located at Long Cove, St. George, Me., for 12,000,000 blocks taken therefrom during the last 6 yrs. prior to this writ at $7 per M. for full stumpage $2400.00

To 1-5 stumpage rental or use of said quarry for the production of posts, specials, dimension and random stone and other granite than paving blocks taken from said quarry and sold 400.00

$2800.00"

The second count is for granite bargained and sold and furnished, and need not be considered. The third count alleged that the defendant by consent had been operating and taking the granite on the Smalley farm and was indebted therefor to the plaintiff to an amount equal to one-fifth of what the granite was reasonably worth. It was further stated in the declaration by way of specifica-

tion that "the amount is the amount set forth in the account hereto attached, and that the detail of the same is as therein specified"

It is too late now to inquire whether it would not have been better pleading, in a case where assumpsit is brought to recover the proceeds of a trespass, the tort being waived, to declare for money had and received, rather than upon an account annexed. The inquiry now is whether the declaration, or any count in it, is broad enough to cover granite taken from land belonging to Smith north of the Smalley farm. The third count is without question limited to the Smalley farm. The first count however is not so limited. It is limited only to the "quarry, located at Long Cove, St. George." The quarry may have been in the Smalley farm, or it may have been partly on that farm and partly on the land north. The petitioner, however, seeks to limit the first count by the specification to which we have referred in the third count. It is argued that the declaration ties the first and third counts together, and specifies and makes certain what is referred to in the account annexed. The third count is certainly tied to the first one, and limited by it. But we think the first count is not tied to, or limited by, the third. The first count stands alone unspecified and unlimited, save by its own language. And that language does not confine the right of recovery to the Smalley farm. And we would not be justified by the record before us in saying that it was intended so to confine it.

Petition denied, with costs.

GERTRUDE E. BARSTOW, et als., *vs.* ELLEN J. TETLOW, Aplt.

From Decree of Judge of Probate.

Kennebec. Opinion June 6, 1916.

Admissibility of self-serving statements. Declaration of donor after gift. Gifts causa mortis. Gifts inter vivos.

1. Where a joint deposit was made in Rhode Island and the transactions connected therewith occurred there, the law of that State governs in the determination of the appellant's claim of title to the fund as the surviving joint tenant of the deposit.
2. To constitute a valid gift *inter vivos* it must be absolute, irrevocable and complete, whether the donor die or not, and the subject of it must be delivered to the donee so that the donor parts with all present and future dominion over it.
3. If the intention be that the gift is to take effect only at the death of the donor, it is ineffectual, because that would be an attempted testamentary disposition of property which can be accomplished only by means of a valid will.
4. To establish the gift *inter vivos* claimed by the appellant, the evidence must show that the alleged donor intended in making the survivorship deposit to give the appellant a then absolute and irrevocable joint tenancy and ownership in the deposit, thereby divesting herself of all present and future dominion and control of the interest and right so given, and to deprive herself of the right to dispose of the fund by a last will and testament.
5. Testimony as to statements made by the alleged donor, after the joint survivorship deposit was made, to the effect that the deposit was hers and that she intended to dispose of it by her will, is incompetent and inadmissible upon the issue whether it was her intention in making the deposit to give the appellant a joint tenancy and ownership therein. If made they were self serving statements. A donor cannot defeat his own gift by declarations made after it has taken effect.
6. Where immediately after a joint survivorship deposit is made, the depositor makes a last will and testament containing numerous specific pecuniary bequests, aggregating $3,000, having substantially no property other than the survivorship deposit from which those pecuniary bequests could be paid, those facts and circumstances, not being in controversy, are competent and admissible as evidence, and are entitled to much weight, in the determination of the question whether the survivorship deposit was in

fact made with an intention on the part of the depositor thereby to divest herself of her right to dispose of the fund by a last will and testament.

Held:

7. That the evidence does not justify a conclusion that the alleged donor made the joint survivorship deposit with an intent to give the appellant a then joint tenancy and ownership in the fund, thereby depriving herself of her control of it during her life, and of her right to make a testamentary disposition of it. On the other hand, the evidence shows that the alleged donor made the survivorship deposit with the understanding that while she lived she retained the use and control of it, and had the right to dispose of it by her will.

Held:

8. Also, that the evidence is not sufficient to establish a gift *causa mortis* of the fund from the alleged donor to the appellant.

Appeal from decree of Judge of Probate, County of Kennebec, State of Maine, to the Supreme Court of Probate. At conclusion of testimony, the cause was reported for the determination of the Law Court, and upon so much of the evidence as is legally admissible, the court to render such judgment as the law and evidence require. Decree of court stated in opinion. Appeal not sustained. Decision of court, that the fund in question does not belong to the appellant, but is a part of the estate of Amanda M. Kent, and should be so accounted for. So ordered.

Case stated in opinion.

Edmund H. Talbot, Howard R. Ives, and Leon V. Walker, for plaintiffs.

William P. Whitehouse, and Edwin J. Tetlow, for defendant.

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

KING, J. February 9, 1909, Amanda M. Kent made a deposit in the Providence Institution for Savings of Providence, Rhode Island in the names of "Amanda M. Kent or Ellen J. Tetlow or the survivor of them." Mrs. Kent died August 27, 1910, testate. Her will was proved and allowed in the probate court for Kennebec County, Maine, and the executrices therein named, Ellen J. Tetlow and Eva R. Crane, were appointed and qualified. At the time of Mrs. Kent's death the amount to the credit of said bank deposit was $6,188.90, which Ellen J. Tetlow thereafter drew out of said bank claiming title thereto. Thereupon, on petition of the appellees

and after hearing, the Judge of probate of said county decreed that the amount of said deposit should be inventoried and accounted for as a part of the estate of Mrs. Kent. From that decree Ellen J. Tetlow appealed, and the case is reported to this court for determination on so much of the evidence as is legally admissible.

The appellant asserts title to the fund in question (1) as the surviving joint tenant and owner of the deposit, claiming that such joint tenancy was created by a gift *inter vivos* from Mrs. Kent to her; and (2) that, if the evidence is not sufficient to establish such a joint tenancy in the deposit by a gift *inter vivos,* there was a gift *causa mortis* of the deposit to her.

The deposit having been made in Rhode Island and the transactions connected therewith having occurred there, the law of that State undoubtedly governs in the determination of the appellant's claim of title to the fund as the surviving joint tenant of the deposit.

It is well established by the dscisions of the court of that State that a bank deposit may be so made that two persons shall be joint owners thereof during their joint lives, and the survivor take upon the death of the other. *Whitehead* v. *Smith,* 19 R. I., 135; *Industrial Trust Co.* v. *Scanlon,* 26 R. I., 228. Where it is claimed that a joint tenancy in a bank deposit is created by a gift *inter vivos,* the gift must be established by sufficient proof as in the case of any other gift. *Trust Co.* v. *Scanlon,* supra. And in the instant case, in order to sustain the appellant's claim of title to the deposit as the surviving joint tenant of it by a gift *inter vivos* the evidence must establish an intention on the part of Mrs. Kent to make such a gift and that she carried out that intention by such acts as were necessary to be done on her part to make it complete and effectual.

In behalf of the appellees it is claimed that the joint survivorship deposit was made by Mrs. Kent with no intention to make a present gift to Mrs. Tetlow of an interest as joint tenant in the deposit or that any title or beneficial interest in the money should pass to Mrs. Tetlow until Mrs. Kent's death; but that the deposit was so made as a matter of convenience in order that Mrs. Tetlow, living in Providence, could draw from the deposit such sums as Mrs. Kent, who lived in Maine, should from time to time require, and also with the intent and belief that, if the deposit was so

made, then, in the event of Mrs. Kent's death before she had made a satisfactory testamentary disposition of her property, any balance of this deposit would pass to Mrs. Tetlow and not go to the heirs at law of Mrs. Kent.

To constitute a valid gift *inter vivos* it must be absolute, irrevocable and complete, whether the donor die or not, and the subject of it must be delivered to the donee so that the donor parts with all present and future dominion over it. *Sessions* v. *Mosley,* 4 Cush., 87, quoted with approval in *Flaherty* v. *O'Connor,* 24 R. I., 587, 590; *Grover* v. *Grover,* 24 Pick., 261; *Dole* v. *Lincoln,* 31 Maine, 422. If the intention be that the gift is to take effect only at the death of the donor it is ineffectual, because that would be an attempted testamentary disposition of property which can be accomplished only by means of a valid will. *Prov. Inst. for Savings* v. *Carpenter,* 18 R. I., 287, citing *Savings Bank* v. *Fogg,* 82 Maine, 538. And to establish the gift claimed by the appellant the evidence must show that Mrs. Kent intended to give Mrs. Tetlow a then absolute and irrevocable joint tenancy and ownership in the deposit, thereby divesting herself of all present and future dominion and control of the interest and right so given, and that she made a delivery of the subject matter of the gift—the joint tenancy in the deposit.

Under a joint survivorship deposit either party has authority so far as the bank is concerned to draw any part or the whole of the deposit on presentation of the deposit book. And in some cases the suggestion has been made that inasmuch as the alleged donor of such a deposit has the power to defeat the gift by drawing the deposit the control of the deposit is thereby retained by the donor and the gift is not absolute. Referring to that argument against the vesting of an interest in joint tenancy in such a deposit, the Rhode Island court in *Industrial Trust Co.* v. *Scanlon,* supra, said: "To this it may be replied that the donee has the same power, if he has possession of the book. Both parties cannot hold the book at the same time, and the mere fact that one has possession of it ought not to be conclusive against the rights of the other."

In the case at bar the deposit book representing the joint survivorship account was handed by Mrs. Kent to Mrs. Tetlow at

the time the deposit was made and thereafter she retained possession of it. We are therefore of the opinion that the evidence in this case is reasonably sufficient under the law of Rhode Island to establish a complete gift *inter vivos* to Mrs. Tetlow of a joint tenancy in the deposit if Mrs. Kent then intended to make such a gift in presenti. And this is the controlling question: Did Mrs. Kent intend by making the joint survivorship deposit to divest herself of the beneficial ownership of the fund during her life and to deprive herself of her right to dispose of it by will?

There is no material conflict of admissible evidence. It consists mainly of the acts and statements of Mrs. Kent at the time the deposit was made, and of her previous and subsequent conduct as tending to disclose her intent in opening the bank account in question. It seems proper to make here some reference to that practically undisputed evidence.

Mrs. Kent and her husband formerly lived in Rhode Island. Their only child, a girl, died at the age of about 6 years. Mrs. Tetlow, the appellant, a niece of Mrs. Kent, lived and had her home with them from the time she was about fifteen years old until her marriage to Mr. Tetlow in 1880, when she settled in Providence. For some years prior to Mr. Kent's death in 1907 the Kents lived in Fayette, Maine, on a farm, and Mrs. Kent's residence there continued until her death. Both Mr. and Mrs. Kent had money on deposit in the Providence Institution for Savings. The relations between the Kents and Mrs. Tetlow were always intimate. They were accustomed to send to her orders on the bank for money which she drew and sent to them. They advised with her about their business affairs. She visited them and they visited her. In short the relations existing between them were like those between parents and daughter. Mr. Kent died testate. He gave the residue of his estate to his wife for her life with full power to use any part or portion of the principal thereof as she desired for her own benefit, or to dispose of it by will, and he further provided that if any of his estate should remain at his wife's death undisposed of by her or her will, it should go to Mrs. Tetlow.

At the time of Mr. Kent's death in 1907 there was no deposit at said bank in his name. There had been a deposit there in his own name, and another survivorship deposit there, in his name or that of his wife or the survivor of them, but both of those deposits were withdrawn in March 1906 and re-deposited in Mrs. Kent's name. June 10, 1906, Mrs. Kent wrote Mrs. Tetlow concerning the making of a joint bank deposit as follows:

"I think for the present I had better adopt what you spoke of as to the use of both names and then either could draw, and when I get ready for a will, or when you come down again, could make a change if necessary. I just want to be safe in case I am taken suddenly. I should feet badly if I could not have the disposition of my property, but strange things happen sometimes. . . . I have read and re-read your letters and think your proposals very good, it is something that has given me much thought and fears that something would happen to me before things were settled. . . . I will send it back, or you make out a request to have the book run to us both and I will copy that and send it back."

In accordance with the suggestions in that letter Mrs. Kent sent to Mrs. Tetlow an order on the bank for $5000, which sum she withdrew, and, because the order did not authorize the bank to open the joint survivorship account, the $5000 was deposited in Mrs. Tetlow's name, and she notified Mrs. Kent of the fact offering to give her a note for the amount until the account could be made as desired. That account remained unchanged, except the addition of dividends, until February 9, 1909, when the joint survivorship account in question was made. It then amounted to $5520.40. Mrs. Tetlow never claimed any beneficial interest in that account. On February 9, 1909, the balance of the other account standing in Mrs. Kent's name was $2563.68.

For some years before her death, Mrs. Kent was afflicted with cancer which finally caused her death. She made short visits to the Tetlows after Mr. Kent's death, and in October, 1908, went to Providence to spend the winter with them.

Mr. Tetlow testified that shortly prior to the opening of the joint survivorship account in question, Mrs. Kent said to him that she wanted to get the conditon of her bank account off her mind, "she

wanted the bank account in this way—that during her life she or Nellie—it should be an account in such shape that she or Nellie could draw it during either of their lives, and at her death it should go to Nellie." In answer to one question on cross examination as to what Mrs. Kent said to him as to why she wanted the deposit to be in joint survivorship, Mr. Tetlow said "So it would be theirs together while they lived and it would be Mrs. Tetlow's at her death, if she died first." If that was Mrs. Kent's exact language it would tend to indicate that she then intended a gift in presenti to Mrs. Tetlow of a joint ownership in the deposit. But it is not to be expected perhaps that any witness can recall after the lapse of some years the exact words used by another in a conversation unless it be the use of some peculiar word or expression. And it is to be noted that Mr. Tetlow in his examination in chief did not use that language in stating what Mrs. Kent said, and that almost immediately following this answer he stated that she said nothing about a gift, and that the money was to be so placed "that either could draw from it during their lives," and "That is all the statement there was."

We find no other evidence of any particular statements made by Mrs. Kent before she went to the bank on February 9, 1909, tending to show her intention in making the joint survivorship deposit. Mrs. Tetlow was asked, "Did she state before you went to the bank, or previous to that, her purpose to make a joint account?" and she answered, "I don't remember she did."

On February 9, 1909, Mrs. Kent and Mr. and Mrs. Tetlow went to the bank together. Mrs. Kent called for Mr. Ormsbee, an official of the bank with whom she was acquainted. Mrs. Tetlow testified that while they were waiting for him Mrs. Kent said to her that "she would like to place what money she had there in a joint account so that either of us could draw from it, or so that it would be mine when she was through with what she needed." She did not hear all of Mrs. Kent's conversation with Mr. Ormsbee. He testified that Mrs. Kent said "that she would like to open a deposit in her name and her niece's, Mrs. Ellen J. Tetlow; that she wanted the money put in so that either could draw it during the lifetime of both, and that on the death of one it would go to the

survivor. I said that was all right. She had had a similar account with her husband, so she understood what it was." The amount of the two accounts, less $100 which Mrs. Kent took in cash, was then deposited in the joint survivorship account—$7,984.08. After issuing the book Mr. Ormsbee read it to Mrs. Kent and told her the money would be payable to either as long as both lived and on the death of either one would go to the other. "She said that was just what she wished to accomplish." On cross examination, Mr. Ormsbee stated that Mrs. Kent said, "She wanted the money to go to Mrs. Tetlow in case of her death, and she wanted it so Mrs. Tetlow could draw the money for convenience's sake. She lived in Maine and Mrs. Tetlow lived here." On re-direct examination he was asked this question, "She stated to you, did she not, that she wanted to have this money put in her name and Nellie's so it would be hers and Nellie's while she lived and Mrs. Tetlow's when she died?" And he answered "Yes sir."

It appears that substantially all the property Mrs. Kent had in 1909, in addition to the deposit in this joint survivorship account, was about $600 in a bank in Maine, except that she had under her husband's will the power of disposal of the residue of his property which consisted apparently of the homestead farm in Fayette with the farming tools and household furniture.

In April, 1909, after the joint survivorship deposit was made, and while Mrs. Kent was in Providence with the Tetlows, she made a will wherein she made 19 specific pecuniary bequests aggregating $3000, devised the homestead farm in Fayette to Mrs. Tetlow, and provided that the residue of her estate should be divided into five parts which she bequeathed to particular persons. Mrs. Tetlow was with Mrs. Kent at the attorney's office when the preparation of this will was discussed and arranged for and when it was executed, and she was perfectly familiar with all of its provisions. She testified that she knew "it all by heart." After Mrs. Kent returned to Fayette in the summer of 1909, she executed another will which was practically a duplicate of the first except that she increased her specific pecuniary bequests $600. Mrs. Tetlow was present when that will was executed and knew its provisions. She was familiar with Mrs. Kent's property affairs

and fully understood that the specific pecuniary bequests in her will could not be paid if the deposit in question was not Mrs. Kent's property and subject to her testamentary disposition of it. It appears that Mrs. Kent informed the attorney who was acting for her in the preparation of this second will that she had made the joint survivorship deposit in question and asked his opinion of the effect of such a deposit, and that he suggested to her that it would be safer in his opinion to have it changed. After that, and before the will was executed, Miss Crane, the co-executrix, who was then visiting Mrs. Kent, wrote Mrs. Tetlow that her aunt "wishes you to have the book made out in her name." Before that letter reached Mrs. Tetlow, however, Miss Crane called on her in Providence and told her that Mrs. Kent wanted the bank book, to which Mrs. Tetlow replied, according to her own testimony, that she should "never give up the bank book until I have an order from Aunt Kent." She then wrote to her aunt asking her if she wanted the bank book, to which Mrs. Kent replied, "I received your letter of the 20th this morning and haste to reply . . . I wish the business was settled, but have no need of the bank book only to have it convenient to draw from. . . . You may think I am awful fussy about the will, and think you will see it in the same light after we talk it over. I don't feel happy as things stand now." Mrs. Tetlow went to Fayette soon after and on July 22, 1909, wrote to Miss Crane that her aunt had completed the will and that she "seems content with one change that you understand. . . ."

In the latter part of 1909, Mrs. Kent went to Providence to the Tetlows and the will was put with other papers in a safe deposit box. In January, 1910, Mr. Tetlow took her to Indianapolis for treatment, where she remained, her condition growing worse, until May, when she was brought back to the Tetlows and died there in August, 1910. Money was drawn from the joint survivorship account by Mrs. Tetlow on orders signed by Mrs. Kent so long as she was able to sign them. As to those orders Mrs. Tetlow testified, "She told me I need not require that, but I preferred to do it, so she would know positively about the money." And during Mrs. Kent's life, Mrs. Tetlow drew no money from the deposit except

for Mrs. Kent's own use, and whatever was drawn was used exclusively for her benefit.

We have not referred to certain testimony in behalf of the appellees tending to show that after the joint survivorship deposit was made Mrs. Kent made certain statements to the effect that the deposit was hers and that she intended to dispose of it by her will. We think the testimony as to such statements was incompetent and inadmissible. If made they were self serving statements. A donor cannot defeat his own gift by declarations made after it has taken effect. *Holmes* v. *Sawtelle,* 53 Maine, 179, 182. *Kimball* v. *Leland,* 110 Mass., 325. And we think the rule against hearsay testimony prevents the admissibility of the testimony as to such declarations, even though, if made, they might tend to show the intention of Mrs. Kent in making the joint survivorship deposit. We have therefore disregarded that testimony as inadmissible. But we entertain no doubt of the competency and admissibility of the fact that Mrs. Kent made two wills subsequent to and soon after the deposit in question was made. The evidence as to what she did in respect to the making of those wills and their provisions is not questioned. Neither is the fact questioned that she did not have other property besides this bank deposit from which any of the numerous specific pecuniary bequests in the wills could be paid. And we think her acts in making those wills are entitled to much weight in the determination of the question whether she made that joint survivorship deposit with an intention thereby to divest herself of her right to dispose of that fund by a last will and testament.

We have omitted reference to many minor facts and circumstances put in evidence, all of which are of more or less significance in the determination of the question presented, but those facts and circumstances have not been overlooked by us, and they have been urged upon our attention with much persuasive force by the able counsel for the appellant.

After a painstaking study and weighing of all the evidence in this case we are of the opinion that Mrs. Kent did not make the joint survivorship deposit with an intent to give Mrs. Tetlow a then joint tenancy and ownership in the fund; on the other hand, we

think the evidence justifies the conclusion that neither Mrs. Kent nor Mrs. Tetlow understood that the making of the joint survivorship deposit deprived Mrs. Kent of the beneficial ownership of the fund during her life or divested her of her right to make a testamentary disposition of it. The letter of June 10, 1906, wherein Mrs. Kent expressed for the first time apparently her decision to use both names in making a deposit in the bank, shows plainly that she did not then intend by so doing to divest herself of the right to dispose of the fund by will, for she therein stated that it was to be an arrangement until "I get ready for a will." And we find no sufficient evidence of a change in her intention in that respect up to the time the deposit was made. The answer of Mr. Tetlow in cross-examination, to which reference has been made, that Mrs. Kent said she wanted to make the deposit in her name and Mrs. Tetlow's so "it would be theirs while they lived" has already been commented on. Considering that answer in connection with the other testimony of the witness, in both direct and cross-examination, we have too much doubt that it expresses the exact words used by Mrs. Kent to accord to it the importance contended for by the appellant, especially in view of the subsequent acts of Mrs. Kent. Nor do we think there is any material significance in the fact that Mr. Ormsbee answered affirmatively the leading question asked of him in redirect examination containing a similar expression. He had already testified that Mrs. Kent said that she wanted the deposit made "so Mrs. Tetlow could draw the money *for convenience's sake*. She lived in Maine and Mrs. Tetlow lived here."

But it is of the utmost significance, we think, as showing that Mrs. Kent did not intend in making the deposit to deprive herself of the right to dispose of the fund by will, that immediately subsequent to the deposit she made the will wherein, as it must be conceded, she assumed to exercise the right to dispose of it as her property. She did not do that as a meaningless and idle ceremony. The evidence amply shows that the making of a satisfactory testamentary disposition of her property had been a matter which she had contemplated for years, and that the determination of its provisions and the fear that she might die before it was completed had caused her much anxiety. The fact therefore that she carried out

that long cherished and fixed purpose to make a will immediately subsequent to the deposit in question leaves no doubt in our mind that she did not intend when she made the deposit to give Mrs. Tetlow a then joint ownership with her in the deposit. Moreover, those wills were made with Mrs. Tetlow's full knowledge that they were being made and of their provisions, which she knew could not be carried out unless this fund belonged to her aunt, and yet she made no suggestions to her to the contrary. We are therefore constrained to the conclusion that the appellant's conduct touching the matter of the making and execution of the wills by her aunt, subsequent to the joint survivorship deposit, is inconsistent with the claim she now makes that Mrs. Kent in making that deposit made a gift in presenti to her of a joint ownership in it.

It remains to consider if there was a gift *causa mortis* of the fund to Mrs. Tetlow.

We have already found that Mrs. Kent in making the deposit did not intend to deprive herself of the ownership of the fund so long as she lived or of the right to dispose of it by will. It follows, therefore, that no gift *causa mortis* was made at that time.

There is some testimony, however, by Mr. and Mrs. Tetlow tending to show that thereafter Mrs. Kent made such statements as, "everything is going to Nellie" and, "all I have got is Nellie's," and, "she wanted me to have it." But even those statements were not shown to have been made by Mrs. Kent at any time when she was in contemplation of the near approach of death as required in a gift *causa mortis*. In fact it does not appear when those statements were made. We are therefore clearly of the opinion that Mrs. Tetlow's claim of title to the fund in question under a gift *causa mortis* is not sustained by sufficient proof.

Accordingly it is the decision of the court that the fund in question does not belong to the appellant but is a part of the estate of Amanda M. Kent and should be so accounted for.

A decree will therefore be made ordering Ellen J. Tetlow to inventory and account for as a part of the estate of Amanda M. Kent, the amount which stood to the credit of said joint survivorship account in said Providence Intsitution of Savings on January

18, 1911, when she withdrew the same, to wit, the sum of $6,188.40, together with interest thereon at 4 per cent compounded semi annually from January 1, 1911, (the date to which the last interest credit to said deposit was made), to the date of the decree.

So ordered.

HERBERT L. GRINDLE, Petitioner for Mandamus,

vs.

JOHN E. BUNKER, Secretary of State.

Kennebec. Opinion June 7, 1916.

Election of officers. Interpretation of statutes relative to terms of office. Terms of office. Vacancy in office, either actual or constructive.

P. was duly elected register of deeds for Knox county at the general election held on the second Monday of September, 1910. He qualified and assumed office on January 1, 1911. At the general election held on the second Tuesday of September, 1914, H. was elected register and received his certificate, but died on December 25, 1914, without having qualified. Had he lived he would have entered upon his duties on January 1, 1915. P. is still continuing in the office.

In a petition for mandamus brought by one who has filed the requisite nomination papers, asking that the Secretary of State be compelled to place his name upon the official primary ballot,

Held:

1. That under R. S. ch. 11, sec. 2, P. was elected for a term of four years, and until another should be chosen and qualified, that is for a specific term of four years and a conditional term added thereto.
2. That under R. S. ch. 11, sec. 4, vacancies shall be filled by election at the next September election after they occur, and in the meantime the Governor, with the advice and consent of the Council, may fill the vacancy by appointment.

3. That the term vacancy as used in this statute means an actual vacancy, an office without an incumbent.
4. That the death of H. after his election, but before his qualification and before the beginning of his term of office caused no vacancy.
5. That the office is not now vacant, because P. is the lawful incumbent thereof, is occupying the position and performing its duties under his original election.
6. That no election can now be held to choose another who shall serve the next two years.

Petition for mandamus to compel the defendant, as Secretary of State, to place name of plaintiff as a candidate for the office of register of deeds for Knox ccounty, State of Maine, upon the official primary ballot to be voted upon at the primary election preceding the general election to be held on the second Monday of September, 1916. The plaintiff alleged that a vacancy existed in said office of register of deeds for Knox county, to which defendant, answering, denied that such vacancy existed as claimed. Case reported to Law Court by agreement. Judgment for defendant. Petition dismissed.

Case stated in opinion.

Frank L. Dutton, for petitioner.

O. H. Dunbar, Assistant Attorney General, for John E. Bunker.

H. L. Withee, for Clarence E. Paul.

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

CORNISH, J. Clarence E. Paul was duly elected register of deeds for Knox county at the general election held on the second Monday of September, 1910. He qualified and assumed office on January 1, 1911. At the general election held on the second Monday of September, 1914, one Edwin O. Heald was elected register and received his certificate, but died on December 25, 1914, without having qualified. Had he lived, he would have entered upon his duties on January 1, 1915. Paul is still continuing in the office.

The petitioner has filed with the Secretary of State the requisite nomination papers as a candidate at the primary election to be held

on June 19, 1916, and brings this petition for mandamus to compel the secretary to place his name upon the official primary ballot. The primary election is preliminary to the general election to be held on the second Monday of September, 1916.

The statutes regulating the election of register of deeds and providing for the filling of vacancies are as follows:

"In each county and in each registry district a register of deeds shall be chosen by ballot, by persons qualified to vote for representatives, at town meetings, on the second Monday of September, eighteen hundred and eighty-two and every four years thereafter." R. S., ch. 11, sec. 1.

". . . The person thus elected and giving the bond required in the following section, approved by the county commissioners, shall hold his office for four years from the first day of the next January and until another is chosen and qualified." Sec. 2.

"Vacancies shall be filled by election in manner aforesaid at the next September election after their occurrence; and in the meantime, the Governor, with the advice and consent of the Council, may fill vacancies by appointment, and the person so appointed shall hold his office until the first day of January next after the election last mentioned." Sec. 4.

"In case of vacancy in the office of registry and of his clerk in any county or registry district, the clerk of the judicial courts of the same county, being first sworn, shall perform all duties and services required of a register of deeds during such vacancy." Sec. 8.

The petitioner contends that a vacancy has occurred and still exists which should be filled at the coming September election, the person so elected to fill the unexpired term and hold for two years from January 1, 1917. The respondent claims that no vacancy has occurred, within the contemplation of the statutes above quoted. The decisive question therefore is this, is there a vacancy? If so, the petition for mandamus should be granted, otherwise not. The answer to this question depends upon the interpretation to be given to the word "vacancy" as used in these provisions of the statute.

Under the established rules, "words and phrases shall be construed according to the common meaning of the language. Tech-

nical words and phrases, and such as have a peculiar meaning, convey such technical or peculiar meaning." R. S., ch. 1, sec. 6, par. 1. Vacancy has no technical or peculiar meaning. Webster defines the term as "a place of post unfilled; an unoccupied office or position." The Standard Dictionary expresses the same idea: "An unoccupied post, place or office, a place destitute of an incumbent." Bouvier says: "A place which is empty; the term is principally applied to cases where the office is not filled." And Anderson: "An existing office without an incumbent is vacant, whether the office is new or old."

Confusion has often arisen, we think, from a failure to note that vacancies are of two kinds, either actual or constructive; that is, those that exist in fact and are unaffected by statute, and those that do not occur except as they are created by statute. If an incumbent dies, or resigns, a vacancy in fact occurs, an actual vacancy, and this is its common meaning. But a failure to qualify within a certain time, or to accept the office, or the acceptance of another office, or other conditions, may under the express wording of the constitution or of a statute be made to create a vacancy. To illustrate: under our constitution any person holding one of certain specified offices, "Elected to and accepting a seat in the Congress of the United States shall thereby vacate said office." Art. IX, sec. 2. In some statutes the two classes are grouped. Thus, in the case of a town auditor: "When, by reason of the non-acceptance, death, removal, insanity or other incompetency, etc." Pub. Laws, 1913, ch. 92. And the same is true in the general provision as to other town officers: "when by reason of non-acceptance, death, removal, insanity or other incompetency of a person chosen to a town office, there is a vacancy or want of officers, etc." R. S., ch. 4, sec. 28. While in other acts the disinction is expressly and sharply drawn by the very language employed; as in the case of a county treasurer: "If a person so chosen declines to accept or a vacancy occurs, etc." R. S., ch. 12, sec. 4. The first is vacancy constructive, the second an actual. So too in the case of a road commissioner: "If a person elected as a road commissioner fails to qualify before the first Monday of April, the office shall be deemed vacant and shall be filled by appointment by the selectmen; and in

the event of a vacancy, caused by death or otherwise, the selectmen shall appoint some competent person to fill out the unexpired term." R. S., ch. 4, sec. 15. This was amended by Pub Law, 1913, ch. 213, so that the failure to qualify within seven days "is deemed a vacancy." Again the first is created by statute, the second exists in fact.

With this distinction in mind the true interpretation of ch. 11, sec. 4, is evident. The language is: "Vacancies shall be filled by election in manner aforesaid at the next September election after their occurrence," etc. The vacancy here referred to is an actual one, such as might be caused by death, resignation or other similar event. It means an office destitute of an incumbent, and in this sense it is used throughout this chapter. Such an important position as that of register of deeds, one so closely identified with the property rights of the people, should not be left without an incumbent, and this has been carefully provided for. Under section 8, the clerk of court shall assume immediate charge, and then under section 4, the Governor may temporarily fill the vacancy by appointment until the first day of January following the next election, and at that next election some person shall be chosen to serve the unexpired term. The right of the people to elect and of the Governor to appoint are predicated upon the same situation in a case like that at bar. There cannot be one kind of a vacancy here calling into action the power of the people to elect, and another kind calling into action the power of the Governor to appoint. They both exist or neither. It is evident that in this case no vacancy has occurred that would permit the Governor to appoint, because the office is filled by an incumbent who was elected to hold it not only for four years but "until another is chosen and qualified," and "chosen" in this connection is used in the same sense as in section 1, where it is specified that the register shall be "chosen by ballot." The successor must be chosen in the same manner, that is by ballot at an election.

The history of the statute confirms the view that vacancy means actual vacancy. Under R. S., 1821, ch. 98, sec. 5, the wording was: "Upon the death, resignation or removal" of any register the Justices of the sessions were empowered to call a new election "to

fill up the vacancy." Clearly that meant a vacancy in fact. In the revision of 1841, the words "death, resignation or removal" were omitted without any intervening amendatory acts, and the word vacancy stands alone, R. S., 1841, ch. 11, sec. 10 and 13. Evidently the revisers deemed these words unnecessary, and so they were. Without them the meaning is the same. In 1864, the provision was inserted for the temporary appointment by the Governor in case of "vacancies occurring in said office by death, resignation or otherwise." Pub. Laws, 1864, ch. 278, sec. 13. But the words "or otherwise" did not extend the scope of the term to constructive vacancies. "'Or otherwise' in law when used as a general phrase following an enumeration of particulars are usually interpreted in a restrictive sense as referring to such matters as are kindred to the classes before mentioned. They receive an ejusdem generis construction." 6 Words and Phrases, p. 5105; 3 Words and Phrases, 2nd series, p. 830. The revision of 1871, retained the words "by death, resignation or otherwise," R. S., 1871, chap. 7, sec. 5, while the subsequent revisions of 1883 and 1903 again omit them, without intervening amendment, leaving the word "vacancies" standing alone. R. S., 1883, ch. 7, sec. 4; R. S., 1903, ch. 11, sec. 4. It is obvious that this chapter through all its revisions refers only to vacancies in fact. If so, no vacancy in fact has occurred here. Mr. Paul has neither resigned nor died nor been removed.

If, as the petitioner claims, there is a vacancy, when did it occur and what caused it? It did not occur on December 25, 1914, the date of Mr. Heald's death, because Mr. Paul had not then completed even his four years of service. He was still the rightful incumbent. Nor did it occur on January 1, 1915, the date when Mr. Heald would have assumed office had he been living, because the statutory term for which Mr. Paul was elected was not merely four years but "until another is chosen and qualified." Had the statute provided that at the expiration of four years the office would be deemed vacant, or had it specified a term of only four years, then on January 1, 1915, a vacancy would have occurred. It does neither. On the contrary it expressly states the length of the term to be for four years and until another is chosen and qualified. This grants a specific term of four years and a conditional

term added thereto. As was said by the supreme court of Pennsylvania in a recent case where the right of a county officer to hold over until his successor should be duly qualified was discussed: "In all our cases where the right to hold a county office was involved, we have recognized the constitutional right of the elected incumbent to hold over until his successor was duly qualified. . . . The additional period is, by an express provision of the constitution, as much a part of his official term as the definite number of years fixed in his commission. When he holds over, therefore, his term is extended in exact compliance with the constitution, and the period during which he holds over is a part of his constitutional tenure. It necessarily follows that no vacancy can occur in a county office so long as the elected incumbent continues to perform the duties of the office." *Com.* v. *Sheatz,* 228 Pa. St., 301, 21 A. & E. Ann. Cas., 54; and see *Com.* v. *Wise,* 216 Pa. St., 152. What was granted by the constitution in Pennsylvania is granted by statute in Maine.

This being a question of purely statutory construction authorities from other states, a large number of which have been cited by the learned counsel on either side, are not of great assistance because they are based upon the statutes or the constitution of their respective states. We have examined them carefully, and in none have we found a statute precisely like our own. It does however seem to be settled by the great weight of authority that the death of a person elected to office, before his qualification and before his term of office begins creates no vacancy. *Com.* v. *Hanley,* 9 Pa. St., 513; *Com.* v. *Sheatz,* 228 Pa. St., 301; *Kimberlin* v. *State,* 130 Ind., 120; *State* v. *Linkhauer,* 142 Ind., 94; *Lawrence* v. *Hanley,* 84 Mich., 399; *State* v. *Benedict,* 15 Minn., 198; *State* v. *Dabbs,* 182 Mo., 359; *Ballantyne* v. *Bower,* 17 Wyo., 356, 17 A. & E. Ann. Cas., with an instructive note.

The cases cited by the learned counsel for the petitioner which seem at first reading to hold a contrary doctrine, can on critical examination be distinguished on one or the other of two grounds. In some, the vacancy under consideration was not a vacancy in fact, as in the case at bar, but one created by statute. Thus in *State* v. *Hunt,* 54 N. H., 431, where a vacancy could be declared by the supreme court "when there is manifest hazard to the public inter-

est;" and in *Dixon* v. *Candill,* (Ky. Ct. of App. 1910) 136 S. W., 1043, where the statute defined the various situations which would cause a vacancy, among them, "when there has been no election to fill the office at the time appointed by law." In that case, although an election was held, the result was not ascertained and declared by reason of violent interference at the polls.

In others of these cited cases the constitution, or the statute under consideration, seems to have segregated the holding over feature from the regular term of office and treated it as a mere temporary holding to subserve public convenience, and not a part of the official term. Thus in *Dyer* v. *Bagwell,* 54 Iowa, 487, it was provided that "when it is ascertained that the incumbent holds over another term, he shall qualify anew." Had the holding over been considered a part of the original term, the renewed qualification would have been unnecessary. In *State* v. *Young,* (La. 1915) 68 So., 241, the bank examiner was appointed for a straight four years' term. A general statute however provided that all officers should continue to discharge the duties of their office until their successors had been inducted into office. The segregation here is clear. In *Kline* v. *McKelvey,* (W. Va. 1905) 49 S. E., 896; *People* v. *Supervisor,* 100 Ill., 332; *People* v. *Ward,* (Cal. 1893) 40 Pac., 538; and *State* v. *Thomas,* (Mo. 1890) 14 S. W., 108, the situation was similar. In *Maddox* v. *York,* 21 Tex. Ct. App., 622, affirmed 93 Tex., 275, the same distinction was made by the constitution. *Campbell* v. *Dotson,* (Ky. App. 1901) 63 S. W., 480, and *Olmstead* v. *Augustus,* (Ky. App. 1901) 65 S. W., 817, more nearly support the plaintiff's contention but, in so far as they do, their reasoning is not convincing to our minds.

In the end, the determination of the question before this court depends upon the construction of our own statutes. After a careful analysis and consideration we are of the opinion that under the existing law Mr. Paul is still the rightful incumbent of the office, that no vacancy therein has occurred, and therefore no election can now be held for the choosing of another to serve the next two years. If a change is desired the Legislature can effect it by amendment.

Petition dismissed.

PETER HARMON *vs.* CHARLES A. FLOOD, et als.

Kennebec. Opinion June 15, 1916.

Action of replevin. Defenses open in action on replevin bond. Replevin Bond. Title of goods replevied.

1. Where the lessee of land used as a woodyard agreed to assign the lease and to sell the assignees about 200 cords of wood, part of which was then on the lot and the balance of which was to be delivered on the lot and to become the property of the assignee when paid for according to the certificates of a surveyor, and the assignee paid an amount on account of the wood then on the lot, and afterwards paid certain amounts on the surveyor's certificates, the title to the wood was in the assignee or buyer.
2. In an action to replevin wood alleged to be detained in W. county, where the writ was returnable at the superior court of K county and where the court granted the motion of the defendant therein to dismiss for want of jurisdiction, with judgment for the return of the wood, the judgment was conclusive only upon the question of such return, and did not determine the question of title.
3. Where, in an action of replevin of wood, defendants' motion to dismiss for want of jurisdiction was granted with judgment for the return of the wood, without determining title, and after the breach of the bond by failure to return, an action was brought thereon, the defendants, plaintiffs in the replevin action, might set up their ownership in defense or in mitigation of the damages.

Action of debt on replevin bond. Defendants brought an action of replevin against the present plaintiff, and on the writ issued in said action took possession of ninety cords of wood in Thorndike, in the county of Waldo, claiming title thereto. The writ was made returnable to the superior court in Kennebec county, accompanied by a sufficient bond. On motion of attorneys for the then defendant in the replevin case, the writ was dismissed for want of jurisdiction and a return of the goods ordered. The goods were never returned and this action was brought upon the bond. In answer to the suit upon the bond, the now defendants, who were plaintiffs in the replevin suit, claimed the right to prove title in themselves, the original plaintiffs, in mitigation of damages. Judgment for

plaintiff for the penal sum of the bond. Damages assessed at one dollar, for which execution is to issue.

Case stated in opinion.

Williamson, Burleigh & McLean, for plaintiff.

Fred W. Clair, and Pattangall & Plumstead, for defendants.

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

HALEY, J. An action of debt upon a replevin bond, before this court upon report.

In August, 1913, Charles A. and Alpheus W. Flood, co-partners at Waterville under the firm name of G. A. Flood & Co., brought an action of replevin for ninety cords of wood against Peter Harmon, of Thorndike, alleging the wood to have been detained at Thorndike in the county of Waldo. The writ was returnable to the superior court of Kennebec county. The defendant in that action, plaintiff in this, objected to the jurisdiction of the court, as the goods were alleged to have been detained in Waldo county at the time the action was brought.

Section 9, chapter 98, R. S., provides: "Actions of replevin of goods shall be brought in the county where they are detained."

The motion of defendants to dismiss was granted, and judgment for the return of the goods and costs was awarded against the plaintiffs in replevin. The goods not being returned, Harmon brought this suit on the replevin bond given by the Floods as principals with sureties. In answer to this suit the defendants set up title to the wood ordered returned in the replevin suit, and claim a right to prove such title in mitigation of damages. The two issues, therefore, are, First: Were the defendants Floods (the plaintiffs in the replevin suit) the owners of the wood in question? Second: If they were the owners of the wood, can that ownership be set up in defence or mitigation of damages in this case?

First: In February, 1913, one George P. Blethen leased of L. G. Munroe a small tract of land in Thorndike, near Saywood bridge, that was used as a wood yard. Blethen commenced hauling wood on to the lot, and on February 15th made a trade with the defendants, Floods, (plaintiffs in the replevin suit) to assign the

lease to the Floods, and an agreement to sell them in the neighborhood of two hundred cords of wood, a small part of which was then on the lot, the balance to be delivered upon the lot with the understanding that the wood was to be the Floods when paid for, according to certificates of surveys to be mailed them, and it was agreed that L. A. Bradford should act as the surveyor. At the same time they paid Blethen $50 on account of the wood then on the lot. February 19th, Bradford, the surveyor agreed upon, furnished a certificate that there were around sixty cords of the wood on the lot, and on February 26th he returned a certificate that he had surveyed and found about ninety cords on the lot. On February 20th the Floods paid to Blethen $150 on account of the wood, and on February 28th, $100, and paid a bill for Mr. Blethen of $60. Afterwards the wood was attached on a writ against Blethen as Blethen's property, and the officer and attaching creditor were notified that it was the property of the Floods; execution was issued against Blethen in said suit and the wood was sold on the execution. Under these circumstances there can be no question but that the title to the ninety cords of wood was in the defendants, Floods. It was on land that they had the right to use by arrangement with Blethen, who had a lease of it; it was placed upon the lot as their wood, it was surveyed by a surveyor agreed upon by Blethen and the Floods, and paid for according to the survey. Blethen had no interest in it, all things necessary to pass the title had been done; the delivery at a place designated by the Floods, the buyers and Blethen, the seller; a survey by a surveyor agreed upon, and the payment of the contract price.

It is urged that the title did not pass because the survey was not accurate. The surveyor himself testified that he did not survey it accurately. It is very doubtful if cord wood in lots of this size is ever surveyed accurately; different surveyors would probably vary in their surveys to some small extent, and if there was no fraud,—and there is none claimed in this case—the survey by the surveyor agreed upon was binding upon the parties. The Floods and Blethen accepted it, and there is no evidence of any fraud, or of any substantial error in the survey, and attaching creditors cannot defeat the sale without evidence of fraud. There is none

claimed, and the title to the ninety cords of wood must be considered to have been in the defendants, Floods.

Second. Can the title to the wood be offered in mitigation of damages in the suit upon the replevin bond where the title was not adjudicated in the judgment entered in the replevin suit? We think it can.

It is claimed by the plaintiff that the defendants cannot raise the question of title, that the judgment for return in the replevin suit is conclusive in this suit, because the superior court of Kennebec county, to which the replevin suit was returnable, and which entered the judgment for return, and is a court of general jurisdiction concurrent with the supreme judicial court in actions of replevin, and, although, by statute and the decisions the action is local, the defendant may waive his right to object and the court proceed to try the case upon its merits. The reason given is sound, but does not apply to this case, because the defendant in that case (plaintiff in this case), did object and thereby deprived the superior court of jurisdiction to try the case. He did not waive his right to object, but did object, and the court sustained his objection, and sustained his motion, and entered judgment, without deciding the title to the goods replevied, and he must abide by that judgment. The title not having been passed upon in that suit, remained as it was when the goods were replevied. The judgment was merely that the plaintiff in replevin return to the defendant in replevin the goods replevied. In other words, the replevin bond which was attached to the writ provided that the plaintiff should return the goods if they were not found to be his goods or that he be entitled to possession. The court not having jurisdiction, it could not decide the title to the goods, and therefore it was the right of the defendant in replevin to be placed in statu quo.

It is urged that in *Bettinson* v. *Lowry,* 66 Maine, page 224, the court in discussing *Buck* v. *Collins,* 69 Maine, 445, the opinion in which was written by Judge Barrows, said: "The doctrine of Judge Barrows indicates that he would favor, in case of abatement or nonsuit, where the replevin bond is sued, allowing the parties to try their title to the property in mitigation of damages.

That is, where the plaintiff illegally took property on color of process that he was required to return and had covenanted so to do, he would excuse him in a reduction of damages if he could show title to the same. In other words, he would incorporate into suits upon a replevin bond the issues triable in the main case. Such doctrine has never been authorized in this state, and cannot be sustained upon principle." The above statement was not called for in a decision of the case; it was an action of replevin in which the writ was quashed at the return term. The presiding justice ordered a return of the property replevied, and left the question of damages to be determined on the bond; and in absence of pleading in the case, ruled as matter of law that the defendant was entitled to the order for return, without the production of testimony. And the sole question before the Law Court in that case was whether the defendant in that case was entitled to the order for return without the production of testimony, and the court held, "The property should be restored. Judgment for return went as a matter of course." A discussion of the rules of law governing suits upon replevin bonds was entirely irrelevant in determining whether there should be a return of goods ordered in the replevin suit, and the same opinion, upon the same page upon which is found the paragraph relied upon by the plaintiff, holds that judgments for return are conclusive in all cases upon replevin bonds; but a distinction is made between judgments on the merits where the title is passed upon and determined, and judgments of abatement of nonsuits. In the former they are conclusive as to title; in the latter, as they have not attempted to decide the title, they are conclusive only upon the question of return. The suits miscarry and the parties are simply put in statu quo. They are only put in position to enforce their rights anew. *Bettinson* v. *Lowry*, 86 Maine, 224, supra.

In *Davis* v. *Harding*, 3 Allen, 302, the same question was raised as in this case. It was a suit upon a replevin bond. The goods had been ordered returned. It was admitted that they had not been returned, and the defendant sought to prove that the defendant in replevin had no title to the goods; that title was in the plaintiff in replevin, and claimed that the evidence was admissible in reduction

of damages. In discussing the effect of the judgment for return the court said: "For some purposes, it is obvious that this order for return is conclusive upon the party, and he is to be injuriously affected by his omission to introduce the evidence in opposition to the motion for an order for return. It must have the effect to enable the plaintiff to maintain his action upon the bond, and to charge the defendant with costs. It reduces the question to one of mere damages. But does it exclude the defendant from showing in mitigation of damages that the action of replevin failed solely on account of being prematurely commenced, and that the property, if returned to the present plaintiff, could not have been held by him for his own benefit." It was held that the evidence was admissible for that purpose. In this case that there was a breach of the bond is admitted, because there was a judgment for a return; but no judgment determining the title to the property in question, and therefore the title remained as it was when the property was taken on the replevin writ. Why should not the defendant be allowed to prove title to the replevied goods in himself in mitigation of damages? If the title was in him at the time the goods were replevied, the defendant in that suit, (the plaintiff in this), has not done anything to change the title. Neither has the present defendant, (the plaintiff in the replevin suit), and if the title was not at the time the goods were replevied in the defendant in the replevin suit, (the plaintiff in this suit), why should the plaintiff in this suit be paid for the value of the goods replevied that he did not own? The judgment for the return of the goods replevied is conclusive upon the plaintiff in that suit, (the defendant in this), as to the right of possession; but if the goods had been returned, the present defendant could at once have replevied them or maintained trover against the present plaintiff for their conversion if he refused to redeliver them. For the breach of his bond, in not returning them of course he is liable; but in the suit upon the bond he is only liable for the damages that the plaintiff, (the defendant in replevin), suffered by reason of the breach of the bond, and if he had returned them it would have been the duty of the defendant in replevin to have immediately restored them to the lawful owner; but as they were not

returned according to the judgment, the plaintiff in this suit is entitled to whatever loss or damages he suffered thereby, and there can be no valid objection to permitting the defendant to show title in himself in mitigation of damages, it not being inconsistent with the judgment in the replevin suit, as held in *Jones* v. *Smith,* 79 Maine, 452, and the many authorities therein cited. As the defendant was the legal owner of the goods replevied, he was entitled to the possession thereof, but as his replevin suit failed for an irregularity in the writ, no judgment affecting the title was entered, and, as he did not return the goods replevied and place this plaintiff in statu quo, there was a breach of the bond; but it was admissible for him to show in mitigation of damages that he was the lawful owner of the goods replevied.

Judgment must therefore be for the plaintiff for the amount of the penalty named in the bond, but execution is to issue for only $1 as nominal damages.

Judgment for plaintiff for the penal sum of the bond. Damages assessed at $1, for which execution is to issue.

CLIFFORD H. TORRENS *vs.* HORACE F. GREEN.

Penobscot. Opinion July 8, 1916.

Costs allowed prevailing party in civil cases. Interpretation of Chapter 117, Section 14, R. S.

By R. S., chap. 117, sect. 14, the prevailing party is entitled to costs for travel only from his place of residence in this State to the place of trial.

Action on the case for an alleged assault and battery committed by defendant, tried at nisi prius, Penobscot county. Verdict was rendered for plaintiff in the sum of one dollar. Plaintiff alleged in his writ that he was a resident of the City of Bangor, county of Penobscot, State of Maine. His attorney also was a resident of

the city of Bangor. After verdict, plaintiff made an affidavit setting forth, that for the purposes of this trial, he had traveled from, and intended to immediately return to, New Haven, Connecticut, where he was employed temporarily, and claimed costs based on that mileage. In taxing the costs, the clerk of court allowed mileage to and from the line of the State, which finding was affirmed by the Justice presiding. Defendant filed exceptions to this ruling. Exceptions sustained.

Case stated in opinion.

Albert L. Blanchard, for plaintiff.

John B. Merrill, for defendant.

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

Savage, C. J. This case involves a construction of section 14 of chapter 117 of the Revised Statutes, relating to costs allowable to a prevailing party in a civil suit for his travel to the place of trial. The plaintiff, who was the prevailing party, and his attorney both live in Bangor. The trial was in the supreme judicial court in Bangor. The plaintiff had been temporarily in Connecticut at work, and actually traveled from Connecticut to Bangor for the special purpose of attending court in this case. And he claims that he should recover the statutory allowance of thirty-three cents for every ten miles travel both ways.

We think the plaintiff is entitled to costs for travel only from his place of residence to the place of trial. The first paragraph of section 14 places no limit upon the distance traveled. But the second paragraph says that the costs for travel shall be taxed "according to the distance of said party or his attorney who resides nearest to the place of trial, unless said prevailing party or his attorney who resides farthest from the place of trial actually travels the greater distance for the special purpose of attending court in such cause." And there is a further provision that costs for travel shall not be allowed in the superior and supreme judicial courts for more than forty miles, unless the prevailing party actually travels a greater distance for the special purpose of attending court. We think the place of residence is made the starting point

for computation in all cases. If the party and his attorney reside at different distances, costs are allowed only for the distance of the nearer one of the two from his residence to the place of trial, except where the one who resides the greater distance actually travels that distance to court, in which case costs are allowed for the greater distance; but only from his place of residence. And the forty mile limitation already mentioned also has reference to the distance from the place of residence to the place of trial.

In this case the plaintiff is entitled to costs for travel for one ten miles, thirty-three cents each way, or sixty-six cents in all. By the ruling excepted to, he was allowed for travel from the state line at Kittery to Bangor. This was error.

Exceptions sustained.

JABEZ M. PIKE, et als.

vs.

WILLIAM BANNON AND E. A. HOLMES PACKING COMPANY, Alleged Trustee.

Washington. Opinion July 8, 1916.

Amount of wages exempt. Revised Statutes, Chapter 88, Section 55, interpreted. Trustee action.

Under the provisions of R. S., chap. 88, sect. 55, subsection VI as amended, the exemption from attachment of the wages of the principal defendant, for his own personal labor earned during a period not exceeding one month prior to the service of process is limited to twenty dollars.

The exemption of ten dollars in all cases is not additional to the exemption of twenty dollars, but is applicable when wages for the principal defendant's own labor have been earned during a period more than one month prior to the service of process.

Action of assumpsit with trustee process for the recovery of certain sums of money on account of goods sold and delivered principal defendant. Principal defendant was defaulted, and question was raised as to what sum should be charged the trustee under the disclosure as filed. Under the ruling of the presiding Justice, the trustee was charged with a certain amount, and exceptions were filed by the trustee to this ruling. Exceptions overruled.

Case stated in opinion.

H. E. Saunders, for plaintiffs.

E. W. Pike, for trustee.

SITTING: SAVAGE, C. J., KING, BIRD, PHILBROOK, MADIGAN, JJ.

BIRD, J. This is an action of assumpsit for the recovery of $130.72 for goods sold and delivered the principal defendant. The trustee filed its disclosure, and after hearing the Justice presiding below held the defendant corporation charged with the sum of twelve dollars and fifty cents as trustee of the principal defendant. To this ruling the trustee seasonably excepted and the case is now here upon its bill of exceptions. The disclosure and sec. 55 of c. 88, R. S., as amended by the Public Laws of 1909, c. 256, are made part of its bill.

Service was twice made upon the alleged trustee, the first on Saturday, the twenty-eighth day of August, 1915, and the second on Wednesday, the eighth day of September, 1915. From the disclosure of the trustee it appears that the principal defendant was employed by the trustee as foreman of a department at the wages of fifteen dollars per week and twenty-five cents per hour for extra time, that on the day of the first service the principal defendant had earned within the thirty days next preceding the sum of $34.50 from which amount the sum of $2.00 was due and owing the trustee and that at the date of the disclosure there remained in the hands of the trustee $12.50, twenty dollars having been paid by it to the principal defendant before the day of the second service upon the trustee. The disclosure also shows that during the week ending on Saturday, September 4, 1915, he earned as wages for his personal labor $18.50 on account of which during the same week the trustee had advanced him $17.00 and

that on Wednesday, September 8, 1915, the date of the second service, he had earned $8.50 of which sum the trustee had, before the second service, advanced him the sum of $3.00. The trustee declares in its disclosure that the principal defendant "was working under a weekly contract and no part of it was due or payable until each week's services ending Saturday had been performed by him."

It is provided by c. 88, sec. 55, R. S., as amended by the Public Laws of 1909, c. 256, and Public Laws of 1911, c. 175, that no person shall be adjudged trustee;

VI. By reason of any amount due from him to the principal defendant, as wages for his personal labor, or that of his wife or minor children, for a time not exceeding one month next preceding the service of the process, and not exceeding twenty dollars of the amount due to him as wages for his personal labor, and ten dollars shall be exempt in all cases. . . .

The history of this subsection of section 55, c. 88, R. S., as shown in its various amendments and the decisions of the court, make it clear that this subsection exempts the amount due principal defendant for his personal labor, or that of his wife or minor children, earned during a period not exceeding one month next prior to service of process with the limitation that the amount so exempt shall not, when the amount in the hands of the trustee is due principal defendant as wages for his own personal labor, exceed the sum of twenty dollars, and when earned within a period more than one month prior to such service the amount exempt shall be limited to ten dollars. *Lock* v. *Johnson,* 36 Maine, 464, 465; *Collins* v. *Chase,* 71 Maine, 434, 436; *Haynes* v. *Hussey,* 72 Maine, 448, 449; *Haynes* v. *Thompson,* 80 Maine, 125, 129; *Quimby* v. *Hewey,* 92 Maine, 129, 132; *Meserve* v. *Nason,* 96 Maine, 412, 414. *Jumper* v. *Moore,* 110 Maine, 160, does not change the view of the court, since under the facts in that case twenty dollars was exempt, the amount in trustee's hands being due as wages for the principal defendant's own personal labor performed within one month next preceding service. The contention of the trustee is that thirty dollars were exempt in the case under consideration. But the greater sum includes the less and

we find nothing in the statute to warrant the conclusion that the exemption of ten dollars was independent of the limitation of twenty dollars and additional thereto.

Counsel for both plaintiff and trustee agree, but upon different grounds, however, that there was nothing in the hands of the trustee upon the second service, which was not exempt under the statute. To their conclusion the court assents. *Haynes* v. *Thompson*, 80 Maine, 125, 129.

The exceptions must therefore be overruled.

Exceptions overruled.

JOSEPHINE S. SWAN, et als.,
Appellants from Decree of Judge of Probate.

Penobscot. Opinion July 8, 1916.

Effect of decree of Supreme Court of Probate dismissing an appeal from Probate Court. Probate Appeal.

Where, upon appeal by an executor of an insolvent estate from the decree of the Judge of probate disallowing the private claim of such executor, the supreme court of probate decrees that the appeal be sustained, the decree below reversed and the claim ordered for hearing before the Judge of probate, and, the Judge of probate having thereupon, without hearing the parties, entered a decree allowing such claim, the creditors of the deceased testate appeal from such decree:

Held:

1. That the reversal of the prior decree of the Judge of probate was to annul the decree and no more.
2. That it was the duty of the probate court to hear the parties.
3. That under R. S., Chap. 65, sec. 33, the supreme court of probate may combine two of the acts thereby authorized, provided they be not inconsistent.
4. That the exceptions to the decree of the supreme court of probate dismissing the creditors' appeal must be sustained and the case remanded to the supreme court of probate for further proceedings in accordance with the opinion.

Appeal from the decree of Judge of probate, Penobscot county, State of Maine. In supreme court of probate, appellee filed motion

to dismiss appeal. Motion allowed. Appeal dismissed. Exceptions filed to ruling of court. Exceptions sustained and case remanded to the supreme court of probate for further proceedings in accordance with opinion.

Case stated in opinion.

Hudson & Hudson, for appellants.

W. H. Powell, for appellee.

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

BIRD, J. An appeal from the Judge of probate of Penobscot county, allowing the private claim of the executrix of the last will and testament of Edward T. Spencer, who died at Oldtown, his residence, November 15 or 16, 1905. His will was allowed and his widow, Mary E. Spencer, appointed executrix in February, 1906. The estate was represented insolvent and commissioners appointed to determine the claims of unpreferred creditors in April, 1907. Their report was filed in December, 1907, and accepted December 13, 1911.

On the fifth day of June, 1914, the executrix filed in the probate court her petition that her private claim against the estate of testate, in the amount of $6,353.90 be allowed by the Judge of probate, annexed to the list of claims allowed and a proportional dividend decreed to her. Upon notice and hearing, the Judge of probate decreed the disallowance of the claim.

The claim of the executrix was based upon two notes made by the testator in his life time, payable to order of Mary E. Spencer on demand, one dated April 2, 1903 for the sum of $4,000 and witnessed, upon which payment of $672, was made February 21, 1905, and the other dated February 22, 1905, for the sum of $400.

From the decree of the Judge of probate the executrix appealed to the supreme court of probate, where, after hearing, it was decreed that the appeal be sustained, the decree below reversed and "the claim ordered for a hearing before the Judge of probate." The Judge of probate thereupon, without hearing the parties, allowed the claim of the executrix in the sum of $6353.90. To this decree, Josephine S. Swan and other claimants, creditors of the estate, took their appeal to the supreme court of probate, upon

the ground that further hearing upon the claim was denied by the Judge of probate and that the note of February 22, 1915, was barred by the statute of limitations. In the supreme court of probate, the appellee filed her motion to dismiss upon the ground "that said appeal was not taken from any order, sentence, decree or denial of said Judge of probate as contemplated by the statutes." Upon this motion the appeal was dismissed and the claimants named had exceptions.

We think the exceptions should be sustained. By the decree of the supreme court of probate, the decree of the probate court, refusing allowance of the claim of executrix was reversed. Its effect was to annual the decree and no more. The supreme court of probate might have proceeded further and determined whether the claim should be allowed in full or in part. It did not do so but contented itself with decreeing reversal and a further hearing by the Judge of probate. The reversal left no decree in force and made no decree or order as to the decree which should be entered. There being no decree of the probate court and none ordered by the appellate court, under the decree it was the duty of the probate court to hear the parties, all defenses to the claim, not passed upon by the supreme court of probate in its findings upon the reasons of appeal, being open. With this restriction the proceedings stood as if no decree had ever been entered. See *Donnell,* aplt., 114 Maine, 324, 326, 327.

The contention that the supreme court of probate could not decree both reversal and a further hearing by the Judge of probate cannot be entertained. The statute, R. S., c. 65, sec. 33, it is true, declares that the supreme court of probate may reverse or affirm the decree appealed from, pass such decree as the Judge of probate ought to have passed, remit the case to the probate court for further proceedings or make any order therein that the law and justice require. We think that under the power conferred to make any order that law and justice require, the supreme court of probate has the power to combine in its decree two or more of the acts authorized provided they be not inconsistent.

The exceptions are sustained and the case remanded to the supreme court of probate for further proceedings in accordance with this opinion.

ELLEN M. SARGENT,

Petitioner for Annulment of Marriage.

Hancock. Opinion July 8, 1916.

Effect of docket entry reading "Libel dismissed, or petition dismissed or denied."

Under R. S., c. 62, sect. 15, providing for annulment of marriage, an entry of "petition denied," after a hearing upon the merits, must be held to be a final decree, barring a future action between the same parties involving the same subject matter, despite the language of the statute to the effect that "the court shall decree it affirmed or annulled according to the proof."

The proceeding is as of a libel for divorce and the entry, after hearing upon the merits, "petition denied," without the addition of the words "without prejudice," purports to be a final judgment on the merits.

This proceeding is by libel brought under provisions of section 15, chapter 62, Revised Statutes of Maine, asking for the annulment of a marriage entered into by petitioner and one Alvarado Moseley, deceased. The petitioner alleged that her marriage to said Moseley was invalid for the resason that said Moseley, at the time of entering into said marriage with the petitioner, had a wife then living from whom he had not been legally divorced. Court ruled that said libel should be denied and dismissed, to which ruling petitioner filed exceptions. Exceptions overruled.

Case stated in opinion.

J. P. Cilley, and D. E. Hurley, for petitioner.

John F. A. Merrill, U S. District Attorney, and *Arthur Chapman,* Assistant U. S. District Attorney, for United States, party defendant.

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

BIRD, J. This is a libel as of divorce for the annulment of a marriage under the provisions of R. S., c. 62, s. 15. The libel alleges the marriage of the petitioner, then of Ellsworth, and one Alvarado Moseley, also of Ellsworth, on the thirteenth day of December, 1871 and "that the validity of this marriage is doubted because of a prior marriage of Alvarado Moseley under date of December 13, 1869, to one Ellen M. Sargent, of Rockland, a different person from your libellant, who was living at the date of your petitioner's said marriage on December 13, 1871, and who had not been lawfully divorced."

The libel further alleges "that said Alvarado Moseley is dead and that no pecuniary interests are involved or are in any way affected by said desired annulment of said marriage of December 13, 1871, except her (petitioner's) own pecuniary interest in a pension as the widow of Charles L. Sargent, who died from disease contracted in the U. S. military service while on duty in the 14th Maine Vol. Inf."

Service was ordered and made upon the attorney of the United States for the District of Maine, who appeared and asked the dismissal of the libel upon the ground that one of the parties to the marriage is dead and also upon the ground that upon two similar libels of the petitioner, asking annulment of the same marriage for the same reasons, final judgments were rendered against her after hearings upon its merits.

At the hearing upon the libel now before the court, the presiding Justice found the following facts, upon which the parties agree:

"That the said Ellen M. Sargent presented to the October term, 1908, of the Supreme Judicial Court for Hancock County, Maine, a libel signed by her and dated October 13, 1908, which libel is identical with the libel now before this court except that in this one she has included the additional allegation 'that one child, to wit: Susan T. Sleeper of Bar Harbor, Maine, was born of said marriage.'

"At the April term, 1909, the matter of said libel of October 13, 1908, was reported to the Law Court, and thereafter on December 17, 1910, a mandate was sent down from the Law Court as follows: 'Report discharged. Case remanded for further hearing in the court below.'

"At the April term, 1911, of said court, a hearing was had on said libel and thereupon an entry was made on the docket in said cause as follows: 'Petition denied 6th day. Emery, C. J., presiding.'

"April 11, 1911, a motion for a new trial was filed and thereafter June 6, 1912, a mandate from the Law Court was sent down as follows: 'Motion overruled for want of prosecution.'

"On March 19, 1913, said Ellen M. Sargent filed another libel in said court signed by her, dated March 13, 1913, which is identical with her said libel of October 13, 1908. Upon said libel hearing was had upon the merits at the April term of said court, 1913, and thereupon, after said hearing the Justice presiding entered on the docket of said court, 'Petition denied.'

"Thereafter on April 14, 1914, said Ellen M. Sargent filed a petition asking for a writ of review in the matter of the libel of March 13, 1913, and the decisions of the court thereon. No notice was given of the pending of said petition and no notice was ordered thereon."

Whereon the presiding Justice made the following ruling:

"After consideration of the allegations contained in the petitioner's libel, especially the fact that the said Alvarado Moseley one of the parties to said marriage, is dead and that there is no allegation in said libel that the petitioner desires said marriage to be annulled for any other purpose than that said marriage may no longer be an obstacle in the prosecution of her claim to obtain a pension from the United States Government as the widow of Charles L. Sargent, and further in view of the foregoing facts found by me, to wit: That the said Ellen M. Sargent has heretofore twice presented before this court her libel for the desired annulment of her marriage with said Alvarado Moseley, in each of which instances after hearing on the merits, judgment has been rendered against her, I rule that the petitioner is not entitled to maintain and should not be permitted to maintain or prosecute in this court this, her libel, now being heard for the annulment of said marriage between her and the said Alvarado Moseley, and therefore, for those reasons, I rule that her present libel should be and that it is hereby denied and dismissed."

To the ruling of the court the petitioner excepted.

It is unnecessary to consider the first ground of defense, since it is the opinion of the court that the defense of res adjudicata is sustained.

It is objected, however, that the judgments or decrees of the court rendered in the two earlier cases, "Petition denied," fail to follow the statute and decree that the marriage be affirmed and therefore cannot be considered in support of the defense of res adjudicata.

The entry of the decree "petition denied" after hearing on the merits must be regarded as a final decree barring a future action between the same parties on the same subject matter, despite the language of the statute to the effect that "the court shall decree it affirmed or annulled according to the proof." We do not think that the Legislature intended to tie the hands of the court as to the form of the decree but that the court is free to enter such decree as, being in accordance with its usual practice, finally disposes of the suit. In *Baker* v. *Cummings,* where in the prior case, the appellate court ordered the court below to set aside its decree and dismiss the bill, the court says "It was not a conditional dismissal, without prejudice or words to that effect, but a general one. A dismissal of the bill under such direction is presumed to be upon the merits, unless it be otherwise stated in the decree of dismissal." 181 U. S., 117, 124-1245. Authorities to the same effect are too numerous for citation, among them being found, *Corey* v. *Independent Ice Co.,* 106 Maine, 485, 494, 495; *Blackinton v. Blackinton,* 113 Mass., 231, 234; *Pelton* v. *Mott,* 11 Vt., 48; 34 Am. Dec., 678; *Forist* v. *Bellows,* 59 N. H., 229, 231.

The proceedings in the two earlier cases pleaded were based upon a libel as for divorce, R. S., c. 62, § 15. In *Bradley* v. *Bradley,* 160 Mass., 258, it is held that the entry in a suit for divorce, "Libel dismissed" without the addition of the words "without prejudice," is a bar to a subsequent libel for the same cause of divorce as that alleged in the first libel. After hearing had, it purports to be a final judgment on the merits. Id. And likewise, substantially, in *Vance* v. *Vance,* 17 Maine, 203, 204; *Brown* v. *Brown,* 37 N. H., 536, 537; 75 Am. Dec., 154, 155. See also *Jillson* v. *Jillson,* 63 Vt.,

411. And so where, after hearing on the merits the entry is "petition denied," the judgment must, a fortiori, be regarded as a bar. The exceptions must be overruled.

So ordered.

JOHN MCCARTHY *vs.* INHABITANTS OF TOWN OF LEEDS.

Androscoggin. Opinion July 13, 1916.

Duties of towns and municipalities towards trespassers upon the highway. Effect of Statute prohibiting automobiles being driven on highways without proper license and registration. Effect of Statute where persons are not prohibited, but penalized for using highways without proper license and registration. Notice of defect in highways.

1. The Legislature has the right to limit or control the use of the highways of the State whenever necessary to provide for and promote the safety, peace, health, and general welfare of the people.
2. Where plaintiff was injured by reason of a defective bridge in defendant town, while operating an automobile registered under the license of a dealer from whom he had recently purchased the machine, plaintiff not having been provided with necessary license and registration, under public laws of 1911, chapter 162,

Held:

His rights upon the highway were only the rights of a trespasser upon the lands of another and the defendant town owed him no duty to keep the highway safe and convenient for him to travel on.

Action on the case to recover damages for injuries to plaintiff and his property by reason of a defective condition of the roadway of a bridge of the defendant town. At close of plaintiff's testimony, upon defendant's motion, court directed a verdict for defendant, to which ruling plaintiff filed exceptions. Exceptions overruled.

Case stated in opinion.

McGillicuddy & Morey, for plaintiff.

Tascus Atwood, and H. W. Oakes, for defendant.

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

HALEY, J. This is an action on the case brought by the plaintiff to recover damages for injuries to himself and property, by reason of a defective bridge and rail in the defendant town. After the plaintiff had introduced his evidence the court directed the jury to return a verdict for the defendant, and the case comes to this court on exceptions to the ruling of the presiding Justice in directing a verdict for the defendant as aforesaid.

The evidence in the case shows that the plaintiff, a resident of this State, his chauffeur and two small girls, were riding in an automobile owned by the plaintiff upon a public highway in the defendant town. The automobile itself was registered under the dealer's license from whom the plaintiff had purchased it a few days prior to the accident. While riding along in the town of Leeds, at about six miles an hour, just as they had entered upon the bridge, the automobile was deflected from its course, the plaintiff claims by reason of striking some plank which had been placed upon the bridge for the purpose of patching it, and the automobile was thrown on to the rail, which was rotten, defective and worthless as a rail, and the automobile and its occupants were plunged into Dead river, twelve feet below, and it is to recover for the injuries to the plaintiff's automobile and for the injuries sustained by himself by reason of being plunged into the river that this action was brought. The ruling of the court in directing the verdict for the defendant is sought to be sustained because the automobile of the plaintiff, in which he was riding at the time, was being operated upon a public highway, and had not been registered as required by the laws of this State.

It is the claim of the plaintiff that, although at the time of the injury complained of, he was driving his automobile upon the highways of the State, without registration as provided by law, and thereby doing an illegal act, that act should not defeat his recovery, unless the illegal act charged had some causal connection with and was in some way a concurrent cause of the accident; that there must be some causal connection between the act of the plainiff in driving his auto upon the highway and the injury resulting from

the negligence of the defendant to prevent his recovery for the damages sustained by reason of the defective highway.

The statutes of this State regulating the use of automobiles upon the highways are contained in chapter 162 of the laws of 1911, and the provisions for registration are found in section 8, and so much as is material in this case reads as follows:

"All motor vehicles shall be registered by the owner or person in control thereof in accordance with the provisions of this act. Application for such registration may be made by mail or otherwise to the secretary of State, upon blanks prepared under his authority. The application shall, in addition to such other particulars as may be required by said secretary, contain a statement of the name, place of residence and address of the applicant with a brief description of the motor vehicle, including the name of the maker, the number, if any, affixed by the maker, the character of the motor power and the amount of such power, stated in figures of horse power, and with such application shall deposit an annual registration fee of . . ."

Section 11 provides:

"No motor vehicle of whatever kind shall be operated by a resident of this State of Maine, upon any highway, tramway, public street, avenue, driveway, park or parkway, unless registered as hereto provided."

Section 16 imposes a penalty for the violation of the seven preceeding sections.

Section 11 is a prohibition against their being operated upon any highway, tramway, public street, avenue, driveway, park or parkway, unless registered. It is firmly established that the legisltaure has the right to limit and control the use of the highways of the State, whenever necessary to provide for and promote the safety, peace, health, and general welfare of the people. *State* v. *Phillips,* 107 Maine, 249; *State* v. *Mayo,* 106 Maine, 62; *Commonwealth* v. *Kingsbury,* 199 Mass., 542; *Dudley* v. *Northampton Street Ry. Co.,* 202 Mass., 443.

There is apparently a conflict in the opinions of the courts of the states that have construed the laws relating to the use of motor vehicles upon the highways, but we think there is no real difference

where the statutes are similar to those of the State of Maine. In the case of *Hemming* v. *City of New Haven,* 82 Conn., 661, it was held that the plaintiff might recover for injuries sustained while operating his automobile upon the public highways, although it had not been registered as required by statute, the court ruling that "His failure to register and display his number in no way contributed to cause the injury. The accident would have happened if the law in this respect had been fully observed. The plaintiff's unlawful act was not the act of using the street, but in making a lawful use of it without having his automobile registered and marked, as required by law. The statute contains no prohibition against using an unlicensed and unnumbered automobile upon the highways and streets of the state." The court then refers to the case of *Dudley* v. *Northampton Street Ry. Co.,* supra, and says: "In that case the supreme court of Massachusetts was called upon to construe the effect of a statute which provided that no automobile should be operated upon any public highway unless it was registered, and the court held that Dudley was a trespasser against the rights of all persons lawfully controlling and using the public highways of Massachusetts. The difference between the Dudley case and the one now under consideration is that in Massachusetts there was a statutory prohibition against using upon the highways of the state an automobile unregistered and unmarked. As already stated, no such provisions appear in the Connecticut statutes, which were in force when the plaintiff's automobile was injured." That case recognized the fact that, if there had been a prohibition against the use of the highway, the doctrine of *Dudley* v. *Northampton Street Ry. Co.,* would have applied, and the plaintiff would have been barred from maintaining his action. The law of Connecticut was changed after the happening of the above accident, and the statute expressly provided that no recovery should be had by the owner, operator or passenger of a motor vehicle which is not registered as required by the act, for an injury to person or property received by reason of the operation of said motor vehicle in or upon the public highways of the state.

In *Lockridge* v. *Minneapolis & St. Louis Railway Co.,* 161 Ia. 74, the court said, "it is urged by defendant that the plaintiff was a

trespasser upon the streets of Des Moines, and upon the crossing in question, for that he was traveling in an unregistered automobile; and the defendant owed him no duty, as such trespasser except to refrain from wantonly injuring him when he seemed to be in peril. . . . This court is committed to the doctrine that there must be some causal connection between the act involved in the violation of the statute and the injury resulting, before the violation of the statute will preclude a recovery," and it was held that the plaintiff was not barred by reason of his machine not being registered. The case does not show that the use of automobiles upon the highways was prohibited by statute, but it does refer, with approval, to the case of *Tackett* v. *Taylor County*, 123 Ia. 149, which was an action brought to recover damages against the county for the injuries sustained by the engine of the plaintiff breaking through a bridge which the county was bound by law to keep in repair, and as the engine, while moving along the highway, did not comply with some provisions of the statute in regard to the whistle and stops and the placing of plank of certain dimensions under the wheels, etc., it was claimed that as the plaintiff was violating that statute, he could not recover for the injury. The court held that it was no bar that he was violating the statute, and that it was not a contributing cause to the accident; but it uses this language: "Were the statute to be construed to prohibit a traveler by engines on the highway, or any portion of it, there would be much force in the contention of the appellee that the plaintiff was a trespasser at the time of the accident, and being at a place where he had no right to be, he ought not to be heard to complaint of the consequences." From which it would seem that, if there had been a prohibition against the use of the highway in the state of Iowa by automobiles, as there is in this state, the plaintiff in that case would have been a trespasser and not entitled to recover. In *Atlantic Coast Line Railroad Company* v. *Weir*, 63 Fla. 69, it was held that the owner of an unregistered motor vehicle upon the public highways of the state might recover for an injury sustained by him by reason of the negligence of another. In the statement of the case it would seem that there was a provision that no person should operate an unregistered motor vehicle, upon

the highway, but the opinion states: "The statutes do not provide expressly or by implication that no recovery shall be had for a negligent injury to an unlicensed motor vehicle being operated on the public highways of the state, therefore the demurrers to the plea were properly sustained," and cites the case of *Hemming* v. *City of New Haven,* 82 Conn., 661, as its authority. The action of *Dudley* v. *Northampton Street Ry. Co.* was an action by the owner of an unregistered automobile to recover damages for injury to his machine while being operated upon the highway, and the court said, page 446: "If we had before us simply the case of a plaintiff who was driving his vehicle on a public way in a manner forbidden by law, or without appliances required by law, but who, while himself using all due care, had been injured by an accident due solely to the negligence of a third person, his own violation of law not being a contributory cause of the accident, but merely one of the conditions existing at the time, it could not be said that such a plaintiff was barred from recovery by the mere fact of his violation of law. But that is not the case which is now presented. We are dealing with a peculiar kind of vehicle which has only recently come into use, which requires unusual care in its management, and the presence of which upon the highways has been found to involve more than ordinary risks to other travelers. . . . It is the duty of the Legislature, in the exercise of the police power, to consider the risks that arise from the use of new inventions applying the forces of nature in previously unknown ways. The general principle is too familiar to need discussion. It has been applied to automobiles in different states with the approval of the court."

The opinion then shows that section 1 requires that all "automobiles . . . shall be registered," and provides, with much detail, for the registration by the highway commissioners both of the machine with identifying numbers or marks, and the names of the owners. It refers to the various sections of the act, to the fact that the penalty is imposed upon the owners of an unregistered automobile who operates it upon the highway, and says: "Thus far the provisions of the act in question substantially resembles those of the Lord's Day act formerly in force, which made traveling on that day illegal simply by imposing a penalty upon any

one who did so." But section 3 of the act before us (automobile act) goes yet further, and expressly ordains that "except as otherwise provided herein, no automobile or motor cycle shall . . . be operated upon the public highway . . . unless registered, as above provided. This provision, in addition to the penalties fixed for any operation of unregistered machines, forbid their being operated upon the highway at all. We can not avoid the conclusion that it was intended to safeguard persons, who were lawfully using the highway, from serious risks of injury by machines of this character which were operated in defiance of law, the owners of which furnished no means by which they could be identified and compelled to make proper compensation for the injuries which by their own violation of law or by their mere negligence they might cause to other travelers." And it was held that the owner of an unregistered automobile being operated upon the public highway had no other rights than that of being exempt from reckless, wanton or wilful injury. They were to be no more travelers than is a runaway horse. The court then speaks of the provisions of the act which fixes a penalty for the violation and the operation of an unregistered automobile, and says: "But the purposes of the statute to furnish protection and adequate means of redress to all persons upon the way, would not then have been fully accomplished. The additional prohibition was made, we must suppose, for the purpose of regulating the rights of travelers among themselves, whether they should be walking, traveling in vehicles drawn by horses or operating automobiles. It is a reasonable assumption that the legislature intended to put these forbidden and dangerous machines outside the pale of travelers, not merely for the purpose of the criminal law, but as regards all other persons rightfully upon the street. The addition of the prohibition was well adapted for this purpose; if it is not so construed, it was merely a useless reiteration of the legal effects of the other provision of the same act." The same ruling was made in *Friley* v. *Melrose,* 205 Mass., 329; *Holland* v. *Boston,* 213 Mass., 562; *Chase* v. *Railroad,* 208 Mass., 137; *Bourne* v. *Whitman,* 209 Mass., 155.

An examination of the decided cases we think clearly shows that when the statute provides for the registration of automobiles and fixes a penalty for their operation upon the highways and streets

of the state, unless registered, that their operation upon the highways and streets, while unlawful, does not of itself bar the owner from recovering damages for injuries sustained by reason of defective highways, because the violation of law does not contribute to the injury; but if, in addition to the penalty provided by law, the statute prohibits the use upon the highway of an unregistered auto, the operation of the auto upon the prohibited streets and highways is such an unlawful act that, by reason of the prohibition, its operation is a trespass, and cities or towns are not obliged to keep their ways safe for trespassers to travel upon in violation of law. The language of section 11 of the act of 1911 clearly and plainly prohibits their use upon the highways of the State unless registered, as required by the act, and unless so construed the purpose of the Legislature to protect persons lawfully using the highway will fail; and the plain and unambiguous language of section 11 would be disregarded, which is a violation of all rules of law for the construction of statutes. And we hold that the plaintiff was prohibited by statute from using the auto on the highway, it not being registered as required by section 8, chapter 162 of the laws of 1911, and the town owed him no duty to keep the way safe and convenient for him to travel upon. His rights were only the rights of a trespasser upon the land of another.

Exceptions overruled.

STATE OF MAINE *vs.* LAURIE D. LEBLANC.

Lincoln. Opinion July 13, 1916.

Interpretation of Chapter 235, Public Laws of Maine, 1915. Necessary proof in criminal charge of obstructing officer. Jurisdiction of State Court. Words necessary to make violation of Statute a criminal offense.

Two complaints and warrants under section eleven of chapter 235 of the Public Laws of 1915, "an act to provide for the granting of lobster licenses and giving state wide jurisdiction to wardens," brought to this court on an agreed statement of facts from the Supreme Judicial Court for Lincoln county.

1. In the complaint charging the respondent, who had been duly licensed by the Commissioner of Sea and Shore Fisheries, with obstructing a warden in the discharge of his official duties by refusing to stop his vessel in order to allow the warden to come on board for the purpose of inspection, it is held, that section eleven does not make this act on the part of the licensee a criminal offense. It may warrant the revocation of his license and may work a forfeiture of his bond, but does not constitute a crime.
2. In the complaint charging the respondent with refusing, while outside the waters of this State, to return to waters under the jurisdiction of the State when ordered so to do by the warden, it is held, that as the act complained of took place, not only beyond the limits of the County of Lincoln, but beyond the borders of the State, the court in this State has no jurisdiction. It is beyond the power of the legislature to make such an extra-jurisdictional act criminal. The legislative power, like the judicial, ceases at the State line.

Complaints and warrants under section 11, chapter 235, Public Laws of Maine, 1915. Respondent filed demurrer to each complaint and warrant. Demurrers were overruled and respondent adjudged guilty in each case. An appeal was taken to the Supreme Judicial Court and case reported to Law Court upon agreed statement of facts. Judgment for respondent.

Cases stated in opinion.

James B. Perkins, County Attorney, for State.

C. R. Tupper, for respondent.

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

CORNISH, J. Two complaints and warrants under section eleven of chapter 235 of the Public Laws of 1915 were brought in the Lincoln county municipal court. Demurrers were filed and overruled and the respondent adjudged guilty in each case. Appeals were taken to the supreme judicial court for Lincoln county and thence were brought to this court on an agreed statement of facts.

From this statement it appears that the respondent was the master of the E. McNichol, a vessel owned in Boston, Mass., and enrolled under the custom laws of the United States, and was sailing under a license to carry on the coasting trade, issued at the custom house in Boston. He was engaged in buying lobsters along the Atlantic coast and transporting them to Boston in his vessel. On the morning of October 13, 1915, he left McFarland's Cove, Johns Bay, Bristol, with a cargo of lobsters bound for Boston. He slowed down near White Islands and took lobsters from two boats. While the vessel was under way and at a point two miles east of White Islands, and shortly after the lobsters were taken from the two boats, a fish warden came alongside and "ordered the smack to stop for the purpose of allowing the warden to go on board to inspect the lobsters. The respondent being in charge refused to stop the smack. The warden followed the smack in his power boat until they were outside the waters under the jurisdiction of the State of Maine, and then ordered the respondent to return with the vessel to the waters of the State of Maine. This the respondent refused to do, but continued on his course to Boston." The respondent held a license from the Commissioner of Sea and Shore Fisheries to purchase lobsters in this State and to transport them out of the State, and had furnished the bond required by said Act.

Upon this state of facts two warrants were issued. In the first, the respondent is charged with obstructing a warden in the discharge of his official duties by refusing to stop the vessel to allow the warden to come on board for the purpose of inspection; and in the second he is charged with refusing, while outside the waters of this State, to return to waters under the jurisdiction of the

State when ordered so to do. Neither complaint can be sustained because in neither do the allegations constitute a cognizable offence.

1. Let us consider the first complaint, the alleged obstruction of an officer by refusal to stop and permit search. It might well be doubted whether the alleged act of the respondent in simply continuing on his course could be deemed the obstruction of an officer, as that term is used in law. To obstruct ordinarily implies opposition or resistance by direct action, and forcible or threatened means. *State* v. *Welch,* 37 Wis., 196; *State* v. *Knudson,* 27 So. Dak., 400, 131 N. W., 400; *Vince* v. *State* (Ga.), 39 S. E., 435; *Moses* v. *State,* 6 Ga. App., 25, 64 S. E., 699.

But passing this point without decision, the fatal defect is that section eleven of the Act in question creates no such offense as is here charged. That section does not make the refusal to stop a vessel for purpose of search a criminal offense. The first part of the section reads as follows: "No lobsters shall be transported beyond the limits of this State, whether of legal length or otherwise, except by common carriers, as provided in this Act, unless by persons licensed to transport lobsters outside the limits of the State under the following conditions." This respondent was duly licensed. There was no violation of this provision on his part. The section continues by prescribing the method of procuring and issuing the license, its terms and conditions. Among these conditions is this: "It, (that is the license) shall further provide that such smack, vessel or other conveyance shall, at all times, be subject to inspection and search by the Commissioner of Sea and Shore Fisheries, or his wardens or deputy wardens, with warrant or without, in which inspection and search they shall in no way be obstructed." This is the clause on which this complaint is founded; but a breach of this condition on the part of a licensee, while it works a forfeiture of his bond, does not constitute a criminal offense. It is a breach of contract, not an infraction of the criminal law. This construction is borne out by the terms of the application, the license, and the required bond. The preliminary application signed by the respondent recites: "he further agrees that said smack, vessel or other conveyance above described, shall at all times be subject to inspection and search by the Commissioner," etc., following the words of the statute, and after stipulating that

a bond in the penal sum of five hundred dollars shall be filed, concludes as follows: "I further agree that said bond and my agreement in this application shall constitute and be a part of the conditions under which my license is issued and that if I violate the terms of either this application or the terms of the license, both shall be void and the bond shall be forfeited." The license contains the same stipulations. The condition of the bond reads: "Now if the said Laurie D. LeBlanc shall well and truly conform to all the laws of the State pertaining to lobsters and especially chapter 235 of the Public Laws of 1915, and shall faithfully observe and perform without breach all the conditions of said license and of his agreements in his application therefor, then this obligation shall be void, otherwise, shall remain in full force."

While the respondent may have forfeited his bond and warranted the revocation of his license he has broken no penal law of this State. The statute in no way provides that a licensee shall be deemed to have violated section eleven by violating this condition of his license, and a licensee cannot be criminally liable for a breach of the conditions of his license or bond unless there is some express statute provision making such a breach a criminal offense. To convert the clause under consideration into a penal statute and to hold the acts charged in the complaint a violation of such penal statute, we must read into the statute something that is not there, and it is an elementary rule of criminal pleading that a criminal offense cannot be created by inference or implication, nor can the effect of a penal statute be extended beyond the plain meaning of the language used. *Endlich Int. of Stat.*, sec. 329; *State* v. *Bunker*, 98 Maine, 387; *State* v. *Wallace*, 102 Maine, 229; *State* v. *Peabody*, 103 Maine, 327; *State* v. *Staples*, 110 Maine, 264.

On the first complaint therefore judgment must be rendered for the respondent.

2. The second complaint is based on these words of section eleven: "All licensees under this Act shall be required to load all smacks, vessels or other contrivances within the waters over which this State has jurisdiction, and any licensee loading outside the jurisdiction of this State or who refuses to come within the jurisdictional waters of this State, when ordered so to do by the Commissioner, or any of his wardens or deputy wardens, shall be

deemed to have violated the provisions of this section and his bond shall be forfeited." Section twelve provides that any licensee convicted of violation of section eleven shall be punished by a fine and his bond shall be forfeited.

The precise charge against this respondent under this complaint is that while outside of waters within the jurisdiction of this State he refused to return and come within the jurisdictional waters. This offense, if such it may be called, took place not only beyond the limits of the county of Lincoln but beyond the limits of the State, at a place where this court had no jurisdiction. We cannot take cognizance of any such crime. It is beyond our power, and it is beyond the power of the Legislature to make such an extra jurisdictional act criminal. The legislative power, like the judicial, ceases at the State line. If an offense of which a Maine court will take cognizance was committed in this case, then a warden in the port of Boston, or New York, or Galveston, could order the master of a licensed lobster vessel to return to Maine and his refusal would then and there constitute a like offense. Such refusal may work a forfeiture of the bond and warrant a revocation of the license, because the application, the license and the bond so provide, but it cannot constitute a crime. Citations are unnecessary.

The entry in each of the cases must therefore be,

Judgment for respondent.

NATIONAL PUBLICITY SOCIETY *vs.* J. WESLEY RAYE.

Washington. Opinion August 7, 1916.

Judge of Municipal Court acting as attorney in cases over which his Court has jurisdiction. Jurisdiction of Municipal Court.

Under section 4 of chapter 219, Private and Special Laws of 1903, the Eastport Municipal Court is given "original jurisdiction, concurrent with the Supreme Judicial Court, of all civil actions in which the debt or damage demanded, exclusive of costs, does not exceed one hundred dollars;" section 1 provides that the judge "shall not act as attorney or counsel in any action, matter or thing within the jurisdiction of said court."

In an action of assumpsit, brought in the Supreme Judicial Court to recover the sum of $60.82, the ad damnum stated in the writ was $125. The defendant filed a plea in abatement, alleging that the attorney who instituted the suit and brought and entered the writ was, at the time, the Judge of the Eastport Municipal Court. A demurrer to this plea was filed by the plaintiff, but was overruled by the presiding Justice, and the writ was ordered to be quashed. Upon plaintiff's exceptions to this ruling,

Held:

1. That this action was within the concurrent jurisdiction of the Eastport Municipal Court and the Supreme Judicial Court.
2. That the Judge of the Municipal Court was therefore expressly prohibited from bringing and maintaining the action.
3. That the writ was properly abated.

Action of assumpsit, to which action defendant filed plea in abatement, to which plea plaintiff demurred generally. Issue was joined on the demurrer. After hearing, the presiding Justice overruled demurrer and plaintiff filed exceptions to ruling. Exceptions overruled.

Case stated in opinion.

E. W. Pike, and C. B. & E. C. Donworth, for plaintiff.

J. H. Gray, and E. B. Jonah, for defendant.

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

CORNISH, J. This is an action of assumpsit brought to recover the sum of sixty dollars and eighty-two cents on an account annexed. The ad damnum is one hundred and twenty-five dollars. The plaintiff is a New York corporation, and the defendant a resident of Eastport. The writ was entered at the October Term, 1915, of the supreme judicial court for Washington county, at which term the defendant seasonably filed a plea in abatement alleging that the attorney who instituted the suit and brought and entered the writ was at the time the Judge of the Eastport municipal court, and was prohibited by the statute creating that court from acting as attorney or counsel in any action, matter or thing within its jurisdiction. To this plea the plaintiff demurred. Upon hearing, the demurrer was overruled, the plea in abatement was adjudged good and the writ was ordered to be quashed. The case is before this court on plaintiff's exceptions to this ruling of the presiding Justice.

Three questions present themselves.

First, was this action within the jurisdiction of the Eastport municipal court?

Second, was the Judge of that court prohibited from bringing and maintaining it?

Third, if so, should the action itself have been abated?

On the first point we hold that the action was within the jurisdiction of the Eastport municipal court. This court was established by chapter 219 of the Private and Special Laws of 1903, and under section 3 is given "exclusive original jurisdiction of all civil actions in which the debt or damage demanded do not exceed twenty dollars, and both parties, or one of the parties, or a person summoned in good faith and on probable grounds as trustee, reside in said city of Eastport," etc. The phrase "debt or damage demanded" used in this connection is determined in all actions sounding in damages, as in assumpsit and tort, by the ad damnum in the writ, and not by computing the amount due on the specific claim or account annexed as set forth in the declaration. *Estes* v. *White,* 61 Maine, 22; *Cole* v. *Hayes,* 78 Maine, 539; *Spaulding* v. *Yeaton,* 82 Maine, 92; *Smith* v. *Hunt,* 91 Maine, 572.

Under section 4, the Eastport municipal court is given original jurisdiction, concurrent with the supreme judicial court, of all civil

actions in which "the debt or damage demanded, exclusive of costs do not exceed one hundred dollars, in which either party or a person summoned in good faith and on probable grounds as trustee, reside in said city of Eastport, or in the towns of Cutler, Whiting, Perry or Pembroke." . . . The difference in phraseology between section 3 and section 4 is marked. Under section 3, the exclusive jurisdiction of the municipal court depends upon "the debt or damage demanded," which our court has held to be the ad damnum stated in the writ. Under section 4 the jurisdiction concurrent with the supreme judicial court is governed by "the debt or damage demanded, exclusive of costs." To determine this we must look, not to the ad damnum which is intended to and does include both debt and costs, and which cannot be separated into its component parts, but to the specific claim set forth in the writ. From that alone we can ascertain what the plaintiff claims independent of costs. Therefore under section 4 an inspection of the specific demand in the account annexed must determine the question of concurrent jurisdiction. Here we find the account annexed to be sixty dollars and eighty-two cents, and therefore the action was clearly within the concurrent jurisdiction of the municipal court and of the supreme judicial court even though the ad damnum was in excess of one hundred dollars.

2. The second question we must also answer in the affirmative. Section 1, after prescribing the qualifications and duties of the Judge concludes with this express inhibition: "He shall not act as attorney or counsel in any action, matter or thing within the jurisdiction of said court." The term jurisdiction is here used in its broad sense to include both exclusive and concurrent jurisdiction, both those cases which must be brought in the court over which the municipal judge presides, and those which may be there brought. The plain intent of the act taken as a whole, was to create a court in the city of Eastport which should have a broader jurisdiction than a trial Justice and should facilitate the administration of law at a lessened expense by enabling litigants in Eastport and the other towns named to have access to a tribunal conveniently located and with more frequent terms than the supreme judicial court.

And the plain purpose of this prohibition was to prevent the incumbent of the office from thwarting the general intent of the act by diverting litigation from his own court into the supreme judicial court as it must be diverted if he is to act as counsel, thereby causing additional and unnecessary expense to the parties. The present case is an illustration. The defendant in the case at bar was a resident of Eastport. The expense connected with a trial in the municipal court in that city would have been slight compared with the expense of a trial in distant Machias or Calais where the terms of the supreme judicial court are held. And we can conceive of a situation where, owing to the diligence or popularity of the attorney who holds the office of Judge, a large amount of litigation would be brought to him by clients, to which the door of his court would thereby be closed, while in the hands of another attorney both doors would be open. It was for this reason that the Legislature enacted this prohibition. To permit the Judge to bring writs in the supreme judicial court which might have been brought in the municipal court would violate the plain words of the act. He cannot do this. This much the attorney must sacrifice, who accepts the judicial position.

3. If the bringing of the writ was contrary to law, it follows that the writ itself was properly abated. This is not the case of a plea in abatement to take advantage of technical defects according to the course of common law pleading. If it were, R. S., ch. 84, sec. 10, might apply, which provides that "no process or proceeding in courts of justice shall be abated, arrested or reversed, for want of form only, or for circumstantial errors or mistakes which by law are amendable, when the person and the case can be rightly understood. Such errors and defects may be amended, on motion of either party, on such terms as the court orders." That statute has no application here. It was passed to ameliorate the rigors of the common law. Here however there was neither want of form, nor circumstantial errors nor mistakes which are by law amendable. The writ is in proper form and needs no amendment. The cause of the abatement is not in the writ itself, but in the prohibition contained in the legislative charter.

Nor does it aid the plaintiff to say that under R. S., ch. 81, sec. 45, "Parties may plead and manage their own causes in court or

do so by the aid of such counsel, not exceeding two on a side, as they see fit to employ, or by any citizen of good moral character who produces in court a letter of attorney for that purpose." The plaintiff did not avail itself of the privilege of acting in its own behalf, but employed one who was, in this class of cases, disqualified from acting. The situation is more akin to the next clause in the last cited section, viz: "but no person whose name has been struck from the roll of attorneys for misconduct shall plead or manage causes in court under a power of attorney from any other party."

The precise issue to be settled is the scope and effect of this prohibiting clause. What interpretation shall be given it? The writ is in court in violation of law. That has been done which the statute says shall not be done. Under these circumstances we think the court is not bound to receive and retain the writ, and permit another attorney to carry on litigation thus improperly instituted. The prohibition must extend to both the actor and the act if the intended result is to be accomplished. Otherwise the purpose of the prohibition has been circumvented and the statute has been devitalized. A positive injunction has been weakened to a mild and impotent request.

In answer to the argument that the client should not suffer by the payment of costs because of the error of his attorney, we would quote the language of the court in *Des Brisay* v. *Mackey,* 12 N. B., 138: "We have not overlooked the hardship that by our construction of the act may result to the client from the employment of an unqualified attorney of whose neglect he may be entirely ignorant, but the hardship is not greater than happens in every case where proceedings are set aside in consequence of the mistake of an attorney in omitting to comply with some rule of practice. The inconvenience of the construction however is no reason for departing from the plain meaning of the words of an act."

Authorities are not numerous. 6 Corpus Juris, p. 670, lays down this principle: "Proceedings in a suit by a person not entitled to practice are a nullity and the suit will be dismissed." Among the cases cited to sustain this doctrine is *Des Brisay* v. *Mackey,* 12 N. B., 138, which is quite analagous to the case at bar. The statute involved in that case provided that no attorney who

failed to pay his law library fees should be allowed to practice in the supreme court. A suit brought by an attorney, thus disqualified, was dismissed, and its dismissal was upheld. This doctrine was affirmed in *Ryan* v. *McIntyre,* Stevens, N. B., Dig. 91, and in *Rex* v. *Sisk,* 35 N. B., 560 (1901).

In *Wallace* v. *Harrington,* 34 N. S., 1, the plaintiff's attorney had failed to take out a yearly certificate as required by statute, but under other sections of the same statute the court held that the validity of the judgment thus obtained was not affected even as to costs. "The procedure for enforcing the provision of the act with reference to the certificate," says the court, "seems to be by penalty and supervision under sections 31 and 34." In the case at bar there are no independent provisions for the enforcement of the prohibition. The prohibition itself must carry by its own momentum if it is to be effective. See also *Rader* v. *Snyder,* 3 W. Va., 413; *County of St. Louis* v. *Clay,* 4 Mo., 562, and *Robb* v. *Smith,* 3 Scam. (Ill.) 45. All these decisions rest upon the peculiar wording of the statutes involved. So must our decision in the pending case. In our opinion this statutory prohibition was intended to be effective and to authorize the dismissal of a suit instituted and maintained in plain contravention of its terms.

Exceptions overruled.

KING, J., dissenting. The facts involved in the case have been fully stated in the majority opinion of the court and need not be restated.

The plaintiff's writ, although admittedly in due and sufficient form, properly served, and duly entered in the supreme judicial court for Washington county, which court had complete jurisdiction of the parties and of the subject matter of the action, was quashed under a plea in abatement. The sole alleged reason for quashing the writ was that the plaintiff's cause of action came within the concurrent jurisdiction of the said supreme court and the Eastport municipal court, and that Judge Pike, the Judge of the latter court, had acted as counsel in the preparation of the writ in violation of a provision in the charter of his court whereby the Judge thereof is prohibited to act as counsel in any action within its jurisdiction.

We entertain much doubt if it should be held that Judge Pike in doing what he did in this case violated the inhibition in the charter of his court prohibiting the Judge thereof to act as attorney or counsel in any action "within the jurisdiction of said court." But assume that his act in preparing the writ was a violation of that prohibition, does that go to the abatement of the plaintiff's writ? We think not. To so hold must be to decide that his so acting in violation of the prohibition vitiated and invalidated the writ. And indeed that appears to be the conclusion of the majority opinion, for it declares that the prohibition "must extend to both the actor and the act if the intended result is to be accomplished." But the prohibition itself does not so provide. The Legislature did not declare that if any thing should be done in violation of the prohibition it should be null and void. And we perceive no support either in reason or authority for a conclusion that it was the legislative intent that this prohibition should be enforced by a sacrefice of the rights of innocent parties, the language of the prohibition itself not so providing.

If the prohibition extends to the act as well as the actor, as the majority opinion holds, how shall that theory be applied in a case where such prohibited counsel acts with other counsel? Would this writ have been subject to abatement just the same had Judge Pike acted only in conjunction with some other counsel in its preparation? An affirmative answer would be in accord with the reasoning of the opinion. But it does not seem to us that a construction of the prohibition which leads to such results is justifiable.

We are of the opinion that the plaintiff's writ should not have been quashed. It had been issued by the court itself, under its seal and teste, signed by its clerk, and served and returned to the court as directed. It was before the court as its own legal process, complete and sufficient in every particular, and should not have been quashed as a nullity simply because one forbidden to act as counsel in the case had in fact acted in the preparation of the writ. The plaintiff was innocent. It was unaware that its counsel, Judge Pike, was prohibited, if he was, to act for it. The plaintiff was without any fault in the premises. It was in fact represented in court, before the writ was quashed, by other counsel, C. B. & E. C. Donworth, who requested that the writ be adjudged good and the

defendant be required to answer over, but that request was denied. As we have pointed out the plaintiff's writ was admittedly sufficient and entered in the court having jurisdiction of the action. We think it was the plaintiff's legal right to have its writ remain in court, and to be permitted to prosecute its action either in person or by other counsel, at least. Holding otherwise, and that the plaintiff should be turned out of court, with costs against it, under the circumstances disclosed in this case, is we think a decision out of harmony with those sound and liberal principles which underlie and promote the present-day progress and advancement in judicial procedure.

It is therefore our opinion that the exceptions should be sustained.

MR. JUSTICE HALEY and MR. JUSTICE MADIGAN concur in this dissent.

RUMFORD & MEXICO BRIDGE DISTRICT *vs.* MEXICO BRIDGE COMPANY.

Oxford. Opinion August 10, 1916.

Constitutionality of bridge acts and water districts. County clerk and clerk of Supreme Judicial Court. Notices for special meetings. Right of appeal. Taking property by eminent domain.

The act of incorporation of the plaintiff district provided that it should take effect when approved by a majority vote of the legal voters of the two sections of the district, voting separately at special meetings, to be called, warned, and conducted according to the law relating to municipal elections; that if disapproved by one section, it should still be effective as to the other; that the district should have authority to take the property of the defendant by the right of eminent domain, by petition therefor to the county commissioners; that the county commissioners should fix the valuation of the property and file their report "in the clerk's office for the county of Oxford;" that a justice of the Supreme Judicial Court, in term time or vacation might confirm, reject or recommit the report; that the procedure, and all subsequent proceedings and right of appeal

thereon should be had under the same restrictions, conditions and limitations as are by law prescribed in the case of damages by the laying out of highways.

The district took the property as provided by the act. The county commissioners fixed the value of the property, and filed their report in the office of the clerk of the Supreme Judicial Court for Oxford County.

Upon proceedings to determine the validity of the proceedings, it is

Held:

1. That the act is constitutional.
2. That the requirement that the special meetings of the two sections should be warned according to the law relating to municipal elections was complied with when they were warned in accordance with the statutory provisions for warning town elections.
3. That the act, being approved by one section, became effective as to that section.
4. That the report of the county commissioners was properly filed in the office of the Clerk of the Supreme Judicial Court.
5. That the act gave the Bridge Company a right of appeal from the award of the county commissioners, to be exercised within the time limited by statute in case of assessment of damages occasioned by the laying out of highways.
6. That in case of a seasonable appeal, further action upon the report of the county commissioners by a justice of the Supreme Judicial Court should be stayed until the amount of damages is determined on appeal.
7. That, if no seasonable appeal be taken, hearing is to be had on the affirmance, rejection or recommital of the report, as provided by the act.

Proceedings under chapter 166 of Private and Special Laws of Maine, 1915.

Case stated in opinion.

Lucian W. Blanchard, for plaintiff.

Bisbee & Parker, for defendant.

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

SAVAGE, C. J. By chapter 166 of the Private and Special Laws of 1915, the plaintiff district, which includes that part of Rumford known as the Rumford Village Corporation, and certain described territory in Mexico, was incorporated as a public municipal corporation for the purpose of acquiring by the exercise of the right of eminent domain, or by purchase, the toll bridge, approaches and

toll house, and franchises of the defendant. It was provided that the act should take effect when approved by a majority vote of the legal voters of the two sections of the district, voting separately at special meetings, to be called for the purpose. It was further provided that if the voters in the Rumford section should refuse to approve the act, and the voters in the Mexico section approved it, the act should apply to the Mexico section only. Meetings were held in the two sections. The Rumford section refused to approve the Act. The Mexico section approved it. Thereupon, the municipal officers of Mexico, as provided in the Act, organized the plaintiff corporation by appointing trustees.

By section 5 of the Act, the district was authorized to buy, and the company to sell, the bridge property. The district was also authorized to acquire the property by the exercise of the right of eminent domain. If the parties should agree upon the terms of purchase, no further statutory proceedings were necessary. But if not, the procedure for acquiring the property was prescribed by section 6. That section provided that in case the parties failed to agree upon the terms of purchase, the district might take the property "by petition therefor to the county commissioners of Oxford county wherein said company and its mortgagees shall be parties defendant." The parties did not agree upon terms of purchase, and the district filed its petition to the county commissioners, as provided by section 6, and thereby took the bridge property. And the proceedings so far, since, have been under section 6. This the record clearly shows.

Section 6 further provided that: "Such petition shall not be dismissed after filing, but may and shall be amended in any manner required to enable the court to make all necessary decrees thereon. The county commissioners of Oxford county shall, after due notice and hearing, fix the valuation of said toll bridge, approaches, toll house and franchises of said defendant company at what they are fairly and equitably worth. . . . The report of the commissioners of Oxford county shall be filed in the clerk's office for the county of Oxford within three months after their hearing and determination. After said report is so filed, any single Justice of the supreme judicial court, either in term time or vacation, after notice and hearing, may confirm or reject said report, or recommit

it, if justice so requires. The award of the county commissioners, or committee in case of an appeal, shall be conclusive as to valuations."

The county commissioners assessed the damages on February 15, 1916, and filed their report in the office of the clerk of the supreme judicial court for Oxford county. At the following March term of that court, the defendant filed a motion to dismiss the report for three reasons, namely:—First, because the Act is unconstitutional and void; secondly, because the Act never became operative, inasmuch as that section of the district, known as the Rumford Falls Village Corporation never approved, nor refused to approve, the Act; and lastly, because the commissioners' report was illegally and improperly filed in the office of the clerk of the supreme judicial court. At that stage of the proceedings the case was reported to this court. If the Act is unconstitutional, or inoperative, or if by failure to have the report filed in the proper office, the plaintiff has lost the benefit of the proceedings, the cause must be dismissed. Otherwise it must be remanded for further proceedings in accordance with the statute.

1. That the Act is constitutional, we entertain no doubt. Whether the public exigency requires the taking of private property for public uses is a legislative question, the determination of which by the legislature is final and conclusive. Whether the use for which such taking is authorized is a public use is a judicial question for the determination of the court. *Kennebec Water District* v. *Waterville,* 96 Maine, 234; *Brown* v. *Gerald,* 100 Maine, 351; *Bowden* v. *York Shore Water Co.,* 114 Maine, 150. In this case the Legislature has determined that a public exigency exists. And that the use of a bridge as a part of a highway is a public use admits of no debate. In all legal aspects, bridge districts are like water districts. They are all public municipal corporations. They all hold their property for public uses, and may, when authorized by the Legislature, take private property for such uses, by exercising the right of eminent domain. The case of *Kennebec Water District* v. *Waterville,* supra, is entirely analogous to the case at bar, and the doctrines declared in that case are controlling in this one.

2. The contention that this Act never became operative is based upon the claim that that section of the proposed district, known as the Rumford Falls Village Corporation has never legally approved, or refused to approve, the Act. It is properly urged that some action on the part of that section, either to approve, or to refuse to approve, was made, by the Act itself, a prerequisite to its becoming operative. It is admitted that a meeting of the voters in the Rumford Falls Village Corporation was called and held, and that, by a majority vote, approval of the Act was refused. But it is claimed that the meeting was not legally warned. The Act provided that the meetings should be called respectively by the selectmen of Mexico, and the assessors of the Village Corporation, and that they should be "called, warned and conducted according to the law relating to municipal elections." A similar phrase is found in many of the charters for water districts, which were submitted to the voters for approval. In *Kittery Water Dist.* v. *Water Co.*, 103 Maine 25, it was held that, under a similar provision, Chapter 4 of Revised Statutes relating to town elections applied and controlled. But the defendant urges that the Village Corporation was itself a municipal corporation, and contends that, by clear implication, the Legislature intended that the meeting in the territory of that corporation should be warned according to the law relating to that corporation, namely, its special charter. The charter of the Village Corporation requires that a copy of a notice of a meeting of the corporation shall be published in some newspaper "seven days at least, before the time appointed for such meeting." The statute relating to town elections does not require any such publication. In this case, such a notice was published, but only two days before the meeting. And this is the only infirmity suggested. It is not claimed that the meeting was not warned in all respects according to the laws relating to town elections.

We think the defendant's contention is not tenable. First, it may be observed that if the Legislature intended that the meeting within the Village Corporation should be warned according to its special charter, it did not say so, at least, not expressly. There is a general law for warning town meetings. There is this special law for warning meetings of this corporation. Had the Legislature intended that the special method should be used rather than

the general one, we should naturally expect it to say so. Again, the Act uses the same language with reference to warning the meeting in Mexico, and the meeting in Rumford. It used a single phrase applicable to both. So far as words go, both meetings were to be warned in the same manner, namely, "according to the law relating to municipal elections." That required the meeting in Mexico to be warned according to the law relating to town elections. *Kittery Water Dist.* v. *Water Co.,* supra. Was the Rumford section required by the same language to employ a different method? We do not think the language is open to such a construction. What the Legislature has joined we are not at liberty to sunder.

3. Section 5 of the Act required that the report of the county commissioners should "be filed in the clerk's office for the county of Oxford." The report was in fact filed in the office of the clerk of the supreme judicial court. The defendant contends that "clerk's office" means the office of the county clerk, or clerk of the county commissioners, and therefore that no report has yet been filed in accordance with the Act. Since the clerk of the supreme judicial court is ex-officio county clerk, R. S., ch. 80, sect. 6, and the same office suffices for him in both capacities, the objection seems technical. Yet we are not disposed to say that it is of no importance. The duties of the clerk in the two capacities are entirely distinct, and his records separate and independent. Though only one person, property is sought to be taken away from its owner by condemnation proceedings, all the acts prescribed by statute as necessary to be done, must be done, or the proceedings are void.

We think, however, that the report was filed in the right clerk's office. The county commissioners did not act strictly as such. They were a special tribunal created by the Act. When their report was filed they had nothing more to do with the matter. All subsequent proceedings were to be had in the supreme judicial court. A Justice of that court had jurisdiction to affirm, reject or recommit their report. It would be a singular situation indeed for a judge of one court to be acting upon a report filed and pending in another court. The Act evidently intended that the report should be filed in the office of the clerk of the court which was to act upon it.

In reaching this conclusion, we have not overlooked section 3 which provides that,—"If said bridge company and said district shall not mutually agree upon the sum to be paid therefor, either party upon petition to the county commissioners of the couny where said bridge, approaches, and toll house are situated may have damages assessed by them. The procedure, and all subsequent proceedings and right of appeal thereon shall be had under the same restrictions, conditions and limitations as are or may be by law prescribed in the case of damages by the laying out of highways." It is by reason of this section that the defendant contends that the report should have been filed in the office of the county clerk. But as we have said, the record shows clearly that the proceedings have been had under section 6, and that section we have construed to require the filing of the report in the office of the clerk of the supreme judicial court.

It is expedient to notice one more question, since the case must go back for further proceedings. The defendant claims that it has the right to appeal. The petitioner denies the right. The statute is somewhat crudely and clumsily drafted. It is not easy to construe all the provisions so as to make them harmonious. But the intendment of the Act is, we think, reasonably certain. Although the procedure is prescribed by section 6 which does not expressly include a right of appeal, section 3 cannot be disregarded. That section recognizes the right of appeal. Even section 6 inferentially recognizes it by its reference to the award of a "committee in case of appeal." We think it evident that the Act was intended to give the defendant a right of appeal, to be exercised subject to the limitations of time prescribed by section 3. And that section expressly made the right of appeal subject to the limitations prescribed in the case of damages by the laying out of highways.

To sum up, we hold that the bridge district act is constitutional and operative; that the plaintiff district has been legally organized; that it has taken the proper steps for taking the bridge property, and for having the valuation fixed; that the report of the county commissioners was properly filed, and that thereupon the defendant had the right of appeal to be exercised seasonably within the statutory limitation.

Whether the right of appeal has been exercised at all, and if so, whether it was done seasonably, are not made to appear in the record. If a valid appeal be taken, further proceedings on the report should be stayed until the amount of damages is determined on appeal in accordance with the statute in case of land damages in road cases. If no appeal be taken, hearing is to be had on the affirmance or rejection of the commissioner's report, as provided in section 6.

Remanded for further proceedings in accordance with the opinion.

ERNEST W. WOOSTER *vs.* ALLEN A. FISKE.

Hancock. Opinion August 16, 1916.

Dedication of land to public use. Presumptions as to permissive use of way. Private and Public ways.

Action of trespass quare clausum to recover damages for injury to the plaintiff's land in the town of Hancock.

Held:

1. The jury found that the road in question was a public way, and in so finding erred. The instances of use of the road from all the witnesses during its history are confined to individuals having private interests in adjoining lots, and by sportsmen, and such use was not made by any of these as travellers as of right, but privately, and the contrary not appearing, presumably by permission. There is no evidence that ordinary travel ever passed over the road from one end to the other, or that it was ever dedicated to public uses, or that any owner of the land ever assented to its use for public purposes, as a public way.
2. Dedication exists only when so intended by the party, and permissible use does not prove it.
3. Where there has been a cessation for twenty years, unexplained, to use a way originally acquired by use, it is regarded as a presumption, either that the former presumptive right has been extinguished in favor of some adverse right, or, when no such adverse right appears, that the former has been surrendered, or that it never existed.

Action of trespass quare clausum. Plea, general issue and brief statement claiming right of way. Verdict for defendant. Plaintiff filed motion for new trial. Motion sustained. New trial granted.

Case stated in opinion.

Hale & Hamlin, for plaintiff.

William E. Whiting, for defendant.

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

HANSON, J. This is an action of trespass quare clausum to recover damages for injury to the plaintiff's land in the town of Hancock, in which the plaintiff claims that the defendant "with his cattle and team wagon did trample, cut up and injure the said land." The jury found for the defendant, and the case is before the court on the plaintiff's general motion for a new trial.

The plaintiff's land consists of one hundred and thirty acres, of which about twelve acres are now under cultivation as a fruit farm; the rest of the lot is covered with growth of various sizes, but mainly second growth. The easterly side line of the land is parallel with the Maine Central Railroad right of way at Washington Junction in the town of Hancock. The county road leading from said Junction to Ellsworth crosses the southwesterly corner of the plaintiff's land, and passes the cultivated portion mentioned. The case shows that for at least seventy years, and dating back to the time when the whole lot was wild land, there was a road running from the southwest corner, across the land, to the northeast corner, and for a period nearly if not quite as long, a branch road from the center of the lot to the northwest corner thereof. The branch road led to the defendant's land, a smaller lot adjoining the plaintiff's and containing thirty-one acres. The defendant's land was north of the county road about one-half mile, and he could reach the county road either by using the road hereinbefore described, or by another similar road extending westerly from his lot to the county road. The origin of the first named road is in doubt. It is not disputed that early in the last century the road led to a small water mill near the northeast corner of the land. The character of the road, as appearing from the evidence, is similar to

all winter roads running through wild lands, where from time to time work has been resumed in winter, with occasional use in summer by sportsmen, and by settlers hauling hay in the fall. It is apparent that until the plaintiff made some improvements within the last seven years, the road had not been repaired by any person for fifty years at least. The defendant has occasionally used the road since he purchased his lot in 1913, admits the acts complained of, and justifies under the following brief statement: "that he was rightfully upon the premises, and had a right to use the road . . . under and by virtue of a public right of way . . . and failing in this that he still had a right to use said premises . . . under and by virtue of a private right of way."

The history of the case shows that the defendant's predecessor, one Keefe, first occupied this lot, and built a house thereon in 1856, and tilled and cultivated three or four acres of land; that for a period of six years, Keefe and the members of his family used the road in question for all purposes, with team and on foot. Keefe sold to Mrs. Celia Larkin in 1864. It appears too that about the year 1856, the mill mentioned above was abandoned, but from earliest times the road has been used by sportsmen in each year, and by owners of adjoining lots, to pass over with hay in summer and hay and wood in winter, with lumber from the mill, and with logs from other lots, but so far as the defendant's lot was involved, after 1864, to 1903, it was practically abandoned for a period of thirty-eight years, the houses on the lot were also abandoned and torn down, and as evidence of such abandonment, and the lapse of time, it appears from witnesses on both sides that trees ten and twelve inches in diameter are growing in the cellar of one of the houses.

Mr. John O. Keefe, son of the former owner of defendant's lot, throws much light upon the question involved. He said, among other things: "I shall be seventy-seven my next birthday. Father built there in 1856," adding that the family lived there six years, and moved off in 1861. Questioned further as to how he went to his farm, he said: "Well, that depended upon what we was going with; if we had a team we went in by the Bachelder (plaintiff's) place; if we walked we went out across by the cemetery," the latter way being a way leading southwesterly from his own lot and meet-

ing the highway north of the first described road. "Q. And then the other road that circled around by Simmons pond came in by another point, or did it join it somewhere? A. That has been put on there since I sold the land; I sold the land to Larkin in 1864, and there wasn't enough on it then to get a one horse load of wood off that thirty-one acres of land; it has all growed up since that time."

The next cutting on the lot was in 1903, and no other use or occupancy of the defendant's land, or land adjoining, appears in the thirty-eight years, except such use as one Soucier made of the Higgins farm, so called, a use unexplained, at a date not fixed by witnesses, but for all practical purposes established by the growth of the trees in the cellar above named on which his house stood.

The facts are substantially as stated, and upon the issue raised, the presiding Justice instructed the jury that there was no evidence to prove that the road was a private way. The jury upon the remaining issue found that the road in question was a public way, and in so finding erred. The instances of use of the road from all the witnesses during its history are confined to individuals having private interests in adjoining lots, and by sportsmen, and such use was not made by any of these as travelers as of right, but privately, and the contrary not appearing, presumably by permission. There is no evidence that ordinary travel ever passed over the road from one end to the other, or that it was ever dedicated to public uses, or that any owner of the land ever assented to its use for public purposes, as a public way. Dedication exists only when so intended by the party, and permissible use does not prove it. *White* v. *Bradley,* 66 Maine, 254; *City of Cincinnati* v. *The Lessee of White,* 6 Peters, 431; *Sevey's Case,* 6 Maine, 118; *Bangor House* v. *Brown,* 33 Maine, 309. *Cole* v. *Sprowl,* 35 Maine, 161; *State* v. *Wilson,* 42 Maine, 9. See *Washburn on Real Property,* 6th Ed., Sec. 1263; *Lyon* v. *Hamor,* 73 Maine, 56; *Words and Phrases,* 1908; *Anderson* v. *Dyer,* 107 Maine, 342.

It is well settled that where there has been a cessation for twenty years, unexplained, to use a way originally acquired by use, it is regarded as a presumption, either that the former presumptive right has been extinguished in favor of some other adverse right,

or, where no such adverse right appears, that the former has been surrendered, or that it never existed. *Washburn on Real Property,* Vol. 2, Sec. 1274; *Farrar* v. *Cooper,* 34 Maine, 394.

The entry will be,

Motion sustained.
New trial granted.

CHARLES H. ROBINSON *vs.* EDWARD CHASE.

York. Opinion August 22, 1916.

Reference under Rules of Court. Revised Statutes, Chapter 84, Section 136, interpreted. Waiving of terms of Statute.

A referee, under a rule of court, has full authority to allow, disallow or limit costs to the prevailing party.

Action of assumpsit on account annexed to recover for work and labor done and materials furnished. Writ entered in Supreme Judicial Court, York county, Maine, May term, 1915. Defendant filed plea of general issue and at the same term the matter was sent to a referee and a writ of reference duly issued. After hearing both parties, referee reported a certain sum due plaintiff, but in the same finding disallowed the plaintiff or his witnesses any fees or costs for the hearing. Objections were filed by plaintiff to said report, and upon an agreed statement of facts, case reported to Law Court for determination on the question of costs. Report of referee accepted. Judgment for plaintiff on the report.

Case stated in opinion.

John G. Smith, for plaintiff.

E. S. Titcomb, for defendant.

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

SAVAGE, C. J. This case was heard by a referee under a rule of court. The referee's award was in favor of the plaintiff; but he awarded that "no costs be allowed and taxed for attendance of plaintiff and for his witnesses at the hearing." The plaintiff objected to the acceptance of the report of the referee in so far as the referee had disallowed costs for his witness fees. Thereupon the case was reported to this court for its determination of the question of costs.

It is the settled rule in this State, that a referee under a rule of court, without limitation or restriction, has full authority to allow, disallow or limit costs to the prevailing party. *Brown* v. *Keith,* 14 Maine; 396; *Hatch* v. *Hatch,* 57 Maine, 283; *Morse* v. *Morse,* 62 Maine, 443; *Nutter* v. *Taylor,* 78 Maine, 424. The rule is of long standing. While Maine was still a part of Massachusetts, this question was considered by the supreme judicial court of the commonwealth in *Nelson* v. *Andrews,* 2 Mass., 164 (1806). The justices delivered their opinions seriatim. The justices were agreed that referees under a rule of court were authorized to make award respecting costs. Parker, J., said: The practice has uniformly prevailed and been acquiesced in. Sewall, J., said: It is sufficient that the practice here has been constant and uniform, and has been recognized by the Legislature. Sedgwick, J., said: In practice referees have uniformly awarded respecting them, sometimes for the whole, sometimes for part, and sometimes for none; and this practice has been sanctioned by the court. The statute gives no express authority to the referees for this purpose, but it clearly supposes such authority to exist. Parsons, C. J., said: This practice is of so long standing that it cannot now be shaken, if we were so disposed. But the practice may be considered as beneficial. There may be reasons respecting the allowance of costs, which in the minds of referees would very properly have weight, although they could not be admitted in a court of law. It may appear to them that a creditor has unduly harassed his debtor for a trifling demand, or has brought his action before the cause of action accrued. Many other reasons may be conceived. It was therefore both legal and expedient that these referees should take the subject of costs into consideration, and make their award concerning them.

In the case of *Nelson* v. *Andrews,* just cited, the reference was of the suit and all demands between the parties. But the rule is the same when only a suit is referred. *Bacon* v. *Crandon,* 15 Pick., 79.

The plaintiff, however, says that if the practice is so settled, it is settled wrong, and in violation of the statute which provides that, in all actions, the party prevailing recovers costs, unless otherwise specially provided. R. S., ch. 84, sec. 132. To this contention there are two answers. The first is that the parties may waive the statute. A reference can be made only by agreement. The parties choose their own tribunal. *Piscataquis Savings Bank* v. *Herrick,* 100 Maine, 494. The settled practice gives to that tribunal the auhority to determine the question of costs. By agreeing to the reference the party submits to that authority, and waives his statutory right. The second answer is that the authority of referees to determine costs is recognized by the statute. R. S., ch. 84, sect. 136. By this statute it is provided that "on reports of referees, full costs may be allowed, *unless the report otherwise provides.* This language plainly implies that a referee may determine the question of costs. It was so held, in effect, in *Brown* v. *Keith,* supra.

It follows, then, that the referee in this case had authority to disallow the plaintiff's costs in whole or in part. His report is final and must be accepted.

Report of referee accepted.
Judgment for plaintiff on the report.

CASAVANT & CLOUTIER COMPANY *vs.* MIKE SMITH.

Kennebec. Opinion September 9, 1916.

Affidavits under Revised Statutes, Chapter 114, Section 2. Writs.

Action of assumpsit with capias writ, Casavant & Cloutier Company being named as the plaintiff or creditor. The oath or affidavit which the Statute, R. S., ch. 114, sect. 8, required as a prerequisite to an arrest upon a writ was made by G. A. Cloutier, who described himself in the affidavit as "clerk of the Casavant & Cloutier Company, and its agent and manager." The Statute provides that such oath or affidavit may be made by an agent or attorney of the creditor.

Upon a motion to dismiss for want of sufficient affidavit,

Held:

1. That on a motion to dismiss, the statements in the affidavit must be taken to be true.
2. That it sufficiently appears on the face of the process that the Casavant & Cloutier Company, mentioned in the affidavit, is the creditor company named in the writ.

Defendant was arrested on a capias writ under Revised Statutes, chapter 114, section 2; writ returnable to superior court, Kennebec county. Defendant's counsel filed motion that writ be quashed, alleging that the affidavit which was attached to said writ did not comply with the terms or wording of the statute. Motion overruled. Defendant filed exceptions. Exceptions overruled.

Case stated in opinion.

Benedict F. Maher, for plaintiff.

Williamson & McLean, for defendant.

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

SAVAGE, C. J. The statute, R. S., ch. 114, sect. 2, provides that under some conditions a debtor may be arrested on civil process, and held to bail, if the creditor, his agent or attorney makes oath

before a justice of the peace, to be certified by the justice on said process, that he has reason to believe and does believe that such debtor is about to depart and reside beyond the limits of the State. with property or means of his own exceeding the amount required for his immediate support, and that the demand sued or the principal part thereof, amounting to at least ten dollars, is due to him.

Such an oath was certified on the writ in this case and the defendant was arrested thereon. When the writ was returned to court he seasonably filed a motion to dismiss the action for want of a sufficient affidavit on the writ. The motion was overruled and the defendant excepted.

On a motion to dismiss for want of sufficient allegation or statement in the affidavit, the statements in the affidavit must be taken to be true so far as they go. *Hunter* v. *Heath,* 76 Maine, 219; *Rines* v. *Portland,* 93 Maine, 227; *Hurley* v. *South Thomaston,* 101 Maine, 538. The question, then, is whether the affidavit on the face of it is sufficient.

The affidavit in this case is questioned in only one particular. It reads, so far as we need to quote it, as follows: "I G. A. Cloutier, clerk of the Casavant & Cloutier Company and its agent and manager, make oath and say," etc. The statute prescribes that the oath may be made by an agent or attorney of the creditor. When the creditor is a corporation the oath must be by agent or attorney. The affiant describes himself as agent or attorney, and these words afford a presumption of his authority to make the oath. *Lewiston Coöp. Soc.* v. *Thorpe,* 91 Maine, 64.

In the writ the plaintiff is described as "Casavant & Cloutier Company, a corporation." And the contention of the defendant is that the words in the certificate "clerk of the Casavant & Cloutier Company, and its agent and manager" do not identify this company as the corporation, Casavant & Cloutier Company, which is the plaintiff. It is argued that the certificate leaves it uncertain whether the affiant was clerk of the plaintiff corporation, or, it might be, of a partnership of the same name, and that there should be some more definite connection, by reference, between the party named in the writ and the one named in the certificate.

We are unable to concur in this view. It is too narrow. It is true, as argued, that the provisions of the statute must be strictly com-

plied with. *Mason* v. *Hutchings,* 20 Maine, 77; *Bailey* v. *Carville,* 62 Maine, 524. And compliance must appear on the face of the certificate. Nothing required by statute is to be left to inference. And, of course, it must appear that the creditor named in the certificate is the creditor named in the writ. Though not specifically required by the statute, this must necessarily be so. Otherwise the process is not fair on its face. It does not show an oath by the creditor, or his agent or attorney.

Now in the first place, we think it sufficiently appears in the certificate that that Casavant & Cloutier Company was a corporation. Cloutier in the affidavit says he was "clerk of it, not a clerk employed by it." He says that he was "*its* agent and manager." This language is appropriate to a corporation, but not necessarily so to a partnership. And it should be so construed.

Here, then, we have a writ in which a corporation, Casavant & Cloutier, is plaintiff. Upon that writ it is certified that the affiant, Cloutier, is clerk, agent and manager of the Casavant & Cloutier Company, a corporation. The two designations in the same language are parts of the same process. To hold, under a motion to dismiss, that it does not thereby sufficiently appear that both designations refer to the same corporation would, we think, be putting too fine a point upon it. It is too technical. And technicalities are not favored.

Exceptions overruled.

ARLINE BLANCHE MORGAN, by Claude S. Morgan, her Father and Next Friend,

vs.

AROOSTOOK VALLEY RAILROAD COMPANY.

Aroostook. Opinion September 9, 1916.

Negligence of parents or guardians being imputed to child who suffers thereby. What is ordinary or reasonable care. What is reasonable or ordinary care upon the part of parents or legal custodians of children.

1. It is the duty of the driver of an electric street railway car to keep a reasonable look out ahead and to exercise a vigilance in his outlook according to the circumstances reasonably to be expected in the section through which his car is passing. To be reasonable, the care must be commensurate with the risks and dangers which there is reason to apprehend.
2. A duty devolves upon the parents or legal custodians of a child to exercise reasonable care in protecting it and keeping it off the streets and other places of danger. In case of failure to exercise such care, the negligence of the parents or custodians is imputable to the child who suffers injury thereby.
3. The evidence warranted the jury in finding that the defendant's motorman was negligent, and that the plaintiff's parents exercised reasonable care.

Action on the case for the alleged negligence of defendant. Defendant pleaded general issue and brief statement, alleging that the plaintiff was not in the exercise of due care at the time when the injuries complained of were received. Verdict for plaintiff in sum of sixty-five hundred dollars. Defendant filed motion for new trial. Motion overruled.

Case stated in opinion.

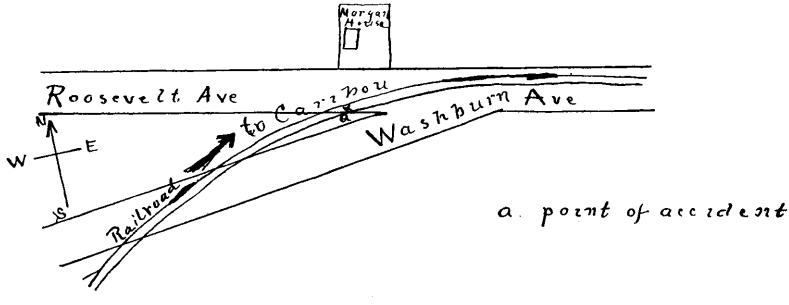
Cyrus F. Small, and Powers & Guild, for plaintiff.

John B. Roberts, C. F. Daggett, and W. R. Pattangall, for defendant.

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

SAVAGE, C. J. The plaintiff, a child less than two years old, was run over and seriously injured by an electric motor engine on the defendant's road, and brings this action to recover damages, on the ground of alleged negligence. The verdict was for the plaintiff, and the case comes before this court on the defendant's motion for a new trial. The only grounds of non-liability argued are that the defendant's servants operating the motor were not negligent, and that the negligence of the child's parents should be imputed to her as contributory negligence.

1. The defendant's negligence. The evidence shows that the accident happened on Roosevelt Avenue, in the village of Caribou, in front of the plaintiff's home. The following sketch will help to understand the situation.



The defendant's track crosses Washburn avenue and proceeds thence northeasterly by a nine degree curve, on a fill from four to six feet high, to Roosevelt avenue, which it enters about one hundred feet westerly from its junction with Washburn avenue. The plaintiff was in the street on the defendant's track. The motor, hauling three or four freight cars, was proceeding easterly to the station in Caribou, at a speed of from ten to fifteen miles an hour. Upon the motor was a motorman, a trolleyman, and the head brakeman. The evidence warranted the jury in believing that the motorman had a plain view of the spot where the accident occurred all the time after he passed Washburn avenue until he was so near

that the front of the motor obstructed the view. The point where this clear view began was about 438 feet from the point of the accident. This distance was traversed in thirty seconds, if the train was going ten miles an hour as the defendant claims, or twenty seconds, if going fifteen miles an hour as the plaintiff claims. This shortness of time might lead a jury to believe that the motorman might at any time within that period have seen the plaintiff about or upon the track, if he had been looking; that is, the time was so short that the child could not have come from any place out of view in that time. Two of the men on the motor, the trolley man and the head brakeman, saw her on the track. Each says that he noticed that the motorman was looking ahead, and therefore said nothing to him, until the danger was exceedingly imminent, when each says he "yelled" to the motorman. This aroused the motorman to a sense of the situation, and he then first saw the child. He says she was then fifty feet in front of him. It is conceded that from that time he did everything in his power to stop the train, but it was too late.

The motorman's excuse is that as he sat in the cab his view of the point of collision, the place where the child was, was obscured part of the way around the curve by the framework of the cab. There was a window in front of him, and one on his right hand out of which he could look. But he says that the framework between, that is, the corner of the cab prevented his seeing all that was in front of him at all times. This is of course true if he sat perfectly still, and moved his head neither to the right or the left. But the jury might have thought that the exercise of reasonable care under the circumstances required him to move his head so as to obtain a view of possible dangers before him, if he could not see them otherwise. At any rate, we think so. He was approaching a street, and was to cross it. The very situation made it a place of possible danger. The proximity of its junction with another street made it more so.

The defendant's brief states the law correctly when it says. "It is the duty of the driver of an electric street railway car, consistent with due care, to keep a reasonable lookout ahead and to exercise a vigilance in his outlook according to the circumstances reasonably to be expected in the section through which the car is passing."

While the driver is holden only to the exercise of reasonable care, what is reasonable care depends upon the circumstances. To be reasonable the care must be commensurate with the risks and dangers which there is reason to apprehend. The quantum of care required varies according to the situation. This doctrine is settled, and it is unnecessary to cite authorities.

It is urged that it was the duty of the motorman in approaching the crossing of a street, and especially when near a junction of streets, to be on the lookout for teams or travelers upon the streets coming from one direction or the other, and that he could not be looking in all directions at once. This is all true. But by a slight movement of his body he could have looked in all directions, not at once, but in much less time than it takes to write it. It was the work of only an instant. His motor car was so constructed as to give him a sweeping view, if he moved himself so as to take it. The jury were warranted in finding that the motorman was negligent in failing seasonably to look ahead on the line of the track, to the point where the child was. Had he done so the accident could easily have been prevented.

2. Contributory negligence of the parents. It seems to be conceded that this child, less than two years old, was not of sufficient age to exercise any care under any circumstances. And we think it should be so declared as a matter of law. This being so, the action cannot be defeated by the plaintiff's own conduct. But in such a case a duty devolves upon the parents or legal custodians of a child to exercise reasonable care in protecting it and keeping it off the streets and other places of danger. And in case of failure to exercise such care, the negligence of the parents or custodians is imputable to the child who suffers injury thereby. But parents are holden only to the exercise of reasonable care. And what is reasonable care depends upon the facts and circumstances, and sometime in part, even, upon the financial condition of the family. No exact rule can be laid down. These principles were carefully considered and declared, and the authorities collated and discussed, in *Grant* v. *Bangor Ry. & El. Co.*, 109 Maine, 133, and require no further elaboration.

The house of Mr. Morgan, the plaintiff's father, fronted on Roosevelt avenue. The yard surrounding it was enclosed by a wire fence

made to keep the plaintiff, and another child a little older, off the street. Apparently when made it was child tight. There were three gates, one opening upon the street, and they were so fastened that the children could not open them. After the accident the father discovered one place where the earth underneath the fence had fallen away so that a child by pressing out the wire netting could crawl out under. But this was not known before. Prior to the accident the plaintiff had been playing in the yard. The mother was washing in the shed at the rear of the house. A few minutes before the accident the groceryman came, and when he left the mother says she went out to see that he fastened the front gate and to see if the other gates were closed. The mother says further that not more than five minutes before the accident the plaintiff came to the shed and wanted her coat put on, and that a neighbor who was there put it on for her, and that the plaintiff then went out, and was not seen again. Two of the train crew say that the front gate was open at the time of the accident. How the plaintiff got out is not known. The defendant in argument suggests that the stories of the mother and the trainmen may all be true, and that the neighbor left the gate open as she went in. But it urges nevertheless that it was negligence on the part of the mother to permit the child to run about unattended so near a dangerous track, at a time of day when a train might be expected, without knowing that the gates and fences were so arranged that the child could not stray away.

Upon the evidence, the question whether the mother exercised reasonable care was for the jury, and we think their conclusion in the affirmative is sustainable.

One ground of the motion for a new trial is that the damages awarded were excessive. The plaintiff has lost the fingers of her left hand. The third and fourth were removed to the wrist joint, the middle finger to the knuckle joint. The motion of the wrist, what there is left of it, is impaired and restricted. The left foot was cut off at the center of the instep. She suffered three surgical operations. Under these circumstances, we cannot say that the verdict for $6500 is so large as to require the interposition of the court.

Motion for a new trial overruled.

STATE OF MAINE, by Indictment, *vs.* HOWARD M. LATHAM.

Cumberland. Opinion September 9, 1916.

Demurrer. Indictments. Interpretation of Chapter 32, Public Laws of 1915.

1. There may be different legislative regulations for different localities. Classes and conditions may differ, but, to be valid, the differentiations or classifications must be reasonable and based upon real differences in the situation, conditions or tendencies of things; otherwise, they offend against the provision in the Fourteenth Amendment to the Federal Constitution which forbids the State to "deny to any person within its jurisdiction the equal protection of the laws."
2. Chapter 32 of the Public Laws of 1915, which provides in substance that purchasers of milk or cream for the purpose of selling, or manufacturing the same into other products, shall pay the producer semi-monthly, and that violators of this provision shall be punished by a fine, is class legislation, is violative of the "equal protection of the laws" provision of the Fourteenth Amendment to the Federal Constitution, and therefore is void.

Indictment returned at Superior Court, Cumberland county for violation of chapter 32, Public Laws of Maine, 1915, said statute relating to the methods of payment to the producers of milk or cream by any firm or person purchasing same for the purposes of re-selling or manufacturing the milk or cream thus purchased. Respondent filed demurrer to said indictment. Indictment adjudged good; to which ruling, respondent filed exceptions. Exceptions sustained. Demurrer sustained. Indictment quashed.

Case stated in opinion.

Jacob H. Berman, County Attorney, for State.

W. K. & A. E. Neal, for respondents.

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

SAVAGE, C. J. The respondent stands indicted for a violation of chapter 32 of the Public Laws of 1915, and the case comes to this

court on exceptions to the overruling of his demurrer to the indictment.

The statute in question reads as follows: "Every person, firm or corporation purchasing cream or milk for the purposes of reselling or manufacturing the same into other products, shall pay the producer, unless otherwise provided for by written contract, semi-monthly; payment to be made on the first day of each and every month for all cream or milk received prior to the fifteenth day of the preceding month, and payment to be made on the fifteenth day of each and every month for all cream or milk prior to the first day of the same month. Whoever violates the provisions of this act shall be punished by a fine of not less than ten dollars nor more than fifty dollars."

The indictment before us is clearly demurrable for want of sufficiently definite allegations of the time and place of the commission of the alleged offense. But the respondent has not made that point. The ground of demurrer relied upon is that the statute upon which the indictment is based is unconstitutional, in that it denies "the equal protection of the laws" which is guaranteed by the Fourteenth Amendment to the federal constitution. The answer of the State is that the statute is the legitimate, constitutional exercise of the police power of the State, which is its inherent power to establish regulations to promote the public health, safety, morals, peace, comfort, and welfare, *B. & M. R. R. Co.* v. *County Comrs.,* 79 Maine, 386; and that the Fourteenth Amendment does not impair the police power of the State.

That the Fourteenth Amendment was not designed to interfere with the proper exercise of the police power by the State was held in *Barbier* v. *Connolly,* 113 U. S., 26. And the doctrine has been reaffirmed since in many cases, both in the federal and in the State courts. It is settled doctrine. *State* v. *Montgomery,* 94 Maine, 192; *State* v. *Mitchell,* 97 Maine, 66; *State* v. *Leavitt,* 105 Maine, 76.

The statute in question when analyzed appears to be designed to compel purchasers of a particular product, intended for a particular use, to pay their purchase debts at particular times on pain of criminal prosecution, punishment by fine, and, of course, imprisonment for thirty days, if the fine is not paid. R. S., ch. 136, sect. 12. Whether such a statute, designed to aid in the collection of mere

civil obligations by the use of the strong arm of the criminal law is within the proper exercise of the police power is at least questionable. Certainly it is not unless the regulation intended be for the promotion of the public health, safety, morals, comfort or welfare. As was said by the court in *Wyeth* v. *Board of Health,* 200 Mass., 474,—"no other interference of the public to the detriment of an individual is permissible."

But passing this point without further discussion, we come to a consideration of the Fourteenth Amendment as applied to this statute. The Amendment forbids the State to "deny to any person within its jurisdiction the equal protection of the laws." It forbids what is called class legislation. Its meaning and effect, as it relates to the question now before us, have been fully discussed in the recent cases of *State* v. *Mitchell,* supra, and *State* v. *Leavitt,* supra, and the discussion need not be repeated. In a word, discrimination as to legal rights and duties is forbidden. All men under the same conditions have the same rights. Diversity in legislation to meet diversities in conditions is permissible. But if in legislative regulations for different localities, classes and conditions are made to differ, in order to be valid, "these differentiations or classifications must be reasonable and based upon real differences in the situation, condition or tendencies of things. Arbitrary classification of such matters is forbidden by the Constitution. If there be no real difference between the localities, or business, or occupation, or property, the State cannot make one in order to favor some persons over others." *State* v. *Mitchell,* supra; *Pearsons* v. *Portland,* 69 Maine, 278; *State* v. *Furbush,* 72 Maine, 493; *State* v. *Montgomery,* 94 Maine, 192; *Yick Wo* v. *Hopkins,* 118 U. S., 356; *Strander* v. *West Virginia,* 100 U. S., 303; *Gulf C. & S. F. R. Co.* v. *Ellis,* 165 U. S., 150; *Cotting* v. *Kansas City Stockyards Co.,* 183 U. S., 79; *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S., 540.

This statute does not apply to all classes of debtors, but to one class. It does not apply to all debts incurred by purchase of products, but to one class of debts. It requires semi-monthly payment for milk or cream of a producer, but not for any other product bought of a producer, It requires the purchaser of milk who is a middleman, or manufacturer of milk products to pay, but does not require him to pay who buys for other purposes. It gives the milk producer a strong club to aid in the collection of debts which

is not given to other creditors. It subjects a class of debtors to liability of criminal prosecution to which other classes of debtors are not subjected. Such discriminations, unless based upon some real differences in condition, or situation, or necessities concerning the public health, welfare and so forth, offend against "the equal protection of the laws" clause of the federal constitution, and the statutes which make them are invalid.

In what way does compulsory payments of the purchase price to producers of milk tend to promote the *public* health, safety, morals or welfare? What reasonable ground of discrimination is there between producers of milk, and producers of hay, or of potatoes, or of oats, in the matter of payment for products? What real difference, so far as public health and welfare are concerned, is there between producers and other vendors? Why should not the middleman be protected as well as the producer? If the producer of milk can properly be aided in this way in the enforcement of his claims, why, with equal reason, may not the man who sells it to the consumer? Why may not grocerymen and dealers in dry goods be given this aid in collecting their bills? Again, to go back to the text, what real difference is there which entitles the milk producer who sells to purchasers for resale or manufacture to protection, while he who sells to others is not protected? Why should one who purchases for resale or manufacture be prosecuted and fined for non payment, while he who purchases for any other purpose is not? We are unable to find satisfactory answers to these questions. The arguments suggest none. We are constrained to the conclusion that there are none which can relieve this statute of its constitutional infirmity. It is class legislation. Its discriminations are not based upon any real differences in situation or condition. We feel compelled to hold that it conflicts with fundamental laws and is, therefore, of no effect.

We may add that our atention has been called to a class of cases in which some courts have sustained the constitutionality of statutes requiring corporations to pay their employees weekly or semi-monthly. We allude to this merely to say that the cases are not in our judgment analogous to the one at bar.

Exceptions sustained.
Demurrer sustained.
Indictment quashed.

JOHN SLACK ALLAN *vs.* ELMER F. WESCOTT.

Somerset. Opinion September 9, 1916.

Manner of filing bills of exceptions. What bills of exceptions should contain. Necessary elements in action for deceit. What plaintiff must prove.

1. In an action for deceit in the sale of property, the plaintiff must show that the defendant intentionally made a false representation to him, with the intent that he should act upon it, or in such manner as would naturally induce him to act upon it, that the representation was material, that it was known to the defendant to be false, or, being of matter susceptible of knowledge, was made as of a fact of his own knowledge, that he was thereby induced to act upon it, and that he was deceived and damaged.
2. The evidence in the case warranted the jury in finding all the essential elements of actionable deceit favorably to the plaintiff.
3. An oral bargain for the sale of land consummated by giving a bond for a deed is not within the statute of frauds.
4. When an oral bargain for the sale of land is consummated by a bond for a deed, the purchaser is not limited in an action for deceit to proof of misrepresentations made at the time of the delivery of the bond.
5. In an action of deceit, the defendant is responsible for such meaning as his words, spoken as of a fact of his own knowledge, reasonably conveyed to the plaintiff.
6. When a bill of exceptions itself does not state enough of the case, enough of the contentions and issues in the case, to enable the court to determine whether the rulings and refusals to rule, complained of were proper or improper, material or immaterial, harmful or otherwise, the court is not bound to consider the exceptions. And this is true, although the report of the evidence and the charge of the judge are made a part of the bill.

Action on the case for alleged deceit, fraud and misrepresentation in sale of farm by defendant to plaintiff. Plaintiff alleged that defendant, or his agent, made false representations relative to the number of acres contained in the farm sold to plaintiff. Defendant pleaded general issue. Verdict for plaintiff in sum of two hundred and fifty dollars. Defendant filed motion for new trial, and also

exceptions to refusal of court to give certain requested instructions and rulings. Motion and exceptions overruled.

Case stated in opinion.

Butler & Butler, for plaintiff.

Fred F. Lawrence, for defendant.

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

SAVAGE, C. J. Action for deceit in the sale of a farm, by misrepresenting the acreage. The plaintiff recovered a verdict, and the case comes up on the defendant's motion for a new trial and exceptions.

THE MOTION: The evidence is conflicting. But we think a jury would be warranted by it in finding the following statement of facts to be true. The defendant owned a farm containing about 60 acres. It was crossed by what is called in the case "an old state road." About 44 acres lay east of the road, and about 16 acres, west. The plaintiff learned through a farm agency that the farm was for sale. He was shown over a part of it by the defendant. The easterly, northerly and southerly boundaries were pointed out. The parties did not go to the westerly end of the farm, but the defendant represented to the plaintiff in effect that the farm contained 75 or 80 acres. The plaintiff concluded to purchase. He paid $50 down, and took the defendant's receipt for $50, "paid on account of a farm of 80 acres, more or less." In the afternoon of the same day the trade was completed. The defendant gave the plaintiff a bond for a deed, and the plaintiff paid $300 more, and obligated himself to pay the balance of the purchase price in instalments. The instalments have been paid so far as they have become due. In the bond for a deed the farm was described as bounded on the west "by the old state road," so that the tract described in the bond contained only about 44 acres. The plaintiff did not know of the existence of any "old state road" until the bond was drawn, and even then did not know where it lay upon the face of the earth. The representation of the defendant as to acreage was made as of a matter of fact within his knowledge, and not as a matter of opinion. The representation was relied upon by the plaintiff. It was false and was known to be so by the defendant. It was

false if applied to the whole of the defendant's farm. It was false, if it related only to the territory included in the bond. And it is on the latter ground that the suit is sought to be maintained, as the declaration in the writ shows.

It is true that the defendant denies that the foregoing statement is true, but the evidence offered by the plaintiff tends to show that it is true. And the jury were warranted in believing it. We must therefore consider the motion upon the assumption that it is true. Upon that assumption, the facts make a clear case for the plaintiff. It was incumbent upon the plaintiff to show that the defendant intentionally made the false representation to him, with the intent that he should act upon it, or in such a manner as would naturally induce him to act upon it, that the representation was material, and that it was known to the defendant to be false, or being of matter susceptible of knowledge, was made as of a fact of his own knowledge, that the plaintiff was thereby induced to act upon it, and that he was deceived and damaged. *Atlas Shoe Co.* v. *Bechard,* 102 Maine, 197; *Banking Co.* v. *Cunningham,* 103 Maine, 455; *Hotchkiss* v. *Coal & Iron Co.,* 108 Maine, 34; *Pierce* v. *Cole,* 110 Maine, 134. The representation was intentional and material, and was made as of a fact of the defendant's knowledge, as an inducement to purchase. The plaintiff was thereby induced to purchase. Not knowing the location of the old state road, the plaintiff was justified in believing, as he claims he did, that the farm described in the bond contained at least 75 or 80 acres. He was deceived and damaged. The motion must be overruled.

THE EXCEPTIONS: The bill of exceptions does not require our consideration. The only statement of the case in the bill is this. "This was an action on the case to recover damages for alleged deceit in the sale of a farm. The presiding Justice in the course of his charge referring to a certain receipt which the plaintiff testified was signed by the defendant in acknowledgement of a $50 payment instructed the jury among other things as follows:—(stating the instruction) At the conclusion of the charge, counsel for the defendant requested the following instructions. (stating them)" The bill does not state enough of the case, enough of the contentions and issues in the case, to enable the court to determine whether the rulings and refusals to rule complained of were proper or

improper, whether they were material or not, and whether they were harmful or not. The bill furnishes no clue to the case.

It is true that the writ, pleadings, charge of the presiding Justice and evidence in full are made a part of the exceptions. That is not enough. In the very recent case of *Dennis* v. *Packing Co.,* 113 Maine, 159, the court said of a similarly defective bill: "It is not a 'summary' bill as contemplated by statute. It is not an infrequent practice in framing a bill of exceptions to refer to the evidence, and make it a part of the bill. This is not improper. The evidence may help to illuminate the exceptions. But neither the statute, nor approved practice, contemplates that a reference in the bill to the body of the evidence, or the incorporation of the evidence as a part of the bill, is to take the place of a succinct and summary statement of the specific grounds of exception in the body of the bill itself." The court does not feel bound to consider exceptions so irregularly presented. *McKown* v. *Powers,* 86 Maine, 291; *Wilson* v. *Simmons,* 89 Maine, 242; *Salter* v. *Greenwood,* 112 Maine, 548.

Nevertheless we have examined these exceptions, and we will dispose of them without extended discussion. The first one relates to an instruction relating to the effect of the $50 receipt, which we have referred to, as taking the bargain for the sale of the farm out of the statute of frauds. This question is immaterial, and irrelevant to any issue in the case. The bargain was consummated by giving a bond for a deed, a sufficient writing. Secondly, the defendant requested the following instruction: "If the plaintiff knew when the bond was delivered to and accepted by him that the defendant was not *then* representing to him as a matter of fact within his own knowledge that the property in question contained seventy-five or eighty acres, he cannot recover." The instruction was properly refused. The word "then" would limit the plaintiff's right of recovery to representations made at the time of the delivery of the bond, and exclude representations made in the course of the bargaining, upon the strength of which the plaintiff accepted the bond.

Lastly, the court was requested to instruct that the plaintiff could not recover "unless the representation upon which he relies concerning acreage was made and intended by the plaintiff to apply

to the land described in the bond." In argument it is stated that the word "plaintiff" was meant to be "defendant." This is a concession that the requested instruction as expressed was inappropriate, and should not have been given. But taking it as intended, the instruction could not properly have been given. It does not state the ground of defendant's liability correctly. It makes his liability depend upon what he intended rather than what he said. In this respect, the defendant is responsible for such meaning as his words, spoken as of a fact of his own knowledge, reasonably conveyed to the plaintiff. Further discussion is unnecessary.

The certificate must be

Motion and exceptions overruled.

ROCKLAND & ROCKPORT LIME COMPANY

vs.

COE-MORTIMER COMPANY.

Knox. Opinion September 18, 1916.

Employer and Independent Contractor. Evidence. Liability of employer for negligence of independent contractor. Master and Servant. Reasonable care. What facts or statements may be considered on the question of reasonable or due care.

1. The owner of a dock is not an insurer of its safety; but he is bound to use reasonable care to have it reasonably safe for use by vessels which enter it by his invitation, express or implied.
2. When the owner of a dock has employed a competent dredging company to dredge his dock, and it has done so and has reported to the owner that the dock is free from rocks and safe, such representations are admissible for the owner on the question of his exercise of due care, when he is sued for damages to a barge caused by grounding on a rock in the bottom of the dock.

3. The owner of a dock is not liable for the negligence of an independent contractor employed by him to dredge his dock.
4. When the question is whether a party acted prudently, and with due care, the information upon which he acted, whether true or false, is admissible on the issue of reasonable care.

Action on the case to recover damages suffered by plaintiff on account of condition of defendant's dock or landing. Verdict for plaintiff. Defendant filed motion for new trial and exceptions to certain rulings and instructions of presiding Justice. Motion for new trial waived. Exceptions sustained.

Case stated in opinion.

A. S. Littlefield, for plaintiff.

Carver, Wardner & Cavanagh, and Alan L. Bird, for defendant.

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

SAVAGE, C. J. Action on the case to recover damages suffered by plaintiff's Barge No. 3 by grounding at the defendant's dock, while unloading a cargo of fertilizer consigned to the defendant. The plaintiff recovered a verdict. The defendant brings the case before us on exceptions to instructions given to the jury and to refusals to instruct. A motion for a new trial was filed, but is now waived.

It appears from the bill of exceptions that prior to the injury to the defendant's barge, the defendant had contracted with the Eastern Dredging Company to dredge out its dock, and that the work had been completed. There was evidence that the dredging company's general manager had told the defendant's engineer that the berth had not only been dredged to the depth required by the contract, but that it was free from all rocks and safe for barges and other craft to berth there; and that a similar statement was made by the dredging company's superintendent in charge of the work to the defendant's superintendent. It further appears that two employees, by direction of the defendant, made a sounding of the dock after the dredging was completed, and that they discovered no rock. As a matter of fact, there was a large rock in the dock. And when the barge settled with the tide, it grounded upon the rock, causing the damage complained of.

The presiding Justice instructed the jury that the statements made by the representatives of the dredging company to the servants and agents of the defendant, that the berth was free from rocks and safe for barges and other craft to berth there, could not be considered by them, on the question of the defendant's exercise of due care, for the reason that a principal is liable in any event for the negligence of its servants and agents, it being assumed that the dredging company was the defendant's servant or agent.

The defendant requested the following instructions: 1. "If the defendant contracted with a reputable dredging company to dredge the dock and provide a safe place for vessels to berth at, and the company dredged the berth and represented to the defendant that the same was free from rocks and obstructions, and the defendant believed said representations were true, and used a reasonable degree of care in making soundings to verify said representations, and had no reason to believe the same untrue, the defendant is not liable in this case." 2. "If the defendant contracted with a reputable dredging company to dredge out the dock so as to be reasonably safe for vessels to discharge at, and the company did the dredging and represented to the defendant that it was dredged to the depth of ten or eleven feet at low water and was free from rocks and obstructions, and the defendant made soundings and believed the representations were true, and had no knowledge of any rocks in the bed of the dock, and no reason to believe there were any, the defendant is not liable." The first requested instruction was refused, on the ground already stated, that the dredging company was the agent or servant of the defendant. The second requested instruction was given with this qualification: "They must exercise due care. They must not rely upon the representations of anyone; they must make proper examinations." There was another requested instruction on the question of liability, which was given with qualifications; but we think it will not be necessary to consider it at this time. To the foregoing rulings, refusals and qualifications the defendant excepted.

The law of the liability of the owner or occupant of a dock, to persons invited to use it, is well settled. He is not an insurer, but he is required to exercise reasonable care to have his dock reasonably safe for use by vessels which enter it by his invitation, express

or implied, or for which he holds it out as safe. He is liable to an invitee for an injury caused by an unsafe condition of the dock which he negligently permits to exist, if the invitee was himself in the exercise of due care. If the owner or occupant fails to use reasonable care, and if there is a defect which is known to him, or which by the exercise of reasonable, or ordinary, care should be known to him, he is liable to an invitee who, using due care, is injured thereby. *Nickerson* v. *Tirrell,* 127 Mass., 236; *Garfield* v. *Rockland-Rockport, etc., Co.,* 184 Mass., 60; *Philadelphia, etc., R. R. Co.* v. *Philadelphia, etc., Towboat Co.,* 23 How., 209; *Smith* v. *Burnett,* 173 U. S., 430.

The plaintiff was invited to use the defendant's dock, and the test of the defendant's liability is, therefore, whether it used reasonable care and diligence, in keeping its dock reasonably safe for use by vessels. And the precise question presented by the first exception is whether the statements of the dredging company's representatives made to the defendant's agents that the dock was free from rocks and safe for barges, were admissible, and were properly to be considered by the jury on the question of the exercise of reasonable care by the defendant. It is not claimed that they would be admissible as evidence of the actual condition of the dock, for as to that they are within the excluding rule of hearsay testimony. It is not claimed that the fact that the defendant contracted with a reputable company for dredging its dock, and relied upon that company's representations that the dock was safe, is conclusive on the question of reasonable care. In its first requested instruction, the defendant added to these conditions the further one that it had used a reasonable degree of care in making soundings to verify the representations, and that it had no reason to believe the same untrue. But it is contended that the defendant might reasonably place some degree of reliance upon the representations of the dredging company, and therefore, that such representations were to be considered as having some tendency, more or less according to the circumstances, to show that it used reasonable care, and to rebut the charge of negligence.

We think the evidence was entitled to consideration upon the question of reasonable care. It would be idle to say that men may not reasonably rely, to some extent at least, upon information

which comes to them from reputable sources, for reasonable men are doing this every day. And when a man's actions, induced by information from others, are to be judged on the issue of reasonable care and prudence, it is necessary to know what the information was, and what was its source. In section 1789 of Wigmore on Evidence, the author says,—"Whenever an utterance is offered to evidence the state of mind which ensued in another person in consequence of the utterance it is obvious that no assertive or testimonial use is sought to be made of it, and the utterance is therefore admissible, so far as the hearsay rule is concerned." Mr. Greenleaf says,—"Where the question is, whether the party acted prudently, wisely, or in good faith, the information on which he acted, whether true or false, is original and material evidence.' 1, Greenleaf on Ev., sect. 101; *Friend* v. *Hamill,* 34 Md., 298. In *Shrewsbury* v. *Smith,* 12 Cush., 177, the defendants were sued for negligence in raising a dam by adding to, and building upon, the original dam. They offered evidence that they employed fit and competent persons to examine the old dam to see if it was sufficient and suitable to build upon. The person employed made an examination and reported that it was sufficient for the purpose. The court said, "that the examination and *report* of persons employed by the defendants, as persons of competent skill and capacity to judge, was competent evidence. . . . It was for the jury to judge of its weight."

The instruction that the representations made to the defendant could not be considered on the question of ordinary care was therefore erroneous. So was the reason given for the ruling. The relation between the defendant and the dredging company was not that of master and servant, but that of employer and independent contractor. An employer is not ordinarily liable for the negligence of an independent contractor. *McCarthy* v. *Second Parish,* 71 Maine, 318. The defendant's liability must be determined by its own reasonable care, or want of it, and not by that of the dredging company.

For reasons already stated the defendant's first requested instruction should have been given. The refusal based upon the theory that the dredging company was the defendant's agent or servant was not well grounded.

The second requested instruction should not have been given, for it was faulty, at least in that it omitted the condition that the defendant made *reasonable* soundings, in so far as soundings would be evidence of reasonable care.

It should be understood that while we regard the representation made to the defendant as competent for consideration on the question of its reasonable care, it is by no means conclusive. It is only one fact to be weighed with all the other facts. Its weight and probative effect are for the jury.

One exception remains to be considered. It relates to damages. Since some of the exceptions must be sustained and the case go back for a new trial, we shall not examine particularly the language of the instructions excepted to, but will state the contentions of the parties. The plaintiff claimed damages for loss of net earnings during the period that the barge was laid up for repairs. And as evidence of net earnings, it relied in part upon the terms of a charter party. The defendant contends that the charter party did not name "Barge No. 3" in particular, that it was in effect a contract of affreightment of from 10,000 to 15,000 gross tons of coal, which might be performed by the use of any of the defendant's barges, and that no particular barge was bound by the charter party. Accordingly it is argued that this vessel is not entitled to the benefit of the charter party as evidence of its probable net earnings in a service which in the future might have been performed by other barges, without a violation of the contract. The charter party is made a part of the bill of exceptions. It does not name Barge No. 3, nor any other vessel. The place where the name of the vessel is usually inserted is left blank. But the charter all through speaks in the singular, of one vessel. Other than this the bill of exceptions is silent on the subject. We think we are not sufficiently informed to express any opinion as to whether the charter party in this case was proper for consideration on the question of damages.

Counsel on both sides have discussed the charter party provision for demurrage, but we think both are agreed that under the circumstances of this case, demurrage does not affect the question of damages.

Exceptions sustained.

DR. T. B. WAGNER *vs.* CONGRESS SQUARE HOTEL COMPANY.

Cumberland. Opinion September 18, 1916.

Common Law Liability of innkeepers. How effected by Statute. Failure to comply with Statute as to posting notices. General rules of liability of innkeepers.

Section 1 of chapter 101 of the Laws of 1913 provides, among other things, that no innkeeper who has a sufficient safe or vault and who keeps a copy of this section printed in distinct type constantly and conspicuously posted in not less than ten conspicuous places in all in his inn, shall be liable for the loss, by a guest, of jewelry, personal ornaments, and other specified classes of property, unless the guest has offered to deliver the same to the innkeeper for custody in the safe, and the innkeeper has refused or omitted to receive it. It also provides that an innkeeper shall not be liable for the value of property in excess of three hundred dollars, whether received, or not. In an action by a guest against an innkeeper for the value of scarf pins, cuff buttons and studs stolen from the guest's room, it appearing that the innkeeper had not posted any copies of section 1, It is held:—

1. Chapter 101 of the Laws of 1913 was intended as a substitute for all existing statutory provisions governing the liability of innkeepers to their guests, and repealed sections 6, 7 and 8 of chapter 29 of the Revised Statutes.
2. An innkeeper, who fails to have copies of section 1 of chapter 101 of the Laws of 1913 posted as provided in the section, is liable as at common law for the loss of jewelry, personal ornaments, and other property specified in the section.
3. At common law an innkeeper is an insurer of the property of his guest, and is liable for the loss of it, when placed within the inn, except when caused by the act of God, the public enemy, or the neglect or fault of the owner or his servants.
4. Though an innkeeper fails to post copies of section 1, chapter 101 of the Laws of 1913, as provided by the section, his liability for articles embraced in section is limited by statute to three hundred dollars.
5. The articles lost by the plaintiff were, most of them jewelry, and all of them personal ornaments. They are within the provisions of section 1 of the Act, and not within section 4, which fixes the liability of an innkeeper for property "other than that described in the preceding sections" as that of a depository for hire.

Action on the case to recover from an innkeeper the value of certain articles of jewelry alleged to have been stolen from the plaintiff's room while he was there as a guest. Plaintiff alleged that articles stolen were of the value of seven hundred and forty-three dollars. Judgment for plaintiff for three hundred dollars and interest from date of writ.

Case stated in opinion.

Dennis A. Meaher, for plaintiff.

Verrill, Hale, Booth & Ives, for defendant.

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

SAVAGE, C. J. This case is an action brought to recover from an innkeeper for goods stolen from a guest's room, and comes before the court on report. The plaintiff was a guest at the defendant's hotel three or four days. His testimony tends to show that he was assigned to a room; in a closet in the room he placed his traveling bag, a substantial one, with a very substantial lock; in the bag was a small leather case which contained 13 or 14 scarf pins, one being a pearl pin set with diamonds, one an opal pin, one a ruby, one a black onyx, one a crystal, and several gold; it contained also about 10 pairs of cuff buttons, some of them matching the pins, one set of pearl studs, one set black onyx studs, and other studs which he was unable to describe. All the articles were worth $743. The plaintiff was a man who traveled much and was in the habit of carrying the case in the bag when he traveled, and he used one or other of the sets of pins, buttons and studs, as might seem suitable to the occasion, or to the color of his shirt, according to fancy.

The plaintiff claims that while he was temporarily absent from the hotel, his traveling bag which he had locked and left in his room was unlocked by someone and the case and its contents stolen from the bag. It is admitted that he did not offer to deposit the articles with the hotel manager or clerk, and on the other hand that the hotel management did not post in any place in the hotel a copy of section 1 of chapter 101, Laws of 1913.

By the common law, innkeepers, like common carriers, are insurers of the property of their guests committed to their care,

and are liable for its loss, or for injury to it, except when caused by the act of God, the public enemy, or the neglect or fault of the owner or his servants. *Shaw* v. *Berry,* 31 Maine, 478; *Norcross* v. *Norcross,* 53 Maine, 163. And the liability extends to all the movable goods, chattels and moneys of the guest which are placed within the inn, and is not limited to such as are reasonably necessary for the present use of the guest. *Berkshire Woolen Co.* v. *Proctor,* 7 Cush., 417; 2 Kent's Com., 11th Ed., 784. And the common law rules are in force except so far as they have been modified by statute.

Under modern conditions, Legislatures have deemed it proper to limit somewhat the liability of innkeepers. In this State, by chapter 174 of the Laws of 1874, now R. S., ch. 29, sects. 7 and 8, it was provided that "Innkeepers are not liable for losses sustained by their guests, except for wearing apparel, articles worn or carried upon the person to a reasonable amount, personal baggage and money necessary for traveling expenses and personal use, unless upon delivery or offer of delivery, by such guests, of their money, jewelry or other property to the innholder, his agent or servants for safe custody." The statute further provided that when the loss is attributable to the negligence of the guest, or to his noncompliance with the reasonable regulations of the inn, brought to his notice, the innkeeper is not liable. Section 6 of chapter 29 provides that in case of loss by fire innholders are answerable only for ordinary care. These statutory provisions are now in force unless repealed by chapter 101 of the Laws of 1913.

The 1913 statute, so far as necessary now to quote it, is as follows:

"Sec. 1. No innkeeper . . . who constantly has in his inn . . . a metal safe or suitable vault in good order, and fit for the custody of money, bank notes, jewelry, articles of gold and silver manufacture, precious stones, personal ornaments, railroad mileage books or tickets, negotiable or valuable papers, and bullion, and who keeps on the doors of the sleeping rooms used by guests suitable locks or bolts, and on the transoms and windows of said rooms suitable fastenings, and who keeps a copy of this section printed in distinct type constantly and conspicuously posted in not less than ten conspicuous places in all in said inn, shall be liable

for the loss or injury suffered by any guest, unless such guest has offered to deliver the same to such innkeeper . . . for custody in such metal safe or vault, and such innkeeper . . . has omitted or refused to take it and deposit it in such safe or vault for custody, and to give such guest a receipt therefor. . . .

Sec. 2. But such innkeeper . . . may by special arrangement with a guest receive for deposit in such safe or vault any property upon such terms as they may agree to in writing, but every innkeeper . . . shall be liable for any of the above enumerated articles of a guest in his inn . . . after said articles have been accepted for deposit, if caused by the theft or negligence of the innkeeper . . . or any of his servants."

Section 3 makes it the duty of the guest to demand and of the innkeeper to give a check or receipt for baggage or other articles of property delivered for safe keeping, elsewhere than to the guest's room, and provides that an innkeeper shall not be liable for such baggage or other articles of property unless actually delivered, nor unless the loss occurred through the negligence of the innkeeper or his servants.

"Sec. 4. The liability of the keeper of any inn . . . for loss of or injury to personal property placed by his guests under his care, other than that described in the preceding sections, shall be that of a depositary for hire, except that in case such loss is caused by fire not intentionally produced by the innkeeper or his servants, such keeper shall not be liable. . . .

Sec. 11. All acts and parts of acts inconsistent with this act are hereby repealed."

At the outset, it is to be noticed that the only statutes relating to losses by guests, and to which the repealing clause in the 1913 statute can apply are sections 6, 7 and 8 of chapter 29 of the Revised Statutes, to which we have already referred.

The 1913 statute is comprehensive, and when it is compared with the above named sections of chapter 29, it will sufficiently appear, we think, that the Legislature intended the later statute to be a substitute for the former one. The two statutes not only relate to the same subject matter, but the provisions of the one are inconsistent with those of the other. To illustrate: Under the old statute an innkeeper was liable to guests for articles worn or carried upon

their persons to a reasonable amount, for personal baggage, and for money necessary for traveling expenses and personal use, without regard to delivery for safe keeping, except so far as liability might be limited by reasonable regulations brought to the notice of the guest, as provided in section 8. These articles were excepted from the non-liability provision. The provision that the innholder is not liable unless upon delivery or offer of delivery by guests of their money, jewelry or other property should not be construed to mean property previously excepted. It means money in excess of what was necessary for traveling expenses and personal use, and jewelry more than reasonable in amount, so far as the jewelry consisted of articles worn or carried on the person.

By the new statute non liability for money, jewelry, precious stones, personal ornaments and other specified things was conditioned so far as the innkeeper was concerned on two things, the keeping of a safe, and the posting copies of section 1. If he complied with those provisions he would not be liable unless the guest had offered to deposit, and he had omitted to receive those articles for custody. If they were accepted, section 2 made him liable for theft or negligence afterwards by him or his servants. If he did not comply with the statute, it afforded him no protection as to liability for such articles. He was left under the common law liability. But the statute provided that an innkeeper should not be liable for the value of such property in excess of three hundred dollars, whether received or not. Otherwise than that, no limit was fixed to the amount of money or amount or number of personal ornaments for which the innkeeper would be responsible.

Again, under the old statute the innkeeper was liable for personal baggage whether placed in his custody or not. Under the new, he is only liable when it is actually delivered into his custody for safe keeping. In both statutes liability for loss caused by fire is limited, but the rule of liability is different.

Finally, after prescribing in section 1 for a conditional liability for certain classes of property, and in section 2 for deposit by special agreement of any property, and in section 3 for baggage and other articles of property, meaning, we think, as the context shows, such articles as are commonly "checked" or receipted for, in section 4 the Legislature prescribed the liability of an innkeeper

for all other personal property placed under his care, that is, infra hospitium, to be that of a depository for hire. All taken together cover the entire field of the liability of innkeepers. It is argued that the words "other than that" in section 4 relate to the preceding word "liability," and not to the nearer preceding word "property." But by natural grammatical construction it relates to "property," and such we think was the legislative intent. This construction makes the act complete, harmonious and entirely comprehensive. It takes the place of the prior statute, and sections 6, 7 and 8 of chapter 29, Revised Statutes, are repealed by it.

It follows then that if the articles for which the plaintiff sues are included in the specifications of section 1, the defendant is liable as at common law, inasmuch as it did not comply with the statute by posting copies of the section. If they were not of any of the classes named in sections 1, 2 and 3, the defendant's liability is only that of a depositary for hire. A depositary for hire is liable only for failure to exercise ordinary care, or as it is sometimes expressed, such care as men of ordinary prudence usually exercise over their own property under like circumstances. *Milliken* v. *Randall,* 89 Maine, 200; *Foster* v. *Essex Bank,* 17 Mass., 479; *Brown* v. *Waterman,* 10 Cush., 117; *Lichtenhein* v. *B. & P. R. Co.,* 11 Cush., 70; *Maynard* v. *Buck,* 100 Mass., 40.

We think the articles lost by the plaintiff fall into one, or the other, or both, of two classes named in section 1, namely, "jewelry" and "personal ornaments." A jewel is defined to be "an ornament of dress usually made of a precious metal, and having enamel or precious stones as a part of its design; a precious stone." Webster's Dict. Tit. Jewel. "It is a precious stone fashioned for use or beauty; a gem, especially one set in precious metal for personal adornment; an ornament containing precious stones." Standard Dict. Tit. Jewel. Jewels collectively are jewelry. Webster's Dict. Tit. Jewelry. Most of the scarf pins, cuff buttons and studs of the plaintiff come clearly within the definition of "jewelry," and all were "personal ornaments."

Our attention is called to the words "personal belongings" in section 4, for the loss of which an innkeeper is liable only as a depositary for hire. But section 4 includes only such articles as are not included in the prior sections. A distinction is made between

"personal ornaments" and "personal belongings." It is only personal belongings, that cannot be classed as personal ornaments, for which a rule of liability is declared in section 4.

We conclude, then, that the defendant is liable as an innkeeper at common law for the loss of the plaintiff's jewelry and personal ornaments, because it did not comply with the condition of the statute, as to posting copies of section 1. But the proviso in section 1 limits liability for all such property to $300. The proviso by its terms applies to all property whether received for safe keeping or not.

Judgment for plaintiff for $300 and interest from the date of the writ.

ELMER E. BRAGG *vs.* ROYAL INSURANCE COMPANY, LIMITED.

Somerset. Opinion September 18, 1916.

Burden of proof. Insurance contract under Maine Statutes. Knowledge on part of insurer as to right to ten days' written notice of intended cancellation of policy. Pleadings. Waiver of right of written notice under Maine form of insurance policy.

1. When the assured in a policy of fire insurance is ignorant in fact of the provision in the policy that it could be cancelled by the company only by giving ten days' notice in writing, and, relying upon the representation of the company's agent that the company had the right to cancel it forthwith, surrenders his policy and receives the unearned premium, he does not thereby waive his contract right to notice, and the policy remains in force.
2. He who sets up a waiver must prove it.
3. Where in an action upon a fire insurance policy, reported to this court, the defence of non-occupancy was not pleaded, and where the defendant had written plaintiff's counsel that its position was that the policy was cancelled by mutual agreement, and said no more, and where it does not appear that the defence of non-occupancy was suggested below, the defendant is held to have waived all defenses except mutual cancellation.

Action on the case for recovery of sum due under an insurance policy. Defendant pleaded general issue and brief statement alleging that the policy, upon which suit was brought, had been cancelled and surrendered by mutual agreement long before the fire, which caused the loss. At close of testimony, case referred to Law Court for determination, upon so much of evidence as legally admissible. Judgment for plaintiff for six hundred and seventy-five dollars and interest from date of writ.

Case stated in opinion.

Fred H. Lancaster, and Harry Manser, for plaintiff.

A. K. Butler, for defendant.

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

SAVAGE, C. J. This action upon an insurance policy comes before this court on report. The issuing of the policy and the loss by fire are admitted. The defendant pleaded the general issue, and specially by way of brief statement, that the policy sued upon was cancelled and surrendered by mutual agreement before the fire.

The defendant contends in argument, also, that the policy was forfeited and void by reason of non-occupancy, long before the alleged mutual cancellation, and therefore that it is immaterial whether there was a cancellation or not. We do not think this defense is open to the defendant now. Not only did the defendant fail to plead non-occupancy, but in a letter to the plaintiff's counsel before suit was brought it said,—"The position of the Royal Insurance Co., Ltd., is that this policy was cancelled by mutual agreement with Elmer E. Bragg, and therefore this company does not owe him any money." It said nothing more. It may not be true in every case that a denial by an insurance company upon one ground will preclude it from setting up other grounds of non-liability, although it is held in some cases that a refusal to pay based on one specified ground will waive other grounds. 2 May on Insurance, sect. 504 A., citing *German Ins. Co.* v. *Ward,* 90 Ill., 550; *Marston* v. *Mass. Life Ins. Co.,* 59 N. H., 92; *Ben Franklin Fire Ins. Co.* v. *Flynn,* 98 Pa. St., see also *Smith* v. *German Ins. Co.,* 107 Mich., 270. The defendant's letter and its pleading might well have led the plaintiff to understand that mutual can-

cellation was the only defense to be offered, and to prepare and present his case accordingly. And apparently it was so presented below. The case having been reported upon the evidence, without rulings or findings, we think the defendant ought not now to be allowed to take advantage of a point which was not only not disclosed by the pleading, but which the defendant's letter and pleading gave the plaintiff reason to believe would not be set up. It has waived all other defenses than the one disclosed.

To recur then to the question of mutual cancellation of the policy. The burden of showing it is, of course, on the defendant. *Rosen* v. *Ins. Co.*, 106 Maine, 229; *Bard* v. *Ins. Co.*, 108 Maine, 506. The evidence is conflicting in some respects. But we think the weight of it supports the following statement of facts. The premises had been occupied by the plaintiff's tenant. A few days before the attempted cancellation, the tenant left them, upon the assurance, as he says, of the defendant's agent, that the policy would remain in force, if he stayed on the premises from Saturday to Monday each week. Shortly after the agent called the plaintiff to his office and informed him that the company would not continue the policy under such conditions, and had instructed him to cancel it. The plaintiff said he would have the tenant go back, or that he would occupy the premises himself. The agent replied that that would not do any good, that the policy was already cancelled, and told the plaintiff to bring in his policy and he would return to him the unearned premium. The plaintiff afterward surrendered his policy and received the premium.

The policy was in the standard form prescribed by statute. R. S., ch. 49, sect. 5. Under the terms of the policy the company could cancel the policy after giving the insured ten days' notice in writing, and tendering a ratable proportion of the premium, and not otherwise, except by mutual agreement. In this case no notice in writing was given, and no unearned premium tendered at the time. Therefore to establish cancellation mutual assent must be shown. In other words it must be shown that the plaintiff waived his contract right to written notice.

It was held in effect in *Rosen* v. *Ins. Co.*, supra, and *Bard* v. *Ins. Co.*, supra, that where an insured was in fact ignorant of the requirement for ten days' written notice, and ignorantly consented

to a cancellation of his policy, it was no waiver of his contract right to notice. For a waiver is the voluntary relinquishment of a known right. But the defendant seeks to distinguish this case from the Rosen and Bard cases on the ground that it does not affirmatively appear that the plaintiff was ignorant of his right. As to this, we say, first, that he who sets up a waiver must prove it. He must prove all the elements that create a waiver. It was incumbent on the defendant to prove that the plaintiff voluntarily relinquished a known right. This it has not done. Again, we think it cannot be said that there is no evidence of the plaintiff's ignorance. It is true that he was not asked directly whether he knew. The agent was asked if he himself knew, and he admitted that he did not at the time. The conduct of the plaintiff points, we think, almost indisputably to the inference of his ignorance of his right. Among other things the plaintiff testified that he asked the agent if he "didn't have any notice or anything," and that the agent replied, "No, we can cancel it at a minute's notice." This statement is not denied by the agent. If the plaintiff had then known that he was entitled to ten days' notice in writing, it is inconceivable that he would have taken the agent's assurance as true, which his subsequent conduct shows that he did. He acted upon that assurance, without further protestation as to the right of the company to cancel without notice. And it is not too much to say in view of common experience, that it ought not to require much evidence to show that ordinarily the insured are not familiar with all the provisions of their insurance policies.

We think this case falls within the doctrine established by the Rosen and Bard cases. Like the Rosen case it is a case, as the court then said, where "the agent, thinking he had the right, notified the insured of immediate concellation, and the insured ignorant of the protecting provision of his policy made no resistance." Accordingly we hold that although the plaintiff did consent to the cancellation of his policy he consented in ignorance of his contract right, and that his consent did not constitute a waiver of written notice as the policy provided. The policy remained in force until the time of the fire.

Judgment for the plaintiff for $675 and interest from the date of the writ.

STATE OF MAINE *vs.* ELLIS M. JONES.

Piscataquis. Opinion September 18, 1916.

Arrest of judgment. Continuando. Evidence supporting indictment. Forms of indictments. Indictment as common seller of intoxicating liquors. Necessary allegations.

The respondent was found guilty by the jury under an indictment charging him as a common seller of intoxicating liquors on the first day of January, 1915, "and continually thereafter up to the day of the finding of this indictment." On exceptions to the overruling of his motion in arrest of judgment, and to the refusal to give certain instructions,

Held:

1. That the averment as to the time when the offence was committed is sufficient in law to constitute a good indictment.
2. That it is not imperative that the Statute form of indictment should be used.
3. That the offence of being a common seller of intoxicating liquors may be established by the acts of the party done on a single day.
4. When, as in this case, the offence is alleged to have been committed on a particular day "and continually thereafter up to the day of the finding of this indictment" such allegation may be supported by proof of the commission of the offence on the particular day named or during any part of the period covered by the continuando.
5. There was no error in the refusal to instruct the jury that the government was bound to prove that the respondent was a common seller "without reasonable cessation, unceasingly and continuously" during the entire period named, and that the offence charged in the indictment "should be construed to mean a sale of intoxicating liquors each and every day between the dates set forth in the indictment."

Respondent indicted charged with being a common seller of intoxicating liquors. After verdict of guilty, respondent filed motion for arrest of judgment. Motion overruled. Respondent filed exceptions to ruling of court and also to refusal of presiding Justice to give certain requested instructions. Exceptions overruled.

Case stated in opinion.

James H. Hudson, County Attorney, for State.

L. G. C. Brown, and J. S. Williams, for respondent.

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

KING, J. The respondent was found guilty by the jury under an indictment charging him as a common seller of intoxicating liquors, and he brings the case to this court on exceptions to the overruling of his moion in arrest of judgment, and to the refusal to give two requested instructions.

1. In support of his motion in arrest of judgment he contends that the indictment is bad because it avers that the offence was committed on the first day of January, 1915, "and continually thereafter up to the day of the finding of this indictment." We think there is no merit in that contention. The offence being a continuing one was properly set out with a continuando, and the form of words used in the indictment for that purpose was appropriate and sufficient. It covers a definite period of time, and there is no uncertainty about it. It is more definite than the allegation, "on divers other days and times between that day and the time of finding of this indictment," which has often been employed and held sufficient in this and other states. The form of words used in alleging the continuando in the indictment in the present case is quoted as an appropriate form of allegation in Bishop on Crim. Procedure, Vol. 1, sec. 394.

The respondent claims, however, that the form of indictment set forth in sec. 72, c. 29, R. S., which alleges the continuando in the words "and on divers other days and times between" the particular day stated and the day of the finding of the indictment, should have been used. But it is not imperative that the statute form of indictment should be used. The Legislature did not so provide. It declared only that the "forms herein set forth . . . are sufficient in law." The provision of the section that the averments in the forms set forth "are sufficient in law" does not preclude the government from using other averments that are sufficient in law to constitute a good indictment. *State* v. *Reed,* 67 Maine, 127, 129.

2. The offence of being a common seller of intoxicating liquors may be established by the acts of the party done on a single day. *Com.* v. *Gardner,* 7 Gray, 497. And where, as in this case, the offence is alleged to have been committed on a particular day "and continually thereafter up to the day of the finding of this indictment" such allegations may be supported by proof of the commission of the offence on the particular day named or during any part of the period covered by the continuando. *State* v. *Small,* 80 Maine, 452. *Com.* v. *Wood,* 4 Gray, 11.

The requested instructions were, therefore, rightly overruled. They asked that the jury be instructed that under the indictment the government was bound to prove that the respondent was a common seller "without reasonable cessation, unceasingly and continuously" during the entire period named, and that the offence charged in the indictment "should be construed to mean the sale of intoxicating liquors each and every day between the dates set forth in the indictment." Such instructions would have been clearly erroneous. "Proof of the commission of the offence charged, during any portion of the time alleged in the indictment, would warrant a conviction. It is not necessary to prove it to have been committed during the whole time charged, although a conviction or acquittal, as already stated, would operate as a bar to a presecution for the same offence, during the entire time alleged." *Com.* v. *Wood,* supra.

Exceptions overruled.

STATE OF MAINE *vs.* JESSE PERRY.

Oxford. Opinion September 18, 1916.

Motion for new trial in criminal case amounting to felony. Motion for new trial in civil and criminal actions. To whom should motion for new trial be addressed.

The respondent, having been indicted for a violation of the provisions of sec. 8, chap. 125, Revised Statutes, by administering a certain drug or medicine to a woman pregnant with child with the intent to destroy such child and whereby such child was destroyed, and being put upon his trial, was found guilty by the jury. Thereupon he presented directly to the law court his motion for a new trial based upon the usual grounds that the verdict is against the evidence and the weight of the evidence.

Held:

1. In criminal cases, a motion to set aside a verdict as against evidence, or the weight of evidence, is to be decided in the first instance by the Justice presiding at nisi prius. This court sitting *in banc* has no jurisdiction of such a motion. There is no provision of Statute for it.
2. If a motion for a new trial in any criminal case amounting to a felony is denied by the Justice before whom the same is heard, the respondent may appeal from said decision to the next law term.
3. As this court has no jurisdiction of the respondent's motion for a new trial, the entry must be, motion dismissed.

Respondent indicted for violation of provisions of chapter 125, section 8, Revised Statutes of Maine. Respondent found guilty. Motion for new trial filed. Motion dismissed.

Case stated in opinion.

Albert Beliveau, County Attorney, for State.

George A. Hutchins, for respondent.

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

KING, J. The respondent, having been indicted for a violation of the provisions of sec. 8, c. 125, Revised Statutes by administer-

ing a certain drug or medicine to a woman pregnant with child with the intent to destroy such child and whereby such child was destroyed, and being put upon his trial, was found guilty by the jury. Thereupon he presented directly to the Law Court his motion for a new trial based upon the usual grounds that the verdict is against the evidence and the weight of the evidence.

In criminal cases a motion to set aside a verdict as against evidence or the weight of evidence is to be decided in the first instance by the Justice presiding at nisi prius. This court sitting in banc has no jurisdiction of such a motion. There is no provision of statute for it. *State* v. *Hill,* 48 Maine, 241; *State* v. *Smith,* 54 Maine, 33; *State* v. *Gilman,* 70 Maine, 329. If a motion for a new trial in any criminal case amounting to a felony is denied by the justice before whom the same is heard the respondent may appeal from said decision to the next law term. Section 27, c. 135, R. S., as amended by chapter 184, Laws 1909, and chapter 18, Laws 1913.

As this court has no jurisdiction of the respondent's motion for a new trial the entry must be,

Motion dismissed.

NOBLE W. HASTEN, et al., *vs.* BALTIMORE & OHIO RAILROAD.

Cumberland. Opinion September 22, 1916.

Chapter 84, Section 54, Revised Statutes, interpreted. New Trial. Motions for new trial; when made. When decree granting new trial shall be filed.

The power of the Justices of the Supreme Judicial and Superior Courts to grant new trials in civil cases, given them by R. S., Chap. 84, Sec. 54, must be fully and completely exercised by them at the term at which the verdict was rendered.

Action of assumpsit to recover wages due plaintiffs, tried at March term, 1915, Superior Court, Cumberland county. Actions were brought under and by virtue of an assignment claiming to have been given by real plaintiffs. At trial, signatures of assignors were denied. Verdict for defendant. Plaintiff filed motion for new trial. Hearing upon same was had, but no docket entry was made of the finding of the court and no record made until February term, 1916, when the docket entry showed that motion for new trial had been granted. Defendant filed exceptions to the decree or order of the presiding Justice. Exceptions sustained.

Case stated in opinion.

Anthoine & Talbot, for plaintiffs.

Symonds, Snow, Cook & Hutchinson, for defendant.

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

BIRD, J. This cause was tried before a jury at the March term, 1915, of the Superior Court of Cumberland county. A verdict was rendered for defendant. At the same term the plaintiff filed a motion for new trial addressed to the presiding Justice and it was then heard. At the same term the presiding Justice signed a decree or order to the effect that the motion for new trial be granted

and a new trial ordered. The conclusion of the presiding Justice was not announced nor was his decree or order filed before final adjournment of the term. At the February term, 1916, the presiding Justice filed the order above recited and by his direction, the following entry was made upon the docket "Feb. T. 1916. 10d. Decree of thirtieth day of March term, 1915, granting motion for new trial f'd." To the decree or order and its filing the defendant excepted.

In 1841, the Legislature enacted that motions for new trials as against law or evidence be heard by the Law Court. Pub. Laws, 1841, c. 171, § 19 (R. S., 1841, c. 115, § 10). The jurisdiction thus conferred was exclusive as regarded civil actions. See *Wallace* v. *Columbia,* 48 Maine, 436, 439; see also *State* v. *Hill,* 48 Maine, 241 and *State* v. *Gilman,* 70 Maine, 329, 334. In 1872 it was provided that "any justice of the Supreme Judicial Court may set aside a verdict and grant a new trial in a case tried before him when in his opinion the evidence in the case demands it. Such verdict must be set aside at the same term at which it was rendered. . . ." Pub. Laws, 1872, c. 83.

This provision as amended by c. 44 of the Pub. Laws of 1881, giving the same power to justices of the Superior Courts, has now become § 54 of c. 84, R. S. (1903). In it must be found whatever power to grant new trials is now enjoyed by the justices mentioned. By the clear words of the statute this power must be exercised by the Justice at the term at which the verdict was rendered. And it is so held in *Averill* v. *Rooney,* 59 Maine, 580, 581 and *McKenney* v. *Alvord,* 73 Maine, 221, 225.

It is unnecessary to say that a verdict is not set aside merely because the mind of the justice hearing the motion reaches a conclusion favorable to the movent unless such conclusion is evidenced by matter of record, or by some order or finding which may become matter of record. This is not the case of the seasonable filing of an order or due declaration of a decision or order which is not entered or minuted through the ommission or misprision of the clerk. See *Lewis* v. *Ross,* 37 Maine, 230, 233, 235; *Limerick, Pet'r,* 18 Maine, 183, 186, 187; *Hall* v. *Williams,* 10 Maine, 278, 290.

The exceptions must be sustained and plaintiff remitted to such proceedings for a new trial after judgment as the law affords.

Exceptions sustained.

MYRTLE E. BORDERS *vs.* BOSTON & MAINE RAILROAD.

York. Opinion September 23, 1916.

Duty of traveler approaching railroad crossing. Rules of law where defendant company maintains gates or flagmen. What bills of exceptions should contain.

1. When a bill of exceptions contains no statement whatever of the issues and contentions in the case, the court is not bound to consider the exceptions, and must not be expected to do so.
2. When a railroad company maintains a flagman at a highway crossing to warn travelers of approaching trains, to be absent from his post when a train approaches is negligence on the part of the flagman for the consequence of which the company is liable to a traveler misled by the absence of the flagman, if he himself is in the exercise of due care.
3. If a person is suddenly confronted by an unexpected peril, and must choose on the instant between alternative hazards, it is not necessarily negligence, if he chooses unwisely. A mere error in judgment is not of itself contributory negligence.
4. When one in imminent peril is compelled to choose instantly between two hazards, he is not guilty of contributory negligence if he exercises that degree of care that an ordinarily prudent person might exercise under the same circumstances.
5. Ordinarily, for one to attempt to cross a railroad track without first looking and listening for a coming train is as a matter of law negligence per se.
6. But, when the flagman usually stationed at a crossing is absent, the traveler has a right to rely to some extent upon the absence of the flagman. And in such a case for the traveler to attempt to cross without looking and listening is not negligence per se. The question of negligence is then one of fact.

7. In a case where the jury might reasonably find that the traveler knew that the railroad company kept a flagman to guard the crossing, that the traveler saw the flagman seventy feet from the crossing, giving no signal of warning, that he listened, but heard no sound of bell or whistle, that the only whistle sounded, if there was any, was not a steam whistle, but an airbrake whistle, and that there was a building between him and an approaching train which prevented him from seeing it, the jury might properly conclude that the traveler was not guilty of contributory negligence in going on to the track without further inspection or test.

Action on the case alleging negligence on the part of the defendant company in operating its cars. Verdict for plaintiff. Defendant filed motion for new trial; also exceptions to certain rulings of presiding Justice, and to refusal of court to grant certain requested instructions. Motion and exceptions overruled.

Case stated in opinion.

Percy N. H. Lombard, and Leroy Haley, for plaintiff.

George C. Yeaton, and Emery & Waterhouse, for defendant.

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

SAVAGE, C. J. The plaintiff was injured in a collision with one of the defendant's trains where its track crosses Atlantic Avenue in Old Orchard, and brought this suit for damages occasioned thereby. He recovered a verdict, and the defendant brings the case here on a motion for a new trial and on exceptions to instructions given to the jury and refusals to instruct.

THE EXCEPTIONS. The bill of exceptions contains no statement whatever of the issues and contentions in the case. Not even is the evidence made a part of the bill. The court has had occasion repeatedly to advise the profession that the excepting party must *on the face of the bill* show that he has been aggrieved, and that the bill must state enough of the issues and contentions in the case to enable the court to determine whether the rulings complained of were pertinent, apposite and relevant, or otherwise, and whether they were harmful or immaterial. All these are to be determined upon the statements in the bill itself. Such a statement cannot be omited, even when the evidence is made a part of the bill. The court has also repeatedly said that it will not feel bound

to consider exceptions so irregularly presented. They do not conform either to the statute or approved practice. *McKown* v. *Powers,* 86 Maine, 291; *Wilson* v. *Simmons,* 89 Maine, 242; *Salter* v. *Greenwood,* 112 Maine, 548; *Dennis* v. *Packing Co.,* 113 Maine, 159. This being the rule, the court will not hereafter be expected to consider such bills of exceptions, except to prevent manifest injustice. In this case, we consider them only to say that we discover no error.

THE MOTION. The evidence shows that Grand avenue in Old Orchard runs parallel with, and about eighty feet distant from, the defendant's tracks for several hundred feet until it reaches Atlantic avenue. Atlantic avenue runs at a right angle with Grand avenue and crosses the tracks. Before the accident the plaintiff, who had been riding along Grand avenue in an automobile which he owned and operated, turned into Atlantic avenue to cross the railroad tracks, 80 feet distant. At the same time a "dummy train," so called, which the defendant was operating at that season of the year between Old Orchard station and Camp Ellis, was being moved from Camp Ground station towards the Atlantic avenue crossing. The train consisted of a locomotive, combination baggage and smoking car and passenger car. The train was being backed down the track, the passenger car being in front as it moved. The passenger car was equipped with an air brake whistle, which it was the duty of a brakeman to sound as the train approached crossings. The defendant also had a crossing tender or flagman at the Atlantic avenue crossing, whose duty it was to give warning to travelers of approaching trains. The plaintiff was familiar with the place, and knew that the defendant kept a flagman at the crossing.

It is contended, and is probably true, that while traveling along Grand avenue, the plaintiff might at some points have seen the tracks towards Camp Ground station if he had noticed, but he did not notice. But after he turned into Atlantic avenue, his view of the track was obstructed by a wooden building, until he reached a point ten or twelve feet from the track. He was then proceeding at the rate of ten or twelve miles an hour. When, at a distance of ten or twelve feet from the track, he first saw the approaching train, he attempted to increase his speed and cross in front of the

train. But the train was so near that it struck his car before it cleared the track, and occasioned the injuries complained of.

The claimed negligence of the defendant is twofold; first that the customary signals required by law to be given by a train approaching crossings, namely the ringing of a bell and the sounding of a steam whistle, were not given; and secondly, that the flagman was not at his station, and gave no warning.

As to the first ground, the plaintiff and several of his witnesses testify that they heard neither bell nor whistle. On the other hand, the trainmen testify that the bell was rung all the way from Camp Ground station, and that the air brake whistle was sounded when approaching Atlantic avenue. Be that as it may, six witnesses testify that when the plaintiff was on Atlantic avenue, approaching the crossing, the flagman was on the piazza of his house, seventy feet from the track, and six other witnesses testify that he was in his proper place in the road, waving his flag, when the plaintiff went by him. In this situation, we certainly are not warranted in saying that the jury could not properly find that the flagman was not in his place and did not give warning to the plaintiff. If this was so, it was a negligence on the part of the flagman, for the consequences of which the defendant would be liable to a traveler misled by the absence of the flagman, if he himself was not guilty of contributory negligence. *State* v. *B. & M. R. R.*, 80 Maine, 430.

And it is the contributory negligence of the plaintiff that the defendant mainly relies upon as a defense. For one thing it is contended that it was negligence for the plaintiff not to stop his car when he saw the danger, instead of trying to speed up and cross in front of the train. Whether the plaintiff could have stopped his car soon enough to avoid being struck by the train is problematical. Some of the evidence is uncertain, as for instance the precise speed at which he was traveling, and the precise point where he first saw the train, and to these may be added the capacity of the car to be stopped. It may be possible that he could have stopped his car, although at his rate of speed he had less than two seconds in which to determine what to do, and to do it. But the answer to the contention is this. It is well settled law that if a person is suddenly confronted by an unexpected peril, and must choose on

the instant between alternative hazards, it is not necessarily negligence if he chooses unwisely, not even if it appears that by choosing the other alternative he would have escaped danger entirely. *Larrabee* v. *Sewall,* 66 Maine, 376; *Tosier* v. *Haverhill, etc., Ry. Co.,* 187 Mass., 179. A mere error in judgment is not of itself contributory negligence. *Wolf Mfg. Co.* v. *Wilson,* 152 Ill., 9; *Hoyt* v. *R. R. Co.,* 6 N. Y. St., 7. An instinctive effort to escape a sudden impending danger, resulting from the negligence of another, does not relieve the latter from liability. *Coulter* v. *Am. Merch. U. Exp. Co.,* 56 N. Y., 585; *Pittsburgh, etc., Ry. Co.* v. *Martin,* 82 Ind., 476; *Haney* v. *Ry. Co.,* 38 W. Va., 570; *Schultz* v. *Ry. Co.,* 44 Wis., 638. When one in imminent peril is compelled to choose instantly between two hazards, he is not guilty of contributory negligence if he exercises that degree of care that an ordinarily prudent person might exercise under the same circumstances. It is always a question of ordinary care. And ordinary care is a question for the jury. In this case the plaintiff was in a trap. The jury could find that he was led into the trap, in part at least, through the negligence of the flagman. The jury must have found that under all the circumstances the plaintiff was not guilty of contributory negligence in not trying to stop his car. And we perceive no sufficient reason to disturb their finding.

The defendant contends further, in effect, that even if the flagman was absent, due care on the part of the plaintiff required him to listen, and to look, and if he could not see, to stop, before he reached the crossing, and particularly so, because it was a "blind crossing." Though negligence is a question for the jury, when the facts are in dispute, or when intelligent and fair minded men may reasonably differ in their conclusions, *Romeo* v. *B. & M. R. R.,* 87 Maine, 540, yet, because the inference of negligence in such cases is so indisputable, the rule is firmly established in this State and elsewhere that it is as a matter of law negligence per se for one to attempt to cross a railroad track without first looking and listening for a coming train if there is a chance for doing so. *Lesan* v. *M. C. R. R. Co.,* 77 Maine, 85; *State* v. *M. C. R. R. Co.,* 77 Maine, 538; *Chase* v. *M. C. R. R. Co.,* 78 Maine, 346; *Allen* v. *M. C. R. R. Co.,* 82 Maine, 111; *Smith* v. *M. C. R. R. Co.,* 87 Maine, 339; *Romeo* v. *M. C. R. R. Co.,* 87 Maine, 540. It is the

duty of the traveler to listen and to look, and if obstacles prevent his looking, he should stop if there is any room for doubt. The rule of due care is not satisfied with any lesser degree of watchfulness. And if all travelers observed this rule the number of railroad crossing accidents would be reduced to a negligible minimum. In this case the plaintiff did not look until too late. He could not. He did not stop. Except for the matter of the absent flagman, it would clearly be a case of negligence on his part which would bar his right to recover.

The crucial question then is whether the absence of the flagman should modify the rule, and if so, to what extent. This question has been before several courts for decision, and they have come to differing conclusions. And cases from the same state are not always easily reconcilable. According to one view, the failure to look and listen for the approach of a train when the flagman is absent cannot be said to constitute contributory negligence. A railway company by stationing a flagman at a crossing and making it his duty to display proper signals of warning whenever a train is approaching may give the public the right to rely upon the absence of signals of warning, and to presume that the tracks are clear. This view is supported by *Berry* v. *P. R. Co.*, 48 N. J. L., 141; *St. Louis, etc., R. Co.*, v. *Amos*, 54 Ark., 159; *Chicago, etc., R. Co.* v. *Clough*, 134 Ill., 586; *Spencer* v. *Illinois, etc., R. Co.*, 29 Iowa, 55; *Cleveland, etc., Ry Co.* v. *Schneider*, 45 Ohio St., 678. On the other hand, it has been held that the fact that a flagman, usually stationed at a crossing to warn travelers, is absent, will not excuse a traveler from the duty to stop, look and listen, and that the traveler has no right to interpret the absence as an assurance of safety. *Smith* v. *Wabash R. Co.*, 141 Ind., 92; *McGrath* v. *New York, etc., R. Co.*, 59 N. Y., 468; *Greenwood* v. *Philadelphia, etc., R. Co.*, 124 Pa. St., 572. There are other cases which seem to qualify the last preceding rule by holding that the traveler has a right to rely to some extent upon the absence of the flagman, but is not excused from using his senses to the extent that an ordinarily prudent man would do. *Tyler* v. *Old Colony R. R.*, 157 Mass., 336; *Merrigan* v. *B. & A. R. Co.*, 154 Mass., 189; *Delaware & H. Co.* v. *Larned*, 161 Fed Rep., 520.

We think the modified rule is the more logical one. It is more consonant with reason, and accords better with what we understand ordinary care to mean, the care that ordinarily prudent persons might have exercised under the like circumstances. The exercise of ordinary care is the test after all. The modification that the traveler may rely to some extent upon the absence of the flagman removes the case from the class of negligence per se cases. It makes it a question of fact whether the traveler in view of all the circumstances, including the absence of the flagman, was in the exercise of ordinary care. *Tobias* v. *Michigan, etc., R. Co.,* 103 Mich., 330; *Baltimore, etc., R. Co.* v. *Carrington,* 3 App. D. C., 101.

To this middle view this court has hitherto inclined. In *State* v. *B. & M. R. R.,* 80 Maine, 431, which was a case of open gates, the deceased heard the whistle of an approaching train, but had reason to suppose it was on another nearby line of tracks. The court said, "While the neglect of the company to perform its duties does not excuse the traveler in a neglect of the duties and degree of care which the law imposes on him, still, in making his calculation for crossing a railroad track safely, he is often justified in placing some reliance on a supposition that the company will perform the obligation resting on it, where there is no indication that it will do the contrary. If the gates were open and the crossing unattended by a flagman, then these persons had a right to accept the fact as some evidence that the train would not attempt to pass the crossing at a faster speed than six miles an hour. Of course full reliance cannot always be placed on an expectation that a railroad company will perform its duties when there is any temptation to neglect them, because experience teaches us that it would not be practicable to do so. But such an expectation has some weight in the calculation of chances, greater or less according to the circumstances. . . . If the presence of a flagman and closed gates indicate a passing train, certainly the absence of the flagman and open gates must be evidence that a train is not presently due or expected."

Again in another case growing out of the same accident, *Hooper* v. *B. & M. R. R.,* 81 Maine, 260, the court said: "Open gates invite passing. Closed gates forbid passing. And by these signals thousands of travelers are governed every day. And as gatemen

usually perform their duties with fidelity, we think it would be a wrong to them as well as to travelers to hold that every one who trusts them is guilty of a want of ordinary care. It would not be true. Ordinarily the great mass of the community do trust them." These cases are not precedents for the case at bar, because the circumstances were widely different. But the language of the court is significant. In *Romeo* v. *B. & M. R. R.*, supra, the court made an application of the rule adversely to the plaintiff, holding that a traveler on foot, having a sufficiently plain view of the track could not be held to have been misled by open gates to such an extent as to come into collision with a rapidly moving train. But in the same connection, as a part of the discussion, the court said: "A person approaching a railroad crossing, in a carriage, with a view of the track obstructed, might in the exercise of ordinary care, be led to rely upon the upright arms of a gate until it was too late to control his horses or turn him aside."

In this case the plaintiff knew that the defendant kept a flagman to guard the crossing. Approaching the crossing he says he saw the flagman on his piazza seventy feet from the crossing, and that he listened, but heard no sound of bell or whistle. Others within hearing say they heard none. There was an obstruction between the plaintiff and the train, which prevented him from seeing the train. When he passed the obstruction, he says, as we understand him, that he glanced up the track in the direction of the train and saw it coming not many feet away. Some twenty or thirty feet in front of him was an express team which crossed in safety. Under such circumstances was the plaintiff necessarily guilty of contributory negligence?

It is to be noted that this case differs from those where the mere absence of the flagman has been relied upon. Here the flagman was absent from his post, but he was in sight. He was awake. He was where he would be presumed to know by his senses when a train was approaching. Under such circumstances a traveler might the more easily and naturally be lulled into a sense of security. This fact brings the case quite near the line of cases which hold that when a flagman is at his post and fails to give a warning signal it is an assurance of safety, and an invitation to cross. *Robbins* v. *Fitchburgh R. Co.*, 161 Mass., 145. Again, the steam

whistle, which signal travelers are accustomed to rely upon perhaps more than any other, and which the statute requires to be blown before reaching a crossing except in cities and villages, was not blown, but only an air brake whistle on the car.

In view of all the circumstances, we do not think that we should say that the conduct of the plaintiff was so conclusively negligent that a jury of fair minded men would not be authorized to find that ordinarily prudent men might have done as the plaintiff did. And that is the final test.

Motion and exceptions overruled.

GEORGE A. SWASEY *vs.* MAINE CENTRAL RAILROAD COMPANY.

Piscataquis. Opinion September 28, 1916.

Contributory negligence. Master and servant. Servant using unsafe method to perform work.

1. Where freight cars were equipped with automatic couplers so as to couple by impact, as required by Act of Congress, March 2, 1893, chapter 196, section 2, a brakeman who, after failing to recouple cars by the automatic coupler went between moving cars and attempted to recouple them with his hands, when there was no necessity or circumstances that made it his duty to try such an unsafe method of work, was guilty of contributory negligence, defeating his right of recovery for injuries sustained by being caught in a guard rail where he was run over and injured.
2. Where the master has provided a safe method for the servant to perform the work assigned to him and the servant knows it, and instead of using the safe method provided uses an unsafe method, without directions so to do from his employer, he does so at his own risk and is guilty of contributory negligence if injured while performing the labor in such manner.

Action on the case against defendant company for injuries received while in the employ of the defendant company as brakeman. Plaintiff filed motion for the allowance of amendment to his writ and the amendment was allowed. Defendant company

excepted to the allowance of the amendment and exceptions were allowed. Defendant company pleaded general issue. Verdict for plaintiff. Motion sustained. New trial granted.

Case stated in opinion.

M. L. Durgin, and Hersey & Barnes, for plaintiff.

Fellows & Fellows, for defendant.

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

HALEY, J. This is an action on the case brought by the plaintiff against the Maine Central Railroad Company to recover damages for injuries received while in the employ of the defendant company as a brakeman.

The plaintiff claims that the defendant negligently permitted, and allowed a certain guard-rail in its yard, at Oakland Junction and station, to be unblocked, unadjusted, unfilled and out of repair, and that, by reason of that negligence, while in the discharge of his duty as a brakeman in coupling and uncoupling cars in the yard, with all due care on his part, he caught his foot in said guard-rail and was held there while the train ran over him, causing the loss of his leg and inflicting other serious injuries. The jury returned a verdict for the plaintiff, and assessed damages at $8375, and the case is before this court upon a general motion to set aside the verdict, and also upon exceptions.

The plaintiff was thirty-two years old at the time of the accident, unmarried, and, prior to the accident, had worked at railroad work for seven years, as fireman, car repairer, car inspector and brakeman, and at the time of the injury, January 2, 1912, he was working as a brakeman for the defendant.

In the railroad yard at Oakland Junction, where the accident happened, are a number of tracks with turn-outs, side-tracks and switches, and there are about eighteen or twenty guard-rails in the yard. The guard-rails are constructed of bent rails placed on the inside of the main rail to keep the car wheels from leaving the track when switching from one track to another. The statute of the State obliges all railroads to keep these guard-rails blocked so that the feet of the employee cannot be caught therein. It is the

claim of the defendant that, at the time of the accident, its guard-rails were all properly blocked and in a safe condition.

The accident happened at about six o'clock in the morning. The plaintiff was acting as middle brakeman, and went with his lantern into the yard, with the other members of the crew, to make up a freight train for Kineo. The engine, with the buggy or caboose, went up the track called the main turn-out, where the caboose was left to await the final making up of the train. The plaintiff then went down with the engine, which hooked on to a string of cars on the side track and hauled them over the switch and started to back them up towards the caboose. At this time the cars were moving towards the caboose up what was called a one per cent. grade between two and three miles an hour. The plaintiff says that Smith, the head brakeman, ordered him to pull the pin of the fourth car, which he did, by operating a lever on the end of the car which raised the pin and uncoupled the car. All this was done by an automatic coupler, and done without going between the cars. The plaintiff was then informed by Smith, the head brakeman, that they didn't want that car, and he attempted to recouple the car by the use of the automatic coupler, but did not stop and start the cars, the pin did not drop, the chain slackened and by wiggling the lever with his hand he could not get the pin to drop or make the recouple by the use of the automatic coupler. Finding that he could not recouple the cars by moving the automatic coupler, as he was attempting to do, he put his lantern over his left arm, stepped in between the cars, grasped the iron lever of the car in front of him with his left hand, and attempted to place the pin by working it with his hand so it would drop and form a recoupling. The plaintiff testified that as he touched the pin with his right hand he felt his left foot catch in the guard-rail, which held him firmly to the track. The car, on which his left hand had grasped the lever, kept on moving, his foot would not release and he was pulled until obliged to drop upon the track between the rails. The cars passed over him and he received frightful injuries.

It is the claim of the defendant that the evidence shows that the plaintiff's foot did not catch in the guard-rail. It was admitted that the cars in question were equipped with automatic couplings, and that said couplers were in good condition, and no claim was

made that there was any defect in or about the cars or the couplings. The case shows that the cars in question were equipped with the automatic couplers; coupling by impact and uncoupling by the use of a lever on the side of the cars, as required by the Federal statute which provides: "That on and after the first day of January, 1898, it shall be unlawful for any such common carrier to haul, or permit to be hauled, or use or used on its line any cars moving interestate traffic not equipped with couplers, coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars. Act of March 2, 1890. Sec. 2, ch. 196, 27 Stat. L. 531.

The defendant relies upon the rule of law that, as between master and servant, if the servant has been guilty of contributory negligence, he can not maintain an action and recover damages for injuries that he sustained when his negligence contributed to the accident.

The cars between which the plaintiff was working at the time he received his injuries were equipped with automatic couplers, as required by the act of Congress. The coupler is a piece of mechanism by which, without going between the cars, but by operating a lever standing outside of the rail, the pin may be raised and the car uncoupled, so that the necessity of going between the cars for the purpose of uncoupling is anticipated by the lever. To couple the cars the mechanism requires that the cars shall be driven together by their own momentum, and the impact, when thus thrown together, causes the coupling contrivance to drop the pin into its place, and by this impact the necessity of going between the cars is obviated, and it is unnecessary, under ordinary circumstances, for the brakeman to go between the cars for the purpose of coupling or uncoupling them, and there is nothing in the record showing any necessity for the plaintiff to go between the cars for the purpose of coupling or uncoupling them, as he was attempting to do.

The plaintiff was an experienced railroad man. He knew of the danger of going between moving cars. He knew that the cars were equipped with automatic couplers; that the couplers were in working order, and that he could couple and uncouple the cars by the use of the automatic coupler without going between them.

There was no necessity or stress of circumstances that compelled him, or made it his duty to go between the cars. He knew that if he used the coupler in the manner that it was intended to be used, he could couple and uncouple the cars in safety, and instead of employing the safe method of doing the work, he saw fit to step into a dangerous position between moving cars and by the use of his hand to compel the coupler to work in a different manner than it was intended to work.

Where the master has provided a safe method for the servant to perform the work assigned to him, and the servant knows it, and, instead of using the safe method provided, uses an unsafe method without directions to do so from his employer, he does so at his own risk and is guilty of contributory negligence if injured while performing the labor. *Leard* v. *Paper Co.,* 100 Maine, 59; *Perkins* v. *Paper Co.,* 104 Maine, 109. There are many Federal cases which hold that the conduct of the plaintiff in this case was negligence, and if it contributed to his injury that he can not recover.

A parallel case is *Gilbert* v. *Railway,* 128 Federal, 529, in which the duty of the brakeman to use the automatic couplers was fully discussed, and the court said: "The devolution of this duty upon the carriers necessarily imposed upon their servants the corelevant duty of using the equipment thus furnished to them and of refraining from going between the ends of the cars to couple or uncouple, unless compelled to do so by necessity. Under this legislation the breach in either of the duties became the failure to exercise ordinary care and constituted actionable negligence. . . . The danger from the negligence of the defendant in permitting the guard-rail to become and remain unblocked was of the same nature, and was in reality a part of, the danger to which the plaintiff exposed himself when he stepped between the cars, and his ignorance of or danger from the unblocked guard-rail, while he knew the general and ordinary danger of the place, constitutes no legal excuse for his want of ordinary care, and cannot be permitted to relieve him from its fatal effects. This view of this question is sustained by a moment's consideration of the fact that the contention of the plaintiff's counsel is suicidal. If, as they argue, the plaintiff is guilty of no actionable or contributory negligence in entering and walking between the cars because he did not know or anticipate the negli-

gence of the defendant in leaving the guard-rail unprotected, then by the same mark the defendant was guilty of no actionable negligence in leaving the guard-rail unprotected, because it did not know or anticipate that the plaintiff would be guilty of the negligence of entering and walking between the moving cars uncoupling them, and if he had not done so he would not have been injured. The plaintiff then failed to discharge his duty to exercise ordinary care when he entered and walked between the moving cars to uncouple them, and this negligence directly contributed to his injury."

As the record clearly shows that the plaintiff was guilty of negligence in stepping between the moving cars to couple and uncouple them, and that his negligence contributed to the injury received by him, by the well settled rules of the common law his contributory negligence is a bar to this action, and it is unnecessary to consider the exceptions.

Motion sustained.
New trial granted.

STATE OF MAINE *vs.* HIRAM SCOVIL STEEVES.

Oxford. Opinion September 28, 1916.

In criminal actions, to whom shall motion for new trial be addressed.

1. A general motion for new trial in a criminal case is to be addressed to and heard by the Justice presiding at the trial.
2. So a motion for new trial upon the ground of surprise at the trial before the jury must be addressed to and heard by the Justice presiding at the trial.
3. Where a motion for new trial is based upon alleged ground of surprise at the trial and such ground is not apparent from the record, it is not to be inferred but is a fact to be proved and the motion must be verified by affidavit.

Respondent indicted for polygamy under chapter 125, section 4, Revised Statutes. Verdict of guilty. Motion for new trial filed by respondent. Motion overruled.

Case stated in opinion.

Albert Beliveau, County Attorney, for State.

George A. Hutchins, for respondent.

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

BIRD, J. The defendant was indicted under section 4 of chapter 125, Revised Statutes and, upon trial the jury having rendered a verdict of guilty, filed a motion for new trial upon the following grounds:

1. Because said verdict is against law; 2, against the evidence; 3, against law and evidence and the manifest weight of evidence and 4, "because the respondent says he was taken by surprise by the change of evidence given by the principal witness against him in this court, from evidence given by the same witness in the lower court upon material facts affecting one of the principal issues in the case." No motion for continuance was made during the trial.

As to the first three grounds upon which the motion is based, we must hold that the motion is improperly here. Such motion for new trial in a criminal case should be addressed to and heard by the Justice presiding at the trial. It was so held in *State* v. *Hill,* 48 Maine, 241; and also in *State* v. *Gilman,* 70 Maine, 329, 334. See also *State* v. *Read,* 62 Maine, 134, 135, 136; *State* v. *Smith,* 54 Maine, 33, 36 and *Brown* v. *Moore,* 79 Maine, 216, 217, in which *State* v. *Hill,* supra, is cited with approval. No change in the statutes upon which the conclusions reached in the last named case were based has been discovered. They remain as then, save as amended by Pub. Laws, 1889, c. 152, now R. S., c. 135, § 27, as amended by Pub. Laws, 1909, c. 184 and Pub. Laws, 1913, c. 18. These amendments granting a right of appeal from the decision of the presiding Justice upon motion for new trial in certain criminal cases impliedly recognize the rule of law declared by *State* v. *Hill,* supra. The motion must be dismissed as to the first three grounds.

The court finds, however, upon an examination of the record, no reason for disturbing the verdict for either of the first three reasons urged.

The fourth ground upon which a new trial is asked is founded upon a cause not shown by the evidence reported. That defendant was surprised by the change of evidence is not apparent from the record and it is not to be gathered by inference only. It is a fact to be proved and, such being the case, the motion should have been verified by affidavit as to the existence of surprise. Rule XVI; *Emmett* v. *Perry,* 100 Maine, 139, 141. Omitting comment upon the indefiniteness and lack of particularity of the allegation of the fourth ground of the motion, we think the motion should have been addressed to the presiding Justice. In *State* v. *Gilman,* supra, where a motion for new trial on account of the alleged incompetence of a juror was filed and carried to the Law Court, it was held that the court was without jurisdiction and that such motion is addressed to the discretion of the Justice presiding at nisi prius and is to be decided by him. That case is decisive of the present case.

It may not be improper to say that testimony of a witness different from that which he gave on a previous occasion has been held in cases not unlike that under consideration, not to constitute such mistake or surprise as to warrant the granting of a new trial. *State* v. *Webb,* 20 Wash., 500, 501; *State* v. *Miller,* 24 W. Va., 802, 804-805; see also *McNeal* v. *State,* 43 S. W. Rep., 792; *Dillingham* v. *State,* 37 Id., 771.

Motion overruled.

MELBOURNE C. SMITH AND THOMAS M. HOYT

vs.

BANGOR & AROOSTOOK RAILROAD COMPANY.

Aroostook. Opinion September 28, 1916.

Duty of common carriers to shippers of freight. What is reasonable care on part of common carriers.

1. It is the duty of a common carrier to use reasonable care and diligence in the transportation of freight given to it to carry.
2. What is reasonable diligence by a railroad company in the transportation of freight depends upon circumstances, and one of the circumstances in transportation is the perishable character of the freight, or otherwise.
3. When a railroad company accepts perishable property, such as potatoes, to be shipped over the line at a season of the year, when in the course of nature severely cold weather is to be apprehended, it is bound to use great diligence in forwarding the property.
4. A shipper, even of perishable goods, cannot require his freight to be started until the arrival of a freight train.
5. But when there were accidents and delays, avoidable or not, and when the freight has lost its regular schedule, and, being perishable, is in imminent danger of being lost, reasonable care may require a carrier to do special service, and expedite the carriage, without waiting for a regular train.
6. When a carrier permitted a car of potatoes to stand upon a siding, in freezing weather, from 36 to 40 hours, without apparent necessity, or apparent reason, except the waiting for the arrival of a regularly scheduled freight train which might take it along, the jury was warranted in finding that it was guilty of negligence.

Action on the case to recover damages for alleged negligence of defendant company in failing to reasonably transport goods, or property of the plaintiff delivered to defendant. Defendant pleaded general issue and brief statement alleging that the delay in transit was unavoidable on account of the severity of the winds and snow-

storms, and that the defendant company used reasonable diligence in transporting the property of the plaintiff. Verdict for plaintiff. Motion for new trial filed by defendant. Motion overruled.

Case stated in opinion.

Hersey & Barnes, for plaintiff.

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

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

SAVAGE, C. J. Action on the case for negligent delay in transportation of car of potatoes from Presque Isle, Maine, to Onley, Va., in consequence of which some of the potatoes were frozen en route. The case comes up on the defendant's motion for a new trial.

The potatoes were in a refrigerator car furnished by the defendant, which was so fitted as to protect the potatoes from freezing for from 10 to 13 days in ordinary winter weather, and from 5 to 7 days in "cold snaps." The usual running time for freight trains from Presque Isle to Northern Maine Junction, where the potatoes were to be delivered to the succeeding carrier, the Maine Central Railroad, is about twenty-four hours. And the usual time of transportation from Presque Isle to Onley is about eleven days.

The car was loaded at Riverview siding, three miles north of Presque Isle, on Friday, February 6, 1914, but too late to be taken by any regular freight train that day. But on February 7 it was moved by the defendant to Presque Isle, the billing point, but too late for the regular day freight trains. In fact a bill of lading had been issued, February 6. This car was one of twenty-two cars of potatoes which made up train "Extra 70." The train left Presque Isle at 12.15 A. M., February 8. It encountered various troubles from drifting snow on the track. Apparently, under the conditions, the load was too heavy for the locomotive. And this car with three others was set off during the forenoon of February 8, at Mapleton, six miles from Presque Isle, where it remained until 6 P. M., February 9, when it was picked up by the first regular freight train that passed. It reached Northern Maine Junction at 11.20 P. M., February 13, one hour short of six days from Presque

Isle. The distance was 184 miles. In the meantime it had stood on sidings at Oakfield thirty-seven and one-half hours, and at Millinocket thirty-six hours.

But for the delay at Mapleton, there is nothing in the case to show that the car would not probably have run through to Northern Maine Junction, and to a warmer climate in ample time to prevent the potatoes from freezing, though it would probably have been unable to make schedule time, for the track conditions were undoubtedly bad.

By reason of the delay, the car got in behind a derailed passenger train at Belvidere, on February 10, and two stalled freight trains south of Millinocket, February 12, and got into a severe storm, accompanied by extreme cold, which caused it to be laid up at East Newport, on the Maine Central Railroad from 5.15 P. M., February 14 to 11.55 A. M., February 16. We think it unnecessary to discuss in detail the misadventures of the car after it left Mapleton. The delay at Mapleton, as we have seen, brought the car into the teeth of cumulative troubles further on.

The defense is that the potatoes were unavoidably delayed in transit by wind and snow storms of great severity, and that the defendant and its connecting carriers used all reasonable diligence in the transportation.

It is certain the weather conditions on February 7 and 8 were bad, unusually bad, but it is not shown that they were unprecedented, phenomenal or extraordinary, in the sense that they should not have been anticipated, in an Aroostook winter. The winter had been severe, with a somewhat larger snowfall than usual. In ploughing out the railroad track high shoulders of snow had been left on either hand. When a wind arose during or after a snow storm, it was inevitable that the snow would drift in onto the track between the shoulders, and make railroading difficult. And the longer the drifts remained unploughed the worse it was.

It began snowing at Presque Isle at 4 A. M., February 7, and continued into the night following. From 4 to 6 inches of snow fell. A high wind was blowing that night. The temperature during the day was around zero. Although the defendant knew all this, and knew of the shoulders of snow, and the dangers of drifting snow, and the vicissitudes of a winter in Northern Maine, yet no

plough was sent over the line that day or night. Not until 8 or 9 A. M. the next day did one start from Caribou, which went over the line once that day. Under these conditions, the defendant started this train of perishable freight, during, or at least on the heels of the storm, at midnight. The train ran into snow drifts. This car and three others were set off at Mapleton. The lightened train went on. It had more trouble with snow. Its engine became disabled. It was found by an engine following and set onto a siding.

It was the duty of the defendant to use reasonable care and diligence in the transportation of this car, and to move it without unreasonable delay. *Johnson* v. *Railroad,* 111 Maine, 267. What is reasonable diligence depends upon circumstances, and one of the circumstances in transportation is the perishable character of the freight, or otherwise. In *Young* v. *M. C. R. R. Co.,* 113 Maine, 117, we quoted, with approval, the following language used by another court: "When a common carrier accepts perishable property, such as potatoes, to be shipped over its line at a season of the year when in the course of nature, severely cold weather is to be apprehended, though the weather may be warm when the freight is received, the carrier is bound to use great diligence in forwarding the property."

In this case we think a jury might reasonably have found that the defendant did not use reasonable care, in that it did not keep its track seasonably ploughed out, that it permitted the storm to get too far ahead of it, and that the delay at Mapleton was not due to unavoidable difficulties, but to difficulties that might have been avoided by the exercise of reasonable care and foresight. Again, a jury might find that the car was left at Mapleton an unreasonable length of time. The track appears to have been open all day, February 9, but the car was not moved until 6 P. M., by the first regular train. It is true that a shipper, even of perishable goods, has no right to require his freight to be started until the arrival of a regular train. *Johnson* v. *Railroad,* supra. Yet when there have been accidents or delays, avoidable or otherwise, and when the freight has lost its regular schedule, and, being perishable, is in imminent danger of being lost, we can conceive of cases where we think reasonable care would require a carrier to do a special

service, and expedite the carriage, without waiting for a regular train. And if the jury found, as it might, that the defendant in this case was guilty of negligence in not starting the car from Mapleton early on February 9, we should not disturb their verdict. Had the defendant done so, this car, so far as anything is shown in the case, would in all probability have proceeded on its way in advance of the derailed passenger train and the stalled freight trains which delayed it on February 10 and 12, and have preceded the storm which delayed it at East Newport, February 14 to 16. The verdict is sustainable.

Motion overruled.

ELLEN M. DARTNELL *vs.* GRACE S. BIDWELL.

Lincoln. Opinion September 28, 1916.

Action of trespass quare clausum. Distinction in cases where easement is claimed by prescriptive right and where title is claimed by adverse use. Effect of letter or written notice forbidding use of way claimed to party claiming easement by prescription. Justification of acts of defendant. How pleaded. Meaning of words "acquiescence of owner." Necessary elements of proof in claiming prescriptive easement. What should brief statement contain.

1. A prescriptive easement is created only by a continuous use for at least twenty years under a claim of right adverse to the owner, with his knowledge and acquiescence, or by a use so open, notorious, visible and uninterrupted that knowledge and acquiescence will be presumed.
2. To create a prescriptive easement, acquiescence, in the sense of passive assent, is essential. It raises the presumption of a grant.
3. When an adverse use has continued for twenty years without interruption or denial on the part of the owner, and with his knowledge, his acquiescence is conclusively presumed, and a prescriptive easement is established.
4. In a case where the defendant claimed a prescriptive right of way over the plaintiff's land, a letter from the plaintiff to the defendant expressly

denying the latter's right to use the land, protesting its present, and forbidding its future exercise, is held to be sufficient evidence of the plaintiff's non-acquiescence, and of an interruption of the defendant's inchoate easement.

5. The provision in Revised Statutes, ch. 107, sect. 12, that an easement may be interrupted by a notice in writing served and recorded, does not exclude other methods of such an interruption.

6. When a defendant would justify or excuse an act which is unlawful unless justified or excused, justification must be pleaded.

7. Justification may be pleaded by way of a brief statement under the general issue, but the brief statement must be precise and certain to common intent.

8. A defendant sued in trespass for acts done upon another's land sought to justify by showing that she had a prescriptive right of way over the land, and that the acts of illegal trespass were done in making repairs on the way. In a brief statement, she set up that she had a right of way, but did not set up that the acts complained of were done in the use or repair of the right of way.

Held, that evidence of repairs is inadmissible.

9. Photographs offered by the prevailing party, and excluded by the court, were sent to the jury room, without the fault of either party, and were examined by at least one or more of the jury.

Held, that they were obviously prejudicial, and so much so as to require a new trial.

10. The testimony of jurors concerning their deliberations and proceedings is inadmissible. It is not competent for a juror to testify what did, or did not, influence him.

Action of trespass quare clausum. Defendant pleaded general issue and brief statement claiming an easement by prescription. Verdict for defendant. Plaintiff filed exceptions to refusal of court to give certain requested instructions, and also motion for new trial. Exceptions and motion sustained.

Case stated in opinion.

Barrett Potter, and Wheeler & Howe, for plaintiff.

George A. Cowan, for defendant.

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

SAVAGE, C. J. Trespass quare clausum. In defense, it was contended that the defendant had a right of way over the plaintiff's premises, and that the acts complained of, or some of them, at least, were done in making necessary and reasonable repairs of

the way. A portion of the way was acquired by grant. The remainder was claimed by prescription. Whether she had such a prescriptive right was contested. The verdict was for the defendant. The plaintiff brings the case here on exceptions to refusals to give requested instructions, and on a motion for a new trial.

One of the issues in the case, and perhaps one decisive of the case, is whether the prescriptive easement claimed by the defendant was interrupted by the plaintiff while it was yet inchoate. The presiding Justice was requested to instruct the jury that "the defendant must not only prove the use of the way claimed by prescription, for twenty years, but that it was continued, uninterrupted and adverse, that is, under a claim of right, with the knowledge and acquiescence of the owner, and not as a matter of favor or courtesy on his part." This language seems to have been taken from the opinion in *Sargent* v. *Ballard,* 9 Pick., 251. The presiding Justice declined to give this instruction. In declining to do so, he said,—"It is true that the use must be for twenty years, that it must be continued, uninterrupted and adverse, under a claim of right, but it need not be under an acquiescence of the owner." The plaintiff excepted. While the easement was still inchoate as claimed by the plaintiff, the plaintiff wrote a letter to the defendant in which she said: "You are hereby notified that that portion of my land . . . which you have recently ploughed and made into a road is across my private property. . . . No person has or ever had any right to pass in or over this field, and you are liable to me in damages for trespass. . . . I hereby notify you to at once go back to the original location and the original cart road width as given in deed Hussey to Myers in 1856. . . . I hereby forbid you or anyone in your behalf to pass in or travel over any portion of my land whatsoever and especially that portion which you have unlawfully and without any right made into a road, and you are notified to hereafter travel only in the single cart road. . . ." This letter related to the prescriptive way in question. The plaintiff at the trial contended that this letter was an interruption of the defendant's inchoate easement, and requested an instruction to that effect. A third request differently phrased was to the same effect. These requests were refused, and the

plaintiff excepted. All the exceptions so far may be considered together.

A prescriptive easement is created only by a continuous use for at least twenty years under a claim of right adverse to the owner, with his knowledge and acquiescence, or by a use so open, notorious, visible and uninterrupted that knowledge and acquiescence will be presumed. Each of the elements is essential and each is open to contradiction. The existence of all the elements for the requisite period creates a right conclusive against attack. *Rollins* v. *Blackden,* 112 Maine, 459, and cases cited. The present controversy concerns the element of acquiescence, and the question is whether the plaintiff's asquiescence was interrupted in law by the letter from which we have quoted. It is not claimed that the defendant's use was interrupted by it.

Acquiescence is used in its ordinary sense. It does not mean license or permission in the active sense. It means passive assent, or submission. It means quiescence. It is consent by silence. *Pierce's Admr.* v. *Pierce,* 66 Vt., 369; *Cass County Commissioners* v. *Plotner,* 149 Ind., 116; *Scott* v. *Jackson,* 89 Cal., 258. See Webster's Dictionary, Tit. Acquiescence. Proof of acquiescence by the owner is held essential by all authorities. It raises the presumption of a grant. *Rollins* v. *Blackden,* supra. Where the adverse use has continued for twenty years without interruption or denial on the part of the owner, and with his knowledge, his acquiescence is conclusively presumed. It was error then to rule that proof of acquiescence was unnecessary.

The distinction between the creation of an easement by adverse use and the gaining of a title to land by adverse possession is not always borne in mind. We said in *Rollins* v. *Blackden,* supra, that in the matter of acquiescence, "the creation of a prescriptive easement logically differs from the acquisition of a title to real estate by adverse possession. In the former the possession continues in the owner of the servient estate, and the prescriptive right arises out of adverse use. In the latter, the owner is ousted from possession, and the right or title arises out of adverse possession; and nothing short of making entry, or legal action, will break the continuity of possession. *Workman* v. *Curran,* 89 Pa. St., 226. If the case at bar had been one of claimed adverse possession, the

request would have been erroneous, and the ruling would have been right.

Anything which disproves acquiescence rebuts the presumption of a grant. *Smith* v. *Miller,* 11 Gray, 145. It interrupts the inchoate easement. So far there is no dispute. The question now is,—In what manner may acquiescence be disproved? And upon the question the authorities are divided. Upon one side is the leading case of *Powell* v. *Bagg,* 8 Gray, 441, in which it was said that if the owner of the land before the lapse of twenty years, by verbal act upon the premises in which the easement is claimed, resists its exercise, and dènies its existence, his acquiescence is disproved, and the essential elements of a title by adverse use are shown not to exist." In *C. & N. W. Ry. Co.* v. *Hoag,* 90 Ill., 339, which was a case where the owner orally remonstrated against the use, the court approved the doctrine of *Powell* v. *Bagg,* and went further, and held that it was not material where the remonstrance was made, whether on or off the land. The doctrine that denials and remonstrances, on or off the land are sufficient to rebut acquiescence, and work an interruption is supported by *Workman* v. *Curran,* supra; *Nichols* v. *Ayler,* 7 Leigh, 546; *Field* v. *Brown,* 24 Gratt., 74; *Reid* v. *Garnet,* 101 Va., 47; *Stillman* v. *White Rock Mfg. Co.,* 23 Fed. Cas., 549; *Wooldridge* v. *Coughlin,* 46 W. Va., 345; *Crosier* v. *Brown,* 25 L. R. A., (N. S.) 174; *Andries* v. *Detroit G. H. & M. R. Co.,* 105 Mich., 557; *Bealey* v. *Shaw,* 6 East., 216; *Livett* v. *Wilson,* 3 Bing., 115; *Washburn on Easements,* p. 162.

On the other hand there are courts which hold that mere denials of the right, complaints, remonstrances or prohibitions of user unaccompanied by physical interference to some degree, will not permit the acquisition of a right by prescription. The leading case, perhaps, on this side, is *Lehigh Valley R. R. Co.* v. *McFarlan,* 43 N. J. Law, 605. See other cases referred to in *Rollins v. Blackden,* supra. In the New Jersey case, the court seemed to follow by analogy the doctrine of adverse possession, and did not mark the distinction, which we have pointed out, between creating an easement and acquiring title by adverse possession.

When we consider what acquiescence means, and that non-acquiescence defeats an easement, but alone does not defeat title by adverse possession, we are persuaded that the doctrine in the

former class of cases is founded upon the better reason. If acquiescence is consent by silence, to break the silence by denials and remonstrances ought to afford evidence of non-acquiescence, rebutting the presumption of a grant. In *Rollins* v. *Blackden,* supra, we held that the grant of an easement to A. effectually interrupted the inchoate easement to B. because it was an act of the strongest potency to rebut the presumption of acquiescence. In that aspect, there was no physical interruption nor disturbance. In the case at bar, we think that the letter of the plaintiff to the defendant expressly denying the latter's right, protesting its present, and forbidding its future exercise, ought, in reason, to be held sufficient evidence of the plaintiff's non-acquiescence, and of an interruption of the defendant's inchoate easement. And we do hold it to be such. In fact, the statute, R. S., ch. 107, sect. 12, provides expressly that an easement may be interrupted by a notice in writing served and recorded. That the notice should be served or delivered is necessary to bring knowledge of the interruption home to the claimant. Otherwise it is not notice to him. The provision for recording is to perpetuate the evidence of the interruption and give notice to third parties. But we think the statutory method is not exclusive. A notice in writing, served or delivered, but not recorded, is sufficient if proved. The plaintiff's requested instruction should have been given.

The plaintiff requested an instruction in these words: As to the matter of continuity of use, the defendant must prove such repeated acts of use, of such character and at such intervals, as afford a sufficient indication to the owner of land that the right of way was claimed. The presiding Justice said: "I give you so much of the instruction as states that the acts must be of 'such a character.'" He gave no more of it. As qualified, the instruction omitted the essential element of continuity of use. The plaintiff was entitled to have the instruction given. *Bodfish* v. *Bodfish,* 105 Mass., 317, from which case the language of the request was taken.

The defendant pleaded in justification by way of brief statement "that the way which is the subject of dispute has been used for forty three years by defendant and those under whom she claims and the defendant claims right by user to pass over the plaintiff's land." The plaintiff requested an instruction in sub-

stance, as it is called in the brief, "that the defendant was not entitled under her plea to introduce evidence of repairs." The request was refused.

When a defendant would justify or excuse an act which is unlawful unless justified or excused justification must be pleaded. *Hall* v. *Hall,* 112 Maine, 234. Justification may be pleaded by way of brief statement, and when that is done the nicety of special pleading is not required. *Clark* v. *Foxcroft,* 6 Maine, 296. But the brief statement must be precise and certain to a common intent. *Washburn* v. *Mosely,* 22 Maine, 160; *Corthell* v. *Holmes,* 87 Maine, 24. The brief statement in this case sets up that the defendant had a prescriptive right of way, but it does not set up that the acts complained of were done in the use or repair of the right of way. The fact that the defendant had a right of way, if proved, would not afford a complete justification. She might have had a right of way, and yet she might have exceeded her rights and become a trespasser. It was necessary for her to prove, and therefore to allege, that the acts complained of were done in the lawful use or repair of the way. Her justification would then be complete. The requested instruction should have been given.

The motion for a new trial is based upon the fact that three photographs which had been offered in evidence by the defendant and excluded by the court were sent to the jury room, and were seen and examined by one or more at least of the jury. So far as appears neither party was at fault. The photographs have been exhibited to us, and we think that they were calculated to influence the jury. It is not a question whether the jurors considered them, or were influenced by them. That we can never know. The testimony of jurors concerning their deliberations and proceedings is not admissible. It is not competent for a juror to testify what did or did not influence him. *Studley* v. *Hall,* 22 Maine, 198; *Hovey* v. *Luce,* 31 Maine, 346; *Greeley* v. *Mansur,* 64 Maine, 211; *Trafton* v. *Pitts,* 73 Maine, 408; *Whitney* v. *Whitman,* 5 Mass., 404.

The photographs were prejudicial, and so much so as to require a new trial. *Benson* v. *Fish,* 6 Maine, 141; *Rich* v. *Hayes,* 97 Maine, 293; *Hix* v. *Drury,* 5 Pick., 296; *Alger* v. *Thompson,* 1 All., 453.

Exceptions and motion sustained.

THE CITY OF BELFAST, In Equity,

vs.

THE BELFAST WATER COMPANY.

Waldo. Opinion September 28, 1916.

Rights of municipalities under special legislative acts. Right of party who has accepted benefits of a contract to question validity of same. Ultra vires contract. Who may take advantage of same.

In 1886, promoters and the City of Belfast entered into a written contract, having for its object the construction in Belfast of a public water system, for municipal and domestic uses. Among other things, the promoters agreed to set certain hydrants, and the City agreed to pay for hydrant service a certain sum annually for twenty years. And the promoters agreed that at all times after the first twenty years expired they would furnish water for the hydrants free to the city. The promoters also agreed to supply all water for sprinkling streets, and for all buildings used for municipal or school purposes, and for certain other public uses, for such sums annually as the City should assess taxes upon the franchise and works of the water system. It was agreed that such of the stipulations in the contract, as the city might not then have the power to make, were not to be binding until authority was granted by a charter to be procured by the promoters. In 1887, the promoters were incorporated under the name of the Belfast Water Company. The charter authorized the city to contract with the company for water for public purposes, on such terms as the parties might agree upon, including the remission of taxes upon the real estate, fixtures and plant of the company. In 1887, the company constructed the water system, and notified the city that the fire service "contracted for with the city" was ready for use. The promoters' contract was never assigned to the company, and no new contract was made by the city with the company. But for thirty years both parties conducted themselves in apparent recognition of the contract. The company set the hydrants and the city paid hydrant rentals for twenty years. Taxes were remitted to compensate for the use of water for the other specified public uses, as provided in the contract. In January, 1916, the company notified the city of its intention not to recognize the contract as of binding force, and not to

permit the use of the hydrants by the city, unless new arrangements were made by the city to pay a fair compensation for their use. In a bill for an injunction to enjoin the company from carrying its intention into effect it is held, as follows:

1. The promoters' contract has been impliedly adopted by both parties, and the company is as much bound by its engagements, as if it had been expressly entered into under the charter.
2. When a corporation expressly or impliedly adopts a contract made by its promoters, and obtains its benefits, it must take it with its obligations and burdens.
3. When a party has accepted the benefits of a contract, not contra bonos mores, he is estopped to question the validity of it.
4. It seems that the defense of ultra vires can be made only by the party whose act, or the acts of whose agents, are claimed to be ultra vires.
5. Whether a water company may compel the settlement of a disputed claim, in a case like the one at bar, by refusing to supply water, quaere.
6. When the parties, instead of making a new contract as authorized by the charter, adopted an existing contract, and acted upon it for thirty years, their contractual relations must be regarded as based upon legislative authority.
7. When the legislature authorizes a city or town to contract for a supply of water for public uses, upon such terms as may be agreed, and places no limit upon the length of time for which a contract may be made, a valid contract may be made for an unlimited time.
8. A legislative determination of public policy within constitutional limitations, is conclusive upon the courts.
9. Under the unlimited powers given by the charter, the City had power to contract for a hydrant service for all time, to be paid for in twenty annual installments.
10. For a water company to contract to furnish a free service to the public is not, at common law, an unlawful discrimination.
11. Section 31, of chapter 129, of the Laws of 1913, which forbids a public service company making unreasonable preferences, is not applicable, because a discrimination in favor of a municipal corporation is not unreasonable.
12. Section 32, of chapter 129, of the Laws of 1913, which makes it unlawful for any person or corporation to receive any rebate, discount or discrimination in respect to any public service has a prospective, and not a retroactive effect. It does not invalidate any previously existing lawful contract.
13. A statute which impairs the obligation of any existing lawful contract is unconstitutional and void.
14. With legislative authority, a municipality may, by contract with a water company, fix the value of certain public services for an unlimited time as the equivalent of the amount of taxes which may be assessed upon the company's property, so that one may off-set the other. When

the legislature has given the power, without limitation of time, the court cannot fix a limit.

Bill in equity asking for the granting of a permanent injunction. Defendant company threatened to discontinue its water service to plaintiff town. Defendant filed demurrer and answer to plaintiff's bill. Case reported to Law Court to render such judgment as the law and evidence require. Bill sustained with costs. Permanent injunction to issue as prayed for.

Case stated in opinion.

Carleton Doak, city solicitor, and Robert F. Dunton, for plaintiff.

Harvey D. Eaton, and H. C. Buzzell, for defendant.

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

SAVAGE, C. J. In 1886, two men, who will be called the promoters, entered into a written contract with the city of Belfast. The contract contained these provisions, among others. The promoters agreed to construct in Belfast a complete system of water works for the extinguishment of fires, and for domestic, manufacturing, and other purposes. They agreed to place in the system forty-five hydrants, and more, if desired by the city. The city agreed to pay for not exceeding fifty hydrants in number, set upon pipe described in the construction plan, an annual rent of nine hundred dollars. For additional hydrants set upon new pipe, the promoters were to receive forty dollars each annually. It was agreed by the promoters that at the expiration of twenty years from the time water was first let into the pipes the payment of rent for each and all hydrants should cease, and that at all times thereafter they would furnish water for the hydrants free to the city.

The promoters further agreed to supply all water for sprinkling streets and flushing gutters, and for all buildings within the limits supplied by its pipes, used by the city for municipal and school purposes, including the public library and a city hospital, and for four drinking troughs or fountains for man and beast, and for two ornamental fountains, for such sums annually as the city should assess taxes upon the franchise and works of the water system.

Further, the promoters agreed to sell and convey the system to the city at any time for such price as might be agreed upon, or in

case of failure to agree, for such price as might be determined by commissioners in a manner prescribed by the contract.

The city agreed that the promoters should have the privilege and right to supply water for domestic and other purposes, and should be authorized to dig up the ways and streets for the purpose of laying pipes, and for doing such other work as might be necessary in the operation of the water works.

It was agreed that such of the agreements and stipulations in the contract, as the city might not then have the power to make without authority of the Legislature, were not to be binding until such authority was granted by a charter satisfactory to the city, to be procured by the promoters.

In accordance with the contract, the promoters procured a charter from the Legislature by which they and one other were incorporated under the name of the Belfast Water Company, the defendant in this case, ch. 94, P. and S. Laws of 1887. The chartered purpose of the corporation was to furnish water to the people of Belfast for domestic and other uses, and to the city of Belfast for the extinguishment of fires and other public uses. Among other things the corporation was empowered to dig up the streets for the purpose of laying its pipes, and to fix and collect water rates. The charter provided that after the corporation should commence receiving pay for water supplied by it, it should be bound to furnish, at a reasonable rate, water for the inhabitants of the city for said uses, and to the city in its corporate capacity for public uses. The charter authorized the city to contract with the corporation for water for public uses, on such terms as the parties might agree upon, including the remission of taxes upon the real estate, fixtures and plant of the corporation.

The Belfast Water Company, in 1887, constructed its water works in Belfast. The contract between the promoters and the city was not assigned by the promoters to the water company. And no new contract was made by the city with the defendant company as was authorized by the company's charter. But December 1st, 1887, the defendant notified the city of the completion of its works in this language: "The works of the Belfast Water Company, so far as they relate to the fire service, *contracted for with the city* are now ready for use, and we have the honor of turning over to

the city the hydrant wrenches, and the use of the hydrants for fire service, in accordance with the terms of said *contract.*" And from that time until recently both parties have conducted themselves in apparent recognition of the contract with the promoters. The company has set the hydrants and furnished water, and the city has paid the agreed hydrant rental, amounting to between thirty and forty thousand dollars. And the company has brought divers suits to enforce contract rights. The compensation for the use of water for sprinkling and other public uses mentioned in the contract, except for hydrants, has been paid by the remission of taxes as the contract provided.

In January, 1916, the defendant, being advised, as it says, that the contract between the promoters, or the company itself and the city was illegal, and that it was wrong for it to be performed further, notified the city that from and after April 1, 1916, it should refuse to recognize it as of binding force, and should thereafter refuse to perform thereunder. It also notified the city that unless arrangements were made by the city to pay a fair compensation for all hydrants in use, it would after April 1, cease to maintain said hydrants or permit their use by the city.

Thereupon this bill was brought setting forth the essential facts, and praying that the defendant be enjoined from preventing the plaintiff's use of the hydrants, and that it be commanded to maintain the hydrants and to furnish an adequate supply of water therefor. The case comes before us on report.

In argument, the defendant does not question the conclusion that the promoters' contract has been impliedly adopted by both parties, nor that the defendant is bound by the engagements entered into by its promoters as far as they were legal. It is settled that if a corporation expressly or impliedly adopts the contract made by its promoters, and obtains its benefits, it must take it with its obligations and burdens. It must do what the promoters agreed to do. *Robbins* v. *Railway & Electric Co.,* 100 Maine, 496.

But the defendant contends that the contract is illegal, null and void for three reasons: 1, that it "ignores the right of the state to regulate and control the terms and conditions of service by fixing terms and conditions unalterably for all time"; 2, that it ignores the principle that utilities must serve all alike on fair terms, by a

provision that a large and important part of the service shall be rendered without compensation for all time after the expiration of twenty years"; and, 3 that it "ignores the right of the state to levy taxes upon a just and reasonable basis by fixing for all time certain public services as the measure of all taxation of the company's property." For these reasons the defendant claims that it is under no duty or obligation to furnish water to the city, and that it has a legal right to discontinue the water services to the city, unless and until the city will make arrangements to pay fair compensation.

The city takes issue with the defendant on all these propositions. But it contends, also, that the defendant is now estopped from denying the validity of the contract which it adopted, and the benefits of which it has received. It is also urged that if the contract was ultra vires, it was so only as to the city, and that the question of ultra vires, and the contention that the contract was against public policy, can be raised only by the municipality affected, and not by the other contracting party.

It has been repeatedly held, and we think with good reason, that when a party has accepted the benefits of a contract, not contra bonos mores, he should not be permitted to question the validity of it, that he is estopped. *Fort Worth City Co.* v. *Smith Bridge Co.*, 151 U. S., 294; *Richardson* v. *Welch*, 47 Mich., 309; *Doane* v. *Lake Street etc. R. R. Co.*, 165 Ill., 510; *Collins* v. *Cobe*, 202 Ill., 469; *State* v. *Germania Bank*, 90 Minn., 150; *Gibbs* v. *Craig*, 58 N. J. L., 661; *Flower* v. *Barnehoff*, 29 Or., 132; *Dyer* v. *Walker*, 40 Pa., St., 147; 2 Pars. on Contracts, 961. And in *Joy* v. *St. Louis*, 138 U. S., 1, where a railroad company was in the enjoyment of a right of way through a park, and had received the benefit of a large sum of money expended by the park commissioners, under an agreement with them, the court said that without offering to return the property obtained by virtue of the agreement, it could not be heard to allege that the agreement was against the policy of the law.

Again, while it is true that in general the court will refuse to enforce contracts contra bonos mores, there is good reason for saying that the defense of ultra vires can be made only by the party whose acts, or the acts of whose agents, are claimed to be ultra

vires. The ultra vires contract of a municipality is a legal wrong. The party that is wronged may be relieved. The other contracting party is not wronged in the eye of the law. And it would seem that it cannot seek to be relieved from a contract with which the other party is content. We have found no case where the other contracting party has been relieved, and no case even where it has sought to be relieved, from a contract ultra vires a municipality. Ultra vires is properly a defensive proposition. It is a defense to an action seeking to enforce a contract. In every case, we think, it has been the municipality that sought relief. It is well settled that courts will not declare a statute unconstitutional except at the instance of those whose rights are injuriously affected by the unconstitutional provision. They and they alone can do this. Courts will never, at the suit of one, pronounce a statute unconstitutional because it may impair the rights of others not complaining. *Williamson* v. *Carleton,* 51 Maine, 449; *Wellington et al. Petr's,* 16 Pick., 87; *Hingham etc. Corp.* v. *County of Norfolk,* 6 Allen 353; *Red River etc. Bank* v. *Craig,* 181 U. S., 548. And if an unconstitutional provision cannot be attacked except by one whose constitutional rights have been invaded, much more it would seem for like reasons that a mere ultra vires contract could be attacked only by the party as to whom it is ultra vires. The decisions of the federal courts in national bank cases are illustrative. They point to the doctrine that the ultra vires transactions are utterly void when made the basis of suit to charge the bank with liability, but when the bank seeks to enforce advantages obtained through such transactions, even though they were impliedly forbidden, they are valid unless questioned by the government. *Bank* v. *Kennedy,* 167 U. S., 362; *Gold Mining Co.* v. *Bank,* 96 U. S., 640; *Bank* v. *Matthews,* 98 U. S., 621; *Reynolds* v. *Bank,* 112 U. S. 405; *Bank* v. *Gadsdeh,* 191 U. S., 451.

Again, we think it should be said that it is at least questionable whether the company should be permitted to discontinue its service, in order to compel the city to come to its terms, for that would be the effect of it. After maintaining relations for nearly thirty years, strictly under the provisions of the promoters' contract, it is now too late to say that the parties have not adopted it, and are not bound by it, so far as lawful. A controversy as to its legality has

arisen. The city certainly had sufficient reason to assert its legality. The courts are seldom willing to give a water company the arbitrary power to compel the settlement of disputed claims by refusing to supply water. Wyman, Public Service Corp., sect. 458. Some expressions of the court in *Wood* v. *Auburn,* 87 Maine, 287, are peculiarly apposite. Applying them to this case they would read as follows: The parties are not on equal grounds. The city once taken onto the system becomes dependent on that system. To suddenly deprive it of water puts it to an enormous disadvantage. It must surrender its sense of injustice. Such a power in the company places the city at its mercy. The city cannot resist lest it lose the water. The case of *Wood* v. *Auburn* is not a precedent for this case, for the circumstances are not alike. But the reasoning of the court is significant.

The foregoing considerations impress us strongly, and we think afford sufficient grounds for awarding an injunction against the defendant. But were it otherwise, we think the contention of the defendant cannot be sustained.

By the charter of the company, the city was authorized to contract with it for water for public uses, on such terms as the parties might agree upon, including the remission of taxes. Instead of making a new contract, the parties, as we have seen, adopted an existing contract. And this we think they might do under the statute. It was in effect making a contract. So that the contract which the parties have mutually acted under for nearly thirty years is based upon legislative authority. The State gave the authority. We are not called upon to consider now whether the State has reserved authority to regulate and control the terms and conditions of service. The State has not yet undertaken to do it in this case. The State so far has said only that the parties might contract on such terms as they might agree upon. And so far as the contract was within the authority given by the charter it must be held to be valid. The Legislature placed no limit upon the length of time for which they might contract, and therefore we cannot. Whether the legislation was wise or unwise was a question of public policy. It was a question for the Legislature. And a legislative determination of public policy, within constitutional limitations, is conclusive upon the court. Cities as well as corporations

are creatures of the State. And we know of no constitutional provision which forbids a contract between city and company for a supply of water for an unlimited period.

A similar question arose in *Atlantic City Water Works Co.* v. *Atlantic City,* 48 N. J. L., 378, where the city resisted the payment of water rates, on the ground that the contract for the same was without limit as to time. The court suggested that the contract, like the contract in this case, was not necessarily unlimited in time, because the city had the right at any time to put an end to it by purchasing the works. The court then said: "But, waiving this, the conclusive answer to the position is that the power to provide the city with a supply of water has been conferred by the Legislature upon the common council in an unqualified form, and that the court has no competency to circumscribe such a grant."

Mr. Dillon says: "When a city has statutory authority to enter into contracts for a supply of water or gas for its own use, and for the use of its inhabitants, the manner in which its statutory authority shall be exercised and the terms of any contract which it may enter into, including the number of years during which it is to continue, rests in the discretion of the municipal authorities; and the courts will not review it or set it aside in the absence of fraud, or an abuse or excess of authority, or unless the contract is so unreasonable, inequitable or unfair as to justify the interference of a court on the established principles of law or equity. . . . The decisions do not disclose that there is any stated terms which the courts will regard as so unreasonable as to be an unfair and unreasonable exercise of the discretionary powers of the municipality." Dillon on Municipal Corporations, sect. 1307.

But it is said that even if the city had authority to make a contract unlimited in time, it had no authority to make one that violates the legal principle that public utilities must serve all alike, without discrimination. In other words it could not make an illegal contract. And it is claimed that the provision for free hydrant service after twenty years is violative of that principle. It is true that by the common law a public service corporation must serve all similarly situated whom it is under a duty to serve, upon equal terms and without discrimination. Free service to some is discriminatory. The same principle is declared in the

Public Utilities law of this State. Laws of 1913, ch. 129, sect. 32. The purpose of the law, both common and statutory, is to protect the public. Persons sui juris, and business corporations, are presumed to be able to protect themselves.

But one answer to the contention is that the hydrant service is not free. It has been bought and paid for. Under the unlimited powers given by the charter we see no reason why the parties might not lawfully have contracted for a hydrant service for all time to be paid for in one gross sum. If so, there is no reason why they might not contract for a gross sum to be paid in instalments. The company on the whole is entitled to reasonable returns only. And the sums contributed by the city, whether at one or many times, serve so far to lessen the burden upon other consumers. We can see no more reason why a city whose statutory power is without expressed limit may not lawfully contract for a future perpetual hydrant service for a present payment, than that it may buy or build and pay for a municipal structure for a future perpetual use. There is no mystery about a hydrant rental contract. It is a pure business proposition. The State invested the city with wide discretionary powers. It must be assumed in the absence of proof to the contrary, that the powers have been exercised in a manner supposed to be advantageous to both parties. There is nothing in the case which shows that the contract was unreasonable, inequitable or unfair to the city. Instead of contracting for a gross sum, or for annual payments, they contracted for twenty year payments. In effect, the city paid the entire hydrant rental in twenty years. A telling point is that the city has paid the entire contract price. The company has received it, and still keeps it. It would be grossly inequitable to permit the company to repudiate the contract now. See *Bank* v. *Matthews,* 98 U. S. at p. 629. It must abide the contract so far as hydrant rentals are concerned.

Another answer is, that free service to the public is not, at common law, unreasonably, and therefore, unlawfully, discriminatory. The law against unreasonable discrimination rests on public policy. It is forbidden because it is opposed to the interest of the public, which requires that all should be treated alike under like circumstances. Discriminations, however, in favor of the public are not opposed to public policy, because they relieve the people generally

of part of their burdens. In the absence of legislation upon the subject such discriminations cannot be held illegal as matter of law without overturning the foundation upon which the rule itself is built. *New York Telephone Co.* v. *Siegel-Cooper Co.*, 202 N. Y., p. 511. So in *Superior* v. *Dayton County Telephone Co.*, 141 Wis., 363, a contract binding a telephone company to maintain, without charge, telephones in the public offices of the city, was held not to be invalid as against public policy. The court said: "The contract in this case having been made before the legislation occurred prohibiting discriminatory rates, such legislation does not cut any figure in this case. If the contract were valid when made it is within the constitutional protection precluding the Legislature from impairing the obligations of contracts. . . . Discriminatory contracts between public utility corporations and their patrons which are held to be void as inimical to the public good are so held because unreasonable advantage is thereby given to one customer or a class over others, whereas all have a moral and legal right to equality of treatment. In the case of the contract being between a private corporation and the state or other public corporation, whatever advantage the particular customer has over general customers, obviously inures to the benefit of the latter in the aggregate. In other words in the ultimate there is no discrimination which is inimical to the public good, and hence no violation of public policy." See *Wilcox* v. *Consolidated Gas Co.*, 212 U. S. 19; *Interstate Commerce Com.* v. *B. & O. R. R. Co.*, 145 U. S., 278; *Water Works Co.*, v. *Kansas City*, 4 McCreary, 198; *Dempsey* v. *N. Y. Central etc. Ry. Co.*, 146 N. Y., 290; Wyman on Public Service Corp., sect. 1304.

This states the case at common law. If it be said that the common law rule has been abrogated by statute, and that the state under its reserved power may enact regulatory provisions which in effect abrogates the contract, it may be answered that the state has not attempted to do so in this case, except, as it may be urged, by the Public Utilities Statute, chap. 129, Laws of 1913. Section 31 of that statute forbids unreasonable preferences. But as we have seen, discrimination in favor of a municipal corporation is not unreasonable. Section 32 makes it unlawful for any person or corporation to receive any rebate, discount or discrimination in

respect to any service rendered or to be rendered by any public utility. We think there is nothing in this statute which tends to show that the Legislature intended to impair the obligation of any existing lawful contract. The language indicates that the legislation was to have a prospective, not a retroactive, effect. See similar case of *Public Service Electric Co.* v. *Board of Public Utility Comr's,* 88 N. J. L., 603. Besides to give it a retroactive effect would impair the obligation of a contract valid at common law, which is forbidden by the federal constitution. See *Superior* v. *Douglas County Telephone Co.,* supra.

But it is said further that the contract is illegal because of the provision for the remission of taxes in consideration of water furnished for several public uses. With respect to this contention it may fairly be said that its determination is not necessarily involved in this case. The contract provisions for free hydrant service and for other public service to be compensated by remission of taxes are distinct and separable. One might be invalid without affecting the validity of the other, and we have held the hydrant service provision to be valid. The issues raised by the bill in this case relate only to the hydrant service. But the question of remission of taxes has been argued, and we will notice it briefly.

The power of remission is granted by the charter. And it may be said here that all the cases where municipalities have attempted to contract without legislative authority are not pertinent to the present discussion. Here the legislative permission, which is precise and express, must control, unless unconstitutional. It is not claimed to be unconstitutional. The State has said that these parties may by contract fix the value of certain public services as the equivalent of the amount of taxes assessed upon the company's property, so that one may off-set the other. In *Portland* v. *Portland Water Co.,* 67 Maine, 135, it was settled that the Legislature may authorize the exemption or remission of taxes as equivalent compensation for public service rendered. So are the cases elsewhere. See cases collected in 40 Cyc., 788. In the Portland case the power was granted by statute for six years only. In *Maine Water Co.* v. *Waterville,* 93 Maine, 586, it appeared that there was legislative authority for a contract for a municipal supply of water, for which such compensation was to be paid as might be agreed

upon, but nothing was said about remission of taxes. A contract was made by which the city agreed to pay for water service a sum annually which should "be equal to the tax annually assessed against the company." The court held the contract, which was limited in time to twenty years, to be valid. It said: "A municipality may, for a reasonably adequate compensation in the way of service rendered to it for municipal purposes, agree to make compensation therefor, for a term of years and not unreasonably long, either in whole or in part, by reimbursing the company, in whole or in part, the amount that the company may be obliged to pay as taxes assessed upon its property." The Waterville case is to be distinguished from the one at bar in this respect, that in that case there was no express legislative authority to remit taxes. The remission was made and upheld under a general grant of power to make a contract. In this case the charter is express, and fixes no limit of time for the operation of the contract. This distinction is noticed in *Home Telephone etc. Co.* v. *Los Angeles,* 211 U. S., 265, cited by the defendant.

And if, notwithstanding the charter, the question of public policy were open to us, it may be said that if such a contract is to be deemed reasonable at the outset, for a limited time, it is not unfair to presume, in the absence of proof to the contrary, that the value of the public services and the amount of taxes assessed would continue, pari passu, to be equivalent.

We conclude that the contract is valid, and that an injunction should be awarded as prayed for.

Bill sustained with costs.
Permanent injunction to issue as prayed for.

PATRICK CAMPBELL *vs.* L. O. CHABOT.

Androscoggin. Opinion September 28, 1916.

Duress. Effect of making payments on note claimed to have been signed under duress. Essential elements necessary to prove duress Waiver of duress.

Motion by defendant to set aside verdict for money paid under duress created by malicious threats of prosecution.

1. Threats of prosecution, either civilly or criminally, are to be distinguished from threats of imprisonment, and threats of prosecution are sufficient to avoid an act only as they are connected with threats of imprisonment either illegal in its beginning or which by its abuse becomes illegal. Moreover the fear of imprisonment must be sufficient to overcome the will of a man of ordinary firmness and constancy.
2. Whether a precept has been issued or is about to be issued is an important factor in the case.
3. A threat of prosecution simply, before the commencement of any legal proceedings, does not necessarily include an arrest. It is no more than assertion that the proper steps will be taken to institute a legal process which may or may not result in the arrest of the person. Whether the process is to be initiated before a magistrate or the grand jury, the law so shields it by the oath of the complainant and witnesses, as well as by the official oaths and responsibilities of the magistrate and jurors, that the danger of imprisonment from such a threat is too remote and contingent to overcome the will of an innocent person of common firmness.
4. Mere threats of criminal prosecution, when no warrant has been issued, nor proceedings commenced, do not constitute duress.
5. If a person, constrained by duress to do an act, afterward voluntarily acts upon it, or in any way affirms its validity, he precludes himself from then avoiding it.

Action on the case to recover certain sums of money paid by plaintiff to defendant, alleging that defendant did maliciously threaten to prosecute the plaintiff by accusing him of having committed a certain crime or felony. Defendant pleaded general issue and brief statement setting forth that if any money was paid to defendant by plaintiff, he, the defendant, was acting solely as the agent of the plaintiff and employed by the plaintiff for that purpose.

Verdict for plaintiff. Defendant filed motion for new trial. Motion sustained. New trial granted.

Case stated in opinion.

George S. McCarty, for plaintiff.

H. E. Holmes, for defendant.

SITTING: CORNISH, KING, BIRD, HALEY, PHILBROOK, MADIGAN, JJ.

PHILBROOK, J. Motion by defendant to set aside verdict for money paid under duress created by malicious threats of prosecution. The plaintiff's only gravamen is duress. In his declaration he asserts "that by reason of said threats of prosecution made to him by the defendant he was induced and compelled to pay to the defendant certain sums of money." He makes no claim of fraud imposed and it may well be doubted whether such a claim could now be made by amendment to his declaration, or by considering the same to be amended as allowed in *Cowan* v. *Bucksport,* 98 Maine, 305, or in *Wyman* v. *American Shoe Finding Company,* 106 Maine, 263. The case must stand or fall upon the claim of duress.

The only witnesses in the case were the plaintiff and the defendant. That their statements are contradictory on all essential points is not surprising. For the purposes of this discussion let us examine the testimony of the plaintiff, giving it credence, and determine whether it satisfies the claim of duress. He says that having received a letter from an attorney, whose surname is the same as that of the defendant, he went to the office of the latter by mistake, that having been shown the location of the attorney's office he went there but returned to defendant's office and told him the attorney was absent and would not return for three days. It developed that a certain young woman had accused the plaintiff of improper conduct and some talk ensued about calling her to defendant's office and about writing her a letter. On the following evening plaintiff again called at defendant's office by request and was told by defendant that the case could be settled for seven hundred dollars. The plaintiff replied that he had no money, whereupon the defendant opened a book, which proved to be a copy of the Revised Statutes of this State, and read about the offence of "unnatural relations," as the plaintiff testified. Quoting further from plaintiff's testi-

mony, are these words: "He read a lot of stuff out of it. It was ten to twenty years for that crime, and I said 'I didn't do it.' Well he says, 'she says you did.' I says 'I didn't.' And he says 'ten to twenty years; and you don't settle with her and you will go to jail.'" The plaintiff was then told that the claim could be settled for four hundred fifty dollars and he signed a note for that amount on October 17, 1915, or, in other words, at the second call, the first call being October 16. After signing the note, he told the defendant he had some money in the bank, to which defendant replied "you get it out before the other Chabot comes back and fetch it to me. If you don't you will go to jail." This was on Tuesday, and on the Thursday next following, October 19, the plaintiff paid the defendant one hundred forty-three dollars and took a receipt "on acct. M. Gagne," who was the young woman in the case. At that time the defendant said "If you ever mention it on the outside, anything about this transaction, I will push you to jail anyway." When the one hundred forty-three dollar payment was made the four hundred fifty note was destroyed and the plaintiff signed a new note. On each of the three Fridays following the signing of the last note the plaintiff made payments, two being five dollars each and the last four dollars, going to defendant's office for that purpose. After the four dollar payment the plaintiff refused to pay any more and was told by the defendant "Well you will go to jail if you don't." Nothing more was paid. At the same interview the defendant said "You don't want to bother with her any more about settling this thing. She has got nothing at all to do with it. It is right in my hands, and I hold this note right here in my pocket, and you will pay that money or go to jail." Nothing was paid after this was said. We have now detailed the alleged threats as testified to by plaintiff, some being before and some being after the signing of the notes and some being after the last payment was made. Do these threats constitute duress in law? We think not.

It seems not inappropriate to turn back to statements of law well settled for us by time and by repeated approval of this court. In Bacon's Abridgment, Vol. 2, p. 156, upon the authority of Lord Coke, we find that for menaces or threats a man may avoid his own act in four instances, 1, For fear of loss of life; 2, Of loss of member; 3, Of mayhem; 4, Of imprisonment. We are not con-

cerned with the first three in this discussion. Fear of imprisonment is here under consideration. It should be noted that threats of prosecution, either on the civil or on the criminal side of the court, are to be distinguished from threats of imprisonment, and threats of prosecution are sufficient to avoid an act only as they are connected with threats of imprisonment either illegal in its beginning or which by its abuse becomes illegal. Moreover the fear of imprisonment must be sufficient to overcome the will of a man of ordinary firmness and constancy. *Harmon* v. *Harmon,* 61 Maine, 227. Whether a precept has been issued or is about to be issued is an important factor in the case. In *Eddy* v. *Herrin,* 17 Maine, 338, relied upon by plaintiff, and in the earlier case, *Whitefield* v. *Longfellow,* 13 Maine, 146, warrants had been actually issued against the threatened person. Not so in the case at bar. "A threat of prosecution simply, before the commencement of any legal proceedings, does not necessarily include an arrest. It is no more than an assertion that the proper steps will be taken to institute a legal process, which may or may not result in an arrest of the person. And whether the process is to be initiated before a magistrate or the grand jury, the law so shields it by the oath of the complainant and witnesses, as well as by the official oaths and responsibilities of the magistrate and jurors, that the danger of imprisonment from such a threat is too remote and contingent to overcome the will of an innocent person of common firmness." *Harmon* v. *Harmon,* supra. In *Higgins* v. *Brown,* 78 Maine, 473, our court held that mere threats of criminal prosecution, when no warrant had been issued nor proceedings commenced, do not constitute duress. Again in *Hilborn* v. *Bucknam,* 78 Maine, 482, it is declared that it is not duress for one who believes that he has been wronged to threaten the wrong doer with a civil suit, and if the wrong includes a violation of the criminal law it is not duress to threaten him with a criminal prosecution. The same principle has been affirmed in *Thorn* v. *Pinkham,* 84 Maine, 101, and in the very recent case of *Knowlton* v. *Ross,* 114 Maine, 18.

Thus it seems quite clear, from a careful study of the evidence in the light of well settled rules of law, that no duress was established by the testimony in this case.

But even if it should still be claimed that duress compelled the signing of the note, it may well be doubted whether the claim of duress has not been waived by the three payments of money which seem to have been voluntary. For 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, *Knowlton* v. *Ross,* supra.

Since no exceptions were taken to any ruling or instruction of the presiding Justice we must assume that the principles of law governing the case were correctly stated but that the jury either misunderstood or misapplied those principles and consequently manifestly erred in arriving at the conclusion which they did. It becomes our duty thereupon to issue the mandate.

Motion sustained.
New trial granted.

STATE OF MAINE *vs.* WALTER C. MAHONEY.

Waldo. Opinion October 2, 1916.

Certainty of allegations in indictments for perjury. Indictment for perjury. Necessity of allegation as to time and place where crime was committed. Statutory requirements, Chapter 123, *section* 1, *Revised Statutes.*

1. An indictment for perjury, which set forth testimony given by the accused upon different subjects, referring to different papers and persons, some of which must have been true, without specifying the false testimony relied upon by the State with that reasonable degree of fullness, certainty and precision requisite to enable the accused to meet the exact charge against him, is bad for uncertainty.

2—Counts in an indictment for perjury containing the allegation "do further present that . . . . of Northport, in the county of Waldo aforesaid, on the 7th day of January, A. D. 1915, appeared as a witness in a proceeding . . . then and there being heard before a tribunal of competent jurisdiction, and committed the crime of perjury by testifying as follows," were defective, as not containing any allegation of the place

where the offense was committed, the words "then and there" not referring to the place where the crime is alleged to have been committed, since when a single fact is alleged with time and place, the words "then and there" subsequently used as to the occurrence of another fact, as the crime, refer to the same point of time and necessarily import that the two were coexistent.

Indictment for perjury. Respondent filed demurrer. Demurrer overruled by presiding Justice. Respondent filed exceptions. Exceptions sustained. Demurrer sustained. Indictment quashed.

Case stated in opinion.

Walter A. Cowan, County Attorney, for State.

Dunton & Morse, for respondent.

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

HALEY, J. An indictment for perjury, before this court on respondent's exceptions to the overruling of his demurrer to the indictment; with the right to plead anew if the exceptions are overruled. There are four counts in the indictment, and the demurrer is general, and applies to them all. "In criminal pleading there is no distinction between a general and special demurrer. Sts. 27 Eliz. 5, sec. 1 and 4 and 5 Anne, ch. 16, relate to pleading in civil actions only. Formal defects in indictments and other criminal prosecutions remain proper subjects of general demurrer, as at common law. . . .

The demurrer regularly admits no other facts than those which are well pleaded; and by the common law, which does not distinguish between the offices of a demurrer assigning a special cause, and one assigning none, a demurrer of either kind confesses no other allegations, in general, than such as are sufficient, both in substance and in form. For facts insufficient in substance, cannot affect the right of the cause; and material facts if ill pleaded and demurred to, even generally are by the common law as unavailing as if they were altogether immaterial." Heards Crim. Plead., 271. "While duplicity may perhaps at the common law require a special demurrer and possibly some other imperfections may also, in most circumstances where no statute intervenes, a defect can be reached as well by general demurrer as by special, the two differ only in form." Bishop's New Crim. Procedure, sec. 777.

This indictment is for the offense of perjury, as set forth in section 1 of chapter 123 of the Revised Statutes, and it is the claim of the State that the indictment follows the form prescribed by section four of the statute. It is the claim of the respondent that the first count in the indictment is bad for uncertainty. The first count sets out two pages of testimony, alleged to be material and false, but contains no assignment of perjury in any particular part of the testimony.

"In all criminal prosecutions, the accused shall have the right . . . to demand the nature and cause of the accusation." Constitution of Maine, Art. 1, sec. 6. He has the right to insist that the facts alleged to constitute a crime shall be stated in the indictment against him 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. *Doran,* 99 Maine, 330.

The question is whether the indictment sets forth the facts with sufficient particularity and certainty to inform the accused of the offense with which he is charged. Does it portray the facts which the State claims constitutes the alleged transgression so distinctly as to advise the accused of the charge which he has to meet, and to give him a fair opportunity to prepare his defense, so particularly as to enable him to avail himself of a conviction or an acquittal in the defense of another prosecution for the same offense. *Armour Packing Co.* v. *United States,* 153 Fed., 1; *State* v. *Lynch,* 88 Maine, 195.

Tested by the above rules the first count in the indictment is void for uncertainty. The testimony set forth in the first count contains many statements of fact, some of which must be true, or not susceptible of being called material, and the respondent was not informed of the specific charge he was to answer to. A brief and short examination of the matters set forth in the indictment is sufficient to demonstrate the above: "Q. I show you Defendant's Exhibit No. 6, check for $25, and ask you what it is? A. June 29th? Q. June 29. A. Well, I don't know anything about that check. I never received it. Q. You never saw that check before in your life? A. I don't seem to remember about that

check. If my name is on the back of it? Q. Did you write your name on the back of that check? A. I don't think I did. That don't look like my writing. I won't be positive, but I don't think so." Is this the false testimony with which the respondent is charged? In preparing his defense should he have witnesses to prove that that statement was true? Or was it this testimony: "Q. I show you these other checks that I have presented to you" (meaning checks marked Defendant's Exhibits Nos. 1 to 5 that had been previously shown to witness and identified by him as checks he had received from Mrs. Bragg, for which he had given her credit on the account which is attached to the writ), "and ask you if that is your writing across the back of those? A. That is there," (meaning the plaintiff's signature on the back of the five checks marked Defendant's Exhibits Nos. 1 to 5, "but it," meaning the payee's signature on the back of check marked Defendant's Exhibit No. 6, "isn't like these" (meaning the payee's signature on the back of the checks numbered 1 to 5). Is this the false testimony upon which the State relies, and to meet which the respondent should prepare his defense? Is he charged with perjury in stating that exhibits 1 to 5 bore his signature, or is it because he stated that the signature on the back of the check Defendant's Exhibit No. 6 "isn't like those," meaning exhibits 1 to 5? Does the State claim that Nos. 1 to 5 were not the respondent's signatures, and therefore his testimony was false, or does it claim that it was true, and that his testimony as to Exhibit No. 6 that the signature there didn't look like the signature upon exhibits 1 to 5, was false? Again, he was asked if it was his writing across the back of the five checks 1 to 5, and his answer was, "I think it is, yes." Is that the testimony which the State claims was false and which he must prepare his defense to meet? Again: "Q. And you say that is not your writing across the back of that one" (meaning Exhibit No. 6 Defendant), "do you? A. Well, I never received any money from Mrs. Bragg. The COURT: That is not the question. Is that your writing on the back of it?" (meaning Defendant's Exhibit No. 6) "A. No, sir; I don't think so." Is that the testimony which the State claims was false, and which the respondent must be prepared to explain? Again, "Q. Whether or not, Mr. Mahoney, you gave that check to A. G. Thorndike?" There is

nothing to show what check is referred to, but the answer is "No, sir, I didn't. I never gave a check to A. G. Thorndike in my life." Is that the false testimony of which the State complains, to meet which the respondent should prepare his defense, or was it this testimony: "Q. Never have had that check in your possession?" (There is no allegation of what check). "A. No, sir. Q. Or at any time? A. No. sir." Is that the false testimony upon which the State relies?

It is very evident that some of the testimony as set forth in the indictment was true, and, as said in *State* v. *Mace,* 76 Maine, 64, "the grand jury, upon the evidence before them, may have come to the conclusion that the statement in relation to one of these matters of fact was false, thereupon voted to indict the defendant, while the traverse jury, upon the evidence before them, may have come to the conclusion that the statement in relation to that matter was true, but that some of the statements contained in the writing was false, and thereupon convicted the defendant of perjury in swearing to the latter statement; and thus the defendant would be convicted upon a matter in relation to which he had never been indicted by the grand jury. Surely, an indictment which will permit of such a result cannot be sustained." As the first count in the indictment contains statements of testimony upon different subjects and refers to different papers and different persons, it does not set forth the alleged false testimony with that reasonable degree of fullness, certainty and precision requisite to enable the respondent to meet the exact charge against him, and is bad for uncertainty.

It is only necessary to consider one of the objections to the other three counts in the indictment. The counts each contain this allegation: "Do further present that Walter C. Mahoney of Northport, in the County of Waldo aforesaid, on the seventh day of January, A. D. 1915, appeared as a witness in a proceeding in which said Walter C. Mahoney and Annie T. Bragg were parties, then and there being heard before a tribunal of competent jurisdiction, and commit the crime of perjury by testifying as follows." The counts allege that he appeared as a witness the seventh day of January, 1915, and testified, but where, in what town, county or state? The rules of criminal pleading require that an indictment shall set forth the time and place where the crime is alleged to have been com-

mitted. In some cases it is sufficient to allege the county; and if a place is named in the indictment it is sometimes sufficient, as the court recognizes the territorial divisions of the state and takes judicial notice of the towns created by law, and evidence of the offense set forth in the indictment at any other place in the county, as the place is immaterial, unless when it is a matter of local description, if the offense is shown to have been committed in the county, it is sufficient. *State* v. *Simpson,* 91 Maine, 86; *State* v. *Jackson,* 39 Maine, 295; *State* v. *Godfred,* 12 Maine, 369-370; *State* v. *Day,* 74 Maine, 220; Bishop's New Criminal Procedure, sec. 381; *Commonwealth* v. *Cummings,* 6 Gray, 488; *State* v. *Libby,* 84 Maine, 461; *Thayer* v. *Commonwealth,* 12 Met., 9; *Commonwealth* v. *Tolliver,* 8 Gray, 386. In the form for indictments for perjury given in section 4, chapter 123, Revised Statutes, the Legislature recognized the above rule, and provided in the blank a space for the venue, or place where the crime should be alleged to have been committed. "A departure from the well settled doctrine of the necessity of certainty and precision in the allegation as to time and place in criminal pleading, would be dangerous in the extreme. However severe and unnecessarily strict these rules may sometimes appear, they have been too long established for their propriety, to be questioned, or the necessity of the reason for their establishment to be stated." *State* v. *Fenlason,* 79 Maine, 117. As neither of the other three counts in the indictment contain any allegation of place, city, town, plantation, county or state in which it is alleged that the offense was committed, by the well recognized rule of criminal pleading they are each defective.

The words in the indictment, "then and there being heard before a tribunal of competent jurisdiction," do not refer to the place where the crime is alleged to have been committed, for the rule as to the words "then and there" is that when a single fact is alleged with time and place, the words "then and there" subsequently used as to the occurrence of another fact, as the crime or a part thereof, refers to the same point of time, and necessarily import that the two were co-existent. *State* v. *Hurley,* 71 Maine, 354. The only place alleged in the three counts is in connection with the residence of the defendant, who is alleged to be "of Northport in the County of Waldo aforesaid." This is "merely descriptio personae, and

has no reference either to time or place where the substantive offense was committed." *State* v. *Jackson,* 39 Maine, 291.

Exceptions sustained.
Demurrer sustained.
Indictment quashed.

CAROLINE VOSE BROWN *vs.* FRANK COLE.

York. Opoinion October 2, 1916.

Effect of adjoining land owners agreeing upon a certain line or fence as a division line and occupying up to that line for twenty years. Necessary form in making up bills of exceptions.

1. Where a bill of exceptions did not contain a requested instruction, did not state whether the court ruled upon it, or what instructions were given the jury in regard to the matter, it cannot be considered, since a bill of exceptions must show what the issue was, set forth enough to enable the court to determine that the points raised are material, and that the rulings excepted to are both erroneous and prejudicial.
2. On writ of entry, where record title was in the plaintiff, and defendant filed a disclaimer as to a portion of the land claimed, evidence held sufficient to justify a finding that the defendant and his predecessor in title had been in open, exclusive, adverse possession of the remainder of the property under a claim of right for more than twenty years prior to an interruption by the building of a fence.

Writ of entry. Plea of general issue filed together with brief statement claiming title to part of premises demanded in writ and disclaiming as to another certain part beyond a given line. Verdict for defendant. Plaintiff filed motion for new trial and exceptions to refusal of presiding Justice to give certain requested instructions. Motion overruled. Exceptions not considered.

Case stated in opinion.

Mathews & Stevens, and William H. Stone, for plaintiff.

N. B. & T. B. Walker, for defendant.

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

HALEY, J. This is a writ of entry brought to recover possession of a lot of land at Biddeford Pool. The defendant filed a disclaimer to all of the land that the plaintiff set out in her writ that was north of what was claimed as a conventional line, agreed upon between the parties who owned the premises before he purchased them, and he also disclaimed to all land included in the plaintiff's declaration that was east of what he says was at one time a stone wall. The verdict was for the defendant, and the plaintiff brings the case to this court upon a motion for a new trial as against law and evidence, and upon exceptions to the refusal of the presiding Justice to give a requested instruction. The exception can not be considered. As said by the court in *Jones* v. *Jones,* 101 Maine, 450: "Many times the court has reiterated the rule that an excepting party, if he would obtain any benefit from his exceptions, must set forth enough in the bill of exceptions to enable the court to determine that the points raised are material and that the rulings excepted to are both erroneous and prejudicial. The bill of exceptions must show what the issue was, and how the excepting party was aggrieved. . . . It is not enough that the court can find all these characteristics by studying the report of the evidence in support of the motion for a new trial, when it accompanies a bill of exceptions. The bill must be strong enough to stand alone. The court, in considering the exceptions, cannot travel outside of the bill itself." The requested instruction called for the construction by the court of a deed that is not a part of the bill of exceptions, and is not set forth therein, and we cannot tell from the bill of exceptions whether the requested instruction was right or wrong. We cannot tell from the bill of exceptions whether the court ruled upon it, or what instructions he gave the jury in regard to the words in the deed to which our attention is called in the exceptions. He may have ruled practically as the plaintiff claims that he should, and may have given instructions to the jury in practically the same language as used in the request. We can not pass upon it and say that the court was not justified in refusing to instruct the jury as requested without an examination of the deed, and so much of his instructions to the jury as referred to the point raised. See the

recent case of *Borders* v. *Boston and Maine Railroad,* in which the rule is stated and the authorities in support of it cited.

At the trial the presiding Justice ruled that the record title to the disclaimed premises was in the plaintiff, and that the defendant must base his claim, if any, to the title thereof, on the ground of adverse possession. No exception was taken to this ruling, and the case was tried upon the question of adverse possession to the strip of land in controversy. The only question is, was there sufficient evidence of adverse possession of the land by the defendant, and his predecessors in title, to authorize the verdict? The defendant introduced two witnesses who testified that in 1890 there was a dispute between Mr. Brown, the husband of the plaintiff under whom she claims title by will, and Charles S. Cleaves, under whom the defendant claims title, who owned the land adjoining the Brown lot as to the line on the north side. There was a good deal of feeling, and the parties went out upon the land, walked up and down and looked it over, and that Mr. Brown said, "Well I don't claim to own any of your land, but I do claim to own the land this side of the stable, that is, north of the stable," and he said, "Your land runs over here, you straighten that line out, make a straight line down there, that will satisfy me," and that Mr. Cleaves said, "I think I own the land, but in order to satisfy you and save further trouble I will straighten it out," and he did so. One of the witnesses, a son of Mr. Cleaves, testified that he was sent to the barn to obtain an iron rod and stone-hammer, and in the presence of both owners and by their direction he drove the iron rod at the corner of their land, as agreed upon, and it was agreed that the line should run from that iron rod to a post on the north side. These two witnesses identify the line as claimed by the defendant as the line agreed upon at that time. The iron hub was identified by them, and there is other testimony that the iron hub was there at the time of the trial, and testimony that the defendant was shown the iron hub and the post at the time he purchased his land as the true line, and that there was a wire fence from the iron hub to the post which is shown by a photograph taken at about the time he purchased. The testimony as to the establishment of the line as set forth above is only attempted to be impeached by the testimony of a witness who

claims that in 1901 or 1902 Mr. Cleaves and Mr. Brown discussed the line in his presence, and that Mr. Cleaves stated, in substance, that he knew that his buildings were on the plaintiff's land, and agreed that he was not claiming and would not claim the land, but would occupy it as the land of Mr. Brown, if he would allow him to do so, and Mr. Brown agreed that, if he was not claiming to hold it adversely, he might continue to occupy it. The defendant claimed that no such conversation took place, and that, even if it had, it proved nothing because the deeds introduced in the case showed that, at that time, Mr. Cleaves had conveyed away his interest in the land; that there is no pretense that he had authority to bind the then owner; that the fact that he did not own the land at that time shows that he did not make the statement testified to. At the time of the trial both Mr. Brown and Mr. Cleaves were deceased, and the place of the conversation was miles from the land. In 1888, before the agreement as to the line as testified to above. Mr. Cleaves erected a house and an ell upon the land, and a stable or lean-to or some other outbuildings. The testimony tends to show that he occupied the lot, including the land up to the conventional line agreed upon, and that he erected a stable or barn close to the stone wall upon the east side, and the land was so occupied from that time to his sale of it to Mercy C. Cleaves in March, 1891, and continued to be so occupied until she conveyed to Frank Cole August 31, 1894. After Mr. Cole's purchase of it he made various additions to the buildings, and built a new stable, or barn, and was never interfered with or the possession of the property claimed by the Browns until 1913, when, Mr. Brown having died, the property descended to his widow by will, and the present plaintiff caused to be erected upon the land occupied by Mr. Cole a wire fence, and sent word to him that they had erected it. This was in the fall, towards the close of the summer season. Mr. Cole went from Biddeford down to the lot, and immediately tore the fence down. The fence as erected was upon land that was covered by the deed of the plaintiff's predecessors in title, and, if extended, would run through the house of the defendant, Mr. Cole, and take off nine feet of his piazza.

There was evidence that the jury were authorized to believe, if they saw fit, that the site of the building next to the conventional

line, so called, had never been disturbed; that in the repair of the house and ell, the sills were placed upon the same foundation that they were upon when he purchased the property, and it was the same foundation placed there by Mr. Cleaves at the time he built the house in 1888. There was also testimony which tended to prove that the barn upon the land that is claimed by the defendant was upon the same foundation next to where he claims there formerly was a stone wall close to the old barn. He is corroborated in his testimony by certain photographs and the testimony of the carpenters who worked there taking down parts of the building, and building the new barn and the ell. It is the claim of the defendant that the iron hub agreed upon is there now, that a post is there at the other end of the line which was placed in the same place that the post was when the line was agreed upon which had rotted down. It is the claim of the plaintiff that the buildings are not upon the same foundation that they were when Mr. Cleaves built the buildings there; but the testimony is not from parties who have knowledge, except from casually passing by, while upon the other hand, the defendant produces the workmen who did the work. There is nothing in the case that contradicts, or can contradict, the fact that for more than twenty-three years after the conventional line as claimed by the defendant was agreed upon, that the defendant and his predecessors in title have occupied the property, that the defendant has not disclaimed, occupied it by buildings all of the time and under the claim of ownership.

The buildings erected by Mr. Cleaves were erected before the line was agreed upon in 1890, by Mr. Brown and Mr. Cleaves, and there can be no question but that from that time to this the owners of the land have continually maintained buildings upon the lot purchased by Mr. Cleaves, and which they claimed includes the part of the land not disclaimed. And the question of course is whether the jury were authorized, from the evidence, to find that the plaintiff and his predecessor have been in open, exclusive, adverse possession under a claim of right for more than twenty years prior to the interruption in 1913 by the building of a fence upon the premises by the plaintiff's authority. The witnesses for the defendant, if their testimony is true, had knowledge of the subject about which they testified, and several of them testified

that the buildings are now in the same place that they were in 1890; that is, upon the side adjoining the land of Mr. Brown, and we cannot say that the jury were not authorized to believe their testimony, and if they were so authorized to believe it, there can be no question but that the land has been occupied adversely, as required by the statute to obtain the title. The jury were authorized to believe their testimony in preference to that of the witnesses for the defense, unless shown to be improbable or incredible, and we have carefully read the record and have failed to discover anything that would authorize us to say that the jury had no right to believe their testimony, and the sole question being a question of fact, the jury having had evidence which they were authorized to believe upon which their verdict can be based, we have no right to disturb it, and the mandate must be,

Motion overruled.

NEVA M. STEWART *vs.* ANNA D. GILBERT, et al.

Androscoggin. Opinion October 3, 1916.

Effect of finding of single Justice sitting in Equity. Statute of Frauds. What will constitute partial performance sufficient to take contract out of Statute of Frauds.

1. It is a rule well established in this jurisdiction that the decision of a single justice upon matters of fact in an equity case should not be reversed unless the appellate court is clearly convinced of its incorrectness and that the burden of showing error is upon the appellant. The rule prevails where the issue must be supported by full, clear and convincing evidence.
2. While proof of part performance, in order to take a contract for the conveyance of real estate out of the statute of frauds, must be clear and convincing, the acceptance by defendant of a substantial sum in part or full payment and permitting the plaintiff to take possession of the premises, expend sums in improvement or repairs and collect the rents is such evidence.

Bill in equity praying for specific performance of an alleged oral contract for the sale of real estate. Defendants filed demurrers to bill and also filed answers, setting forth in substance that there was not a sufficient legal contract which was enforceable. After hearing, presiding Justice decreed that conveyance be made as prayed for in bill. Defendants appealed to Law Court. Decree below affirmed.

Case stated in opinion.

McGillicuddy & Morey, for plaintiff.

Newell & Woodside, for defendants.

SITTING: CORNISH, KING, BIRD, HALEY, PHILBROOK, MADIGAN, JJ.

BIRD, J. This is a bill in equity brought for the specific performance of an alleged oral contract for the sale of real estate. The single Justice after an oral hearing of the witnesses made certain findings of fact to the effect that the defendants did agree to convey to the plaintiff the premises described in her bill; that the plaintiff paid them therefor the sum of fifteen hundred dollars; that under the agreement plaintiff entered into possession, and with the knowledge of defendants, made a lease of and repairs upon the premises and that she is entitled to sustain her bill. A decree followed accordingly from which the defendants appealed.

The well established rule in this State is that the decision of a single Justice upon matters of fact in an equity case should not be reversed unless the appellate court is clearly convinced of its incorrectness and that the burden of proving error is upon the party appealing. *Sposedo* v. *Merriman,* 111 Maine, 530, 538; *Haggett* v. *Jones,* Id., 348. And the rule prevails where an issue must be supported by full, clear and convincing evidence.

We conclude that the single Justice was warranted in finding the alleged agreement to have been made. The defendants urge that the evidence was insufficient to take the contract out of the statute of frauds. In *Goodwin* v. *Smith,* 89 Maine, 506, 508, the court says, that the proof of part performance, in order to take the contract out of the operation of the statute of frauds, must be clear and convincing, clear and satisfactory—and held that the accept-

ance by the defendant of a substantial sum in part payment, and permitting the plaintiff to take possession of the land and expend a large sum in improvements in such evidence.

The decree below is affirmed.

LEWISTON TRUST COMPANY *vs.* GEORGE W. COBB.

Androscoggin. Opinion October 3, 1916.

Damages recoverable under Chapter 114, Section 77. Chapter 114, Section 77 as a penal or remedial statute. Exceptions to rulings where excepting party is not aggrieved by ruling.

This is an action on the case, in which the plaintiff as the creditor of A. seeks to recover, under the provisions of R. S. chap. 114, sect. 77, damages for knowingly aiding and assisting A. in a fraudulent transfer of real estate. The verdict was for defendant, and the case comes before the law court upon plaintiff's exceptions and motion for new trial.

Where the trial Judge gives instructions more favorable to a party than the law permits, he is not aggrieved and is not entitled to exceptions.

Where the trial Judge gives instructions more favorable to a party than he is entitled to ask, exceptions to such instructions will not be sustained, although the court erred in its characterization of the statute under which the action is brought, no exceptions being taken to such characterization.

While a statute may be remedial and not penal, such statute may have penal characteristics and it is not error to so state.

In the determination of values, as of other issues, it is not the number of witnesses which is to be regarded by the jury, but the weight of the evidence.

Action on the case brought under chapter 114, section 77, Revised Statutes of Maine, to recover damages for aiding in a conveyance in fraud of creditors. Defendant filed general issue and brief statement. Verdict for defendant. Plaintiff filed motion for new trial and also exceptions to certain instructions of court. Exceptions and motion overruled.

Case stated in opinion.

Oakes, Pulsifer & Ludden, for plaintiff.
Tascus Atwood, for defendant.

SITTING: CORNISH, KING, BIRD, HALEY, PHILBROOK, MADIGAN, JJ.

BIRD, J. In this action of the case, the plaintiff, as the creditor of one Fred A. Prescott, seeks to recover under the provisions of R. S., c. 114, § 77, damages from the defendant for knowingly aiding and assisting said Prescott in a fraudulent transfer of his property, a farm in Durham. The verdict of the jury was in favor of defendant and the plaintiff brings the case to this court upon exceptions and the usual motion for new trial.

From the bill of exceptions it appears that "the evidence tended to show that on the fifteenth day of July, 1915, the said Prescott being then indebted to the plaintiff on three notes amounting in all to seven hundred and sixty-three dollars and fifty cents, and being also indebted to other creditors, and being insolvent and unable to pay his creditors in full, conveyed the premises in question to the defendant; that at the time he was indebted to the defendant upon two notes; one for the sum of six hundred dollars, dated July 29, 1909, with interest, on which one hundred dollars had been paid on the principal May 10, 1913, and one for one hundred and fifty dollars dated November 20, 1913, payable in one month, with interest at the rate of 5% monthly until paid, both secured by mortgages of the premises claimed to be fraudulently conveyed, of even date with said notes, respectively, the mortgage of November 20, 1913, being placed on record March first, 1915; that at the time of the conveyance there was due on the two notes the sum of eight hundred and twenty-eight dollars and in addition the amount of the taxes for two years, about fifty dollars. No consideration was paid at the time of the transfer, and the defendant claimed that the only purpose of the transaction was to avoid the necessity of a foreclosure to secure payment of his mortgages and that the property was not more than sufficient to fairly cover these mortgages. The plaintiff claimed that the property was worth from fifteen to eighteen hundred dollars, and the defendant claimed that it was not worth more than nine hundred dollars.

"Evidence was introduced on one side and the other in support of these claims as to value by testimony of witnesses acquainted with the property and giving their opinions. With respect to the verdict which the jury would be required to render in case they found for the plaintiff, the court gave the following instructions.

" 'Now the statute does not leave the question of damages for the fraud to be settled according to the judgment of the jury or court, but expressly determines what the damages shall be; and that is in the last clause of the section. Such a person, aiding a debtor in the fraudulent transfer, is liable to any creditor suing therefor in double the amount of the property so fraudulently transferred or conveyed, but not exceeding double the amount of the creditor's demand. In this case, upon the figures given in evidence, the limit would be double the creditor's demand, because upon either value, the value asserted to be the correct one by the plaintiff, or by the defendant, would be more than double the creditor's demand. So that in this case, if the defendant is liable, he would be liable for double the amount of these notes, and interest to the date of the writ, for that, I think, is the day when the time must be fixed.' "

To this instruction exceptions were allowed. In support of the exceptions the plaintiff contends that the correct rule of damages to be double the value of the equity of redemption and not double the amount of the notes and interest. The rule given by the court was, the plaintiff admits, more favorable to him than the rule which he now urges to be correct. Such being the case, he is not aggrieved. *Hotchkiss* v. *Coal & Iron Co.*, 108 Maine, 34, 56; *Staples* v. *Wellington,* 58 Maine, 453, 458; *Lime Rock Bank* v. *Hewett,* 52 Maine, 531, 532. But plaintiff claims that in view of the characterization, earlier in the charge, of the statute under which the action is brought as "penal in its character" the instruction, to which exceptions were taken, were prejudicial to him. It is true that that statute has been held to be remedial and not penal; *Quimby* v. *Porter,* 20 Maine, 218, 221; *Frohock* v. *Pattee,* 38 Maine, 103, 107; *Platt* v. *Jones,* 59 Maine, 232, 244; and remedial is commonly used to contra-distinguish statutes to which the term is applied from penal statutes. But we think remedial statutes while not technically penal may have penal characteristics. This is

recognized in *Fogg* v. *Lawry,* 71 Maine, 215, where Walton, J., speaking for the court regarding the same statute says: "The statute though technically a remedial one, is penal in its character, and must be strictly construed. It must not be so construed as to impose a greater penalty than the plain meaning of its terms requires." The expression of the presiding Justice would seem to be justified. The plaintiff however, made no objection and took no exceptions to its use. The exceptions must be overruled.

On the motion for new trial, we find no reason to disturb the verdict. We think there was evidence upon which, if believed by the jury, the verdict can be sustained. It is true, as urged, by plaintiff that upon the question of value the witnesses for plaintiff outnumbered those of defendant three to one. Yet one-half in number of the witnesses of plaintiff were interested as agents or employees of plaintiff and the others had limited acquaintance with real estate in the town of Durham. On the other hand the defendant, an interested witness and a witness, wholly disinterested who had been a resident of the town for more than a generation fixed the value at a much less sum. The weight of the evidence was for the jury.

Exceptions overruled.
Motion overruled.

STATE OF MAINE,
By Information of Scott Wilson, Attorney General,
Ex Rel. John P. Deering

vs.

C. WALLACE HARMON.

York. Opinion October 3, 1916.

Distinction between an abandonment of an office by the incumbent and his forfeiture of it by official neglect or misconduct. Proof necessary to show an abandonment of an office. Right of Governor, with advice and consent of council, to fill by appointment a judicial office when a vacancy in such office exists.

1. Where quo warranto proceedings are prosecuted in behalf of the State to determine by what authority the respondent is holding a public office, it is immaterial that the relator's term of office expired by limitation pending the proceedings.
2. Under the Constitution the Governor, with the advice and consent of the Council, has authority to fill by appointment a judicial office when a vacancy in such office exists.
3. The tenure of office of judges of municipal and police courts is fixed by the Constitution to be "for the term of four years."
4. The Governor has no authority, either alone or with the advice of the Council, to remove a judicial officer whose term of office is fixed by law, except "on the address of both branches of the Legislature."
5. The abandonment of an office is ipso facto a vacation of it, because the abandonment necessarily implies a voluntary and intentional disclaimer and surrender of it by him to whom it pertains, which in its effect is like a resignation of it.
6. The official neglect of the incumbent of a public office, or his misconduct therein, although constituting just and legal grounds for a forfeiture of the office, do not produce a vacancy therein until it has been judicially determined and declared that the incumbent is guilty thereof, and that he has thereby forfeited his right to continue in the office.
7. The office in question did not become vacant, because the relator had forfeited it by failure to perform its duties, or by any misconduct therein,

since no adjudication of that question has been made by any tribunal having authority to do so.

8. A public office may be abandoned by the incumbent so that a vacancy in the office is thereby created.

9. Whether the incumbent of a public office intended to abandon it is a question of fact, and may be inferred from the party's acts. If his conduct is such as to clearly indicate that he had relinquished the office, an intention to do so may be imputed to him.

10. The provision in the charter of the municipal court of Saco that the Judge of said court "shall reside during his continuance in said office in said Saco," means that the Judge of that court is required to actually reside in Saco, in the sense of being personally present there substantially all the time during his continuance in said office. Mere temporary absence from Saco, for a reasonably limited time, for business or pleasure, would not constitute a failure to reside there within the meaning of the charter.

11. The incumbent of a public office may abandon it so as to create a vacancy therein by removing from the state, county, or other district to which the officer's residence is restricted by the law of the office.

12. Where evidence justifies a finding, that about the middle of July, 1912, the relator voluntarily and intentionally moved from Saco to Piscataquis county there to give his entire attention to a new employment, intending to continue in that employment so long as it was open to him, and was satisfactory to him, and having no fixed intention to return to Saco to reside at any definite time, if at all, and did not return to Saco to live during the rest of his term of office and for a long time thereafter at least; and that from and after June or July, 1912, he was voluntarily personally absent from Saco practically all the time, and was therefore not in a situation to perform, and did not perform, any of the duties of his office as Judge of said court, except in one or two instances. *Held;* that the relator ceased to "reside" in Saco, prior to the respondent's appointment on December 19, 1912, according to the meaning of that term as used in the Act establishing the municipal court of Saco.

13. Where the Judge of a local court, which has two sessions each month for civil business and is constantly in session for the disposal of criminal matters, voluntarily removes from the district where he is required to reside by the law establishing the court, without any fixed intention to return and reside there, but with an intent to make an indefinite stay elsewhere carrying on other business, thereby placing himself in a situation which he knows will prevent his attending to the duties of the office, and which will, under the law establishing the office, disqualify him to continue in it, he is presumed to have intended in so doing to abandon that office.

14. Evidence held sufficient to warrant the conclusion that on December 19, 1912, there was a vacancy in the office of Judge of the municipal court of Saco caused by the abandonment of that office by the relator, and that the respondent was duly appointed to that office and commissioned for the term of four years, which term has not yet expired.

Information in the nature of quo warranto filed by attorney general of State of Maine against C. Wallace Harmon requesting said Harmon to prove his right to hold the office of Judge of Saco municipal court. Bill, answer and replication filed. After hearing, cause reported to Law Court upon so much of the evidence as legally admissible. Law Court to render final judgment thereon. Information dismissed.

Case stated in opinion.

Eben Winthrop Freeman, and Cleaves, Waterhouse & Emery, for plaintiff.

William R. Pattangall, and James O. Bradbury, for defendant.

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

KING, J. This is a proceeding by the attorney general, on the relation of John P. Deering, upon information in the nature of quo warranto against the respondent, C. Wallace Harmon, to test his right and title to the office of Judge of the municipal court of Saco.

The substance of the information, filed January 14, 1913, is, that the relator was duly appointed, February 2, 1909, by the Governor and Council, Judge of said court, and was commissioned as such for a term of four years; that on November 28, 1912, the Governor and Council determined that the office of Judge of said court was vacant by reason of the abandonment of the office by the relator, and by reason of his failure to reside in the city of Saco as required by the charter of said court; that on December 19, 1912 the Governor and Council appointed the respondent to be Judge of said court and he was commissioned for the term of four years; and that since December 20, 1912, he has used and enjoyed and continues to use and enjoy all the rights, privileges and benefits belonging to that office. It is unnecessary we think to state here, either in detail or in substance, the allegations of the answer of the respondent or of the replication in behalf of the relator, since it is conceded by both sides that the controlling question presented is whether there was a vacancy in said office at the time of the respondent's appointment thereto.

The term of office of the relator expired by limitation on February 1, 1913, soon after these proceedings were begun, and before

any hearing was held thereunder. But that fact is immaterial. The proceedings are prosecuted in behalf of the State by the attorney general to determine by what warrant or authority the respondent is holding the public office in question. That is a question of present public interest, for if the respondent is wrongfully holding the office there should be a judgment of ouster against him notwithstanding the relator is not now entitled to the office. *Com.* v. *Swasey,* 133 Mass., 538.

Under the Constitution the Governor with the advice and consent of the Council has authority to fill by appointment a judicial office when a vacancy in such office exists. And it is not contended, as we understand, that the respondent's appointment as Judge of said court on December 19, 1912, was invalid on any other ground than that there was no vacancy in the office at that time.

The tenure of office of judges of municipal and police courts is fixed by the Constitution to be "for the term of four years." And it may be stated at the outset, that the determination by the Governor and Council on November 28, 1912, that the office of Judge of the municipal court of Saco had become vacant by reason of the abandonment of it by the relator, and by reason of his failure to reside in Saco, did not create a vacancy in that office. That office could have become vacant only by the removal of the relator by impeachment for misdemeanor in office, or by his removal "by the Governor, with the advice of the Council, on the address of both branches of the Legislature," (Const. of Maine, Art. IX, § 5), or by his death, or resignation, or by his abandonment of the office. The Governor has no authority, either alone or with the advise of the Council, to remove a judicial officer whose term of office is fixed, except "on the address of both branches of the Legislature." And indeed it is not claimed in this case that the Governor and Council did remove the relator as Judge of said court, thereby creating the vacancy in that office which they filled by the respondent's appointment. If, as a matter of fact, the office was then vacant the Governor and Council were authorized and required in furtherance of the public interest to fill it. What they did, therefore, on November 28, 1912, was to determine for themselves if there was such a vacancy, and, having decided that there was, they appointed the respondent to that office. But their action was

not conclusive against the relator. They could not in that way deprive him of his office, if it then belonged to him to use and enjoy. No such power is vested in them in respect to such an office.

The vital issue involved in this case will appear the more distinct if we note briefly the distinction between an abandonment of an office by the incumbent, and his forfeiture of it by official neglect or misconduct. The abandonment of the office is ipso facto a vacation of it, because the abandonment necessarily implies a voluntary and intentional disclaimer and surrender of the office by him to whom it pertains, which in its effect is like a resignation of it. If the abandonment exists as a matter of fact, then a vacancy also exists, for that is the inevitable inference. But the official neglect of the incumbent of a public office or his misconduct therein, although constituting just and legal grounds of a forfeiture of the office, do not produce a vacancy in the office until it has been judicially determined and declared that the incumbent is guilty thereof and that he has thereby forfeited his right to continue in the office; and the reason for that is apparent, for the official neglect and misconduct which would sustain a forfeiture, do not establish, as an inference of fact or law, that the incumbent had voluntarily or actually relinquished the office. In such case he is still the incumbent of the office, subject, however, to be removed therefrom because he has forfeited his right therein. No claim is made, or could be made, in this case that the office in question became vacant because the relator had forfeited it by failure to perform its duties, or by misconduct therein, since no adjudication of that question has been made by any tribunal having authority to do so; and without such an adjudication there could have been no vacancy in the office for that cause.

The real question, therefore, is whether the relator at or prior to the time of the respondent's appointment on December 19, 1912, had in fact abandoned the office of Judge of said court.

It is a well settled principle that a public office may be abandoned by the incumbent so that a vacancy in the office is thereby created. To establish such abandonment, however, the proof must show a voluntary and intentional relinquishment of the office by the incumbent, for there can be no abandonment of an office or any other right without an intention, actual or imputed, to abandon it.

Such intention is a question of fact, and may be inferred from the party's acts. If his conduct is such as to clearly indicate that he had relinquished the office, an intention to do so may be imputed to him.

This case is before this court on report of the evidence which justifies, we think, a finding of the following material facts. The charter of said court provides that the judge thereof "shall reside during his continuance in said office in said city of Saco." The court is to be held in Saco, with sessions on the second and fourth Tuesdays of each month for the transaction of civil business, and it "shall be considered as in constant session for the trial of criminal offences." The relator was appointed Judge of said court (the last time) February 2, 1909, for the term of four years. He resided in Saco and was a practicing attorney. In April, 1912, he was employed by a Mr. Ray of Massachusetts to organize a corporation and assist in finding parties to finance it for the purpose of developing a township of timberlands in Piscataquis county, Maine. In pursuance of that employment it was necessary for him to be absent from Saco practically all the time. He decided, therefore, to abandon his law practice, for the time being at least, and about the middle of July, 1912, he closed his law office, ceased housekeeping in Saco, and with his wife (there being no children) went to the township in Piscataquis county, where his new employment required him to be, and lived there until the first of December, 1912, when he and his wife went to live at the Colonial Hotel in Bangor, and where he continued to live, except when away on business, until at least a long time after the respondent's appointment. It does not appear from the evidence, which was taken out September 30, 1914, that he was not then living at Bangor. His name was on the letter heads of the corporation as its "Assistant Manager, Bangor, Maine." He rented his house in Saco with his furniture therein, reserving two rooms, to a relative who began to occupy it in October, 1912. After June, 1912, he was in Saco a few times, but only temporarily, for business or pleasure. In June he made an arrangement to pay the recorder of the court two-thirds of his salary of $1,000. In September he presided at a hearing in the court on a manslaughter case. Other than that, he performed practically none of the duties of his office as Judge of

that court. There is some testimony that the recorder conferred with him a few times by letter or otherwise about court matters; but the evidence does not show that he gave any particular attention to the affairs of this office. On the other hand, it clearly appears that his time and attention were fully taken up with the duties of his new occupation in Piscataquis county. From a study of his testimony we conclude, that when he left Saco in June or July, 1912, he intended to give his entire attention and services to his new employment, and to continue in that employment so long as it was open to him and was satisfactory to him, but he did not know how long that would be; and that he then had no fixed intention to return to Saco to reside—he might do so or he might not, and future conditions and circumstances would determine which.

It is plain that the relator's neglect to perform the duties of his office for a considerable period of time preceding the respondent's appointment, although that may have been a just and sufficient ground of a forfeiture of his office, did not produce a vacancy in the office. No vacancy could result for that cause without a judicial determination to that effect, and no such determination has been made. Did the relator cease to "reside" in Saco prior to the respondent's appointment? We think he did, according to the meaning of that term as used in the act establishing the court. The provision of the statute that the Judge of said court "shall reside during his continuance in said office in said city of Saco" must be construed to mean something more than a mere legal residence in Saco—something more than having a "home" there which if continued might ripen into a pauper settlement, and something more than being an "inhabitant" there which might subject him to taxation or entitle him to vote there. It means, we think, that the Judge of that court is required to actually reside in Saco, in the sense of being personally present there substantially all the time during his "continuance in said office." Such personal presence is essential to the proper discharge of the important duties of the judge of a local court holding two sessions each month for civil business and being in constant session for the disposal of criminal matters. But it is not to be understood, of course, that a mere temporary absence from Saco by the Judge of said court,

for a reasonably limited time, on business or pleasure, would constitute a failure to reside there within the meaning of the act. That would be unreasonable. In the case at bar, however, the relator removed from Saco for an unlimited stay elsewhere without a fixed intention of returning at any time. We have no hesitation, therefor, in reaching the conclusion that he ceased to "reside" in Saco after June or July, 1912.

All the authorities seem to be in accord that the incumbent of an office may abandon it by removing from the state, county, or other district to which the officer's residence is restricted by the law of his office. The doctrine is thus stated in the note on page 517, Vol. 113, Am. St. Rept., following the report of *Attorney General* v. *Maybury* (141 Mich., 31.): "If the law requires an officer to reside in the county or district in which he holds his office, and during his term he ceases to reside in such county or district, his violation of the law operates as an abandonment of his office and creates a vacancy therein. However, a merely temporary removal or absence for a limited time from the county or district to which the law restricts his residence, with no intention of abandoning his office, or ceasing to discharge the duties thereof, will not result in terminating his title." An examination of the decisions in cases involving the question whether an incumbent of an office had abandoned it by removing from the district wherein he is required by law to reside, shows, we think, that wherein such decisions differ in their results, such differences arise because different facts and circumstances are found to exist and different inferences therefrom are drawn, and not on account of any disagreement as to the general principle that the incumbent of an office may abandon it by removing from the district to which the officer's residence is restricted. For example, in *Page* v. *Hardin,* 8 B. Mon., 648, a case upon which much reliance is placed in behalf of the relator, it was claimed that the secretary of state of Kentucky had abandoned his office by not residing in Frankfort in accordance with a legislative requirement. The constitution of that state, however, provided that "all civil officers of the commonwealth at large, shall reside within the state, and all district, county or town officers within their respective districts." And the court held that the constitutional provision on the subject of residence as a qualification of holding an office

covered the whole ground and was a denial of power to the Legislature to impose greater restrictions, and, therefore, that the secretary was not required by law to reside in Frankfort. "The secretary," said the court in its opinion, "might reside out of Frankfort and at various distances, and yet keeping his office in Frankfort, he might perform personally, and in due season, every duty pertaining to his official character." Extended consideration was given in the opinion to the question whether the Governor had authority to adjudge an office vacant by reason of the neglect of official duty by its incumbent. And in that case the court recognized and declared that "an office may be voluntarily relinquished by removal from the state, county, or district to which the officer is restricted by the law of his office." The decision in that case, that the secretary of state had not abandoned his office by not residing in Frankfort, and that no vacancy in the office was created by the Governor's adjudication to that effect, under the facts there disclosed, is not a precedent for the relator's contention in this case that his failure to reside in Saco did not vacate his office. It is not to be expected that a decision in one case involving the question whether the incumbent of any office has abandoned it by his removal from the district where he is required to reside, can be of much value as a precedent for a decision in some other case involving a similar inquiry, since the primary question in each case is one of fact, whether the incumbent had an intention, actual or imputed, to abandon his office, and the determination of that question depends upon a consideration of all the facts and circumstances of the particular case. In the following cases the principles herein stated have been recognized and applied. *Relender* v. *State,* 149 Ind., 282; *Prather* v. *Hart,* 17 Neb., 598; *Attorney General* v. *Mabury,* 141 Mich., 31; *People* v. *Brite,* 55 Cal., 79; *Ehlinger* v. *Rankin,* 9 Tex. Cu. App., 424; 29 S. W., 240; *State* v. *Choate,* 11 Ohio St., 511. See also *People* v. *Shorb,* 100 Cal. 537. In some of these cases it appears that the law of the State had declared that the failure of an officer to reside in the place to which his residence is restricted while holding his office, vacates the office. There is no such expressed provision in Maine.

Did the relator's removal from Saco for an indefinite period and his residing elsewhere constitute an abandonment of his office

of Judge of said court? We are of the opinion that it did and that thereby the office became vacant. The statute expressly requires that the Judge of that court shall reside "during his continuance in said office" in Saco. The relator's act in removing therefrom for an indefinite stay elsewhere to carry on other business was voluntary and intentional. He thereby placed himself in a situation which disabled him to perform the important duties of the Judge of said court; and it is plain from the evidence that he did not intend to personally perform those duties during his indefinite absence. Moreover, his failure to reside in Saco, as the Judge of that court was required to do by the Act establishing it, legally disqualified him to continue to hold that office. He is presumed to have intended these inevitable consequences of his voluntary act. And it seems to us that the incumbent of a public office, who thus voluntarily puts himself, for an indefinite period of time, in a situation which he knows will prevent his attendng to the duties of the office, and which will, under the law of the office, disqualify him to continue in it, must be presumed to have intended to abandon it. That is what the evidence in this case shows that the relator did; and we think it must be held that in so doing he had an intention to abandon his office of Judge of said court. To hold otherwise would be to impute to him a wrongful purpose to continue in a public office after he had voluntarily disqualified himself to do so, and after he had intentionally placed himself in a situation which prevented him from performing the duties of that office.

Our conclusion, therefore, is that there was, on December 19, 1912, a vacancy in the office of Judge of the municipal court of Saco, caused by the abandonment of that office by the relator; and that the respondent was duly appointed to that office and commissioned for the term of four years which term has not yet expired. Accordingly the entry will be,

Information dismissed.

CITY OF SACO *vs.* HERBERT R. JORDAN.

York. Opinion October 3, 1916.

Boards of health. Evidence necessary to show legal Board. Penal Ordinance; How construed.

Action to recover the penalty provided for in a health ordinance of the city of Saco. *Held;*

1. To maintain an action for the forfeiture provided for in an ordinance for failure to comply with its provisions, full and definite proof is required of all facts and proceedings necessary to show a case within its terms.
2. It was an essential part of the plaintiff's case to establish by competent proof the fact that there was in October, 1914, a board of health of Saco composed of three members, each duly and legally appointed and qualified, upon whose acts and proceedings, had under the provisions of the ordinance, the action is based.
3. The evidence which the plaintiff offered to establish the fact that there was a board of health of Saco in October, 1914, if competent for that purpose, shows only the appointment of two members of such board. There is a total lack of proof of the appointment of a third member of the board for 1914.
4. If only two members of a board of health are appointed, they cannot legally do acts authorized to be done by a majority of the board, since in such case no official board of health exists of which they would be a majority.

Action of debt to recover of the defendant certain money as a penalty for failure to comply with a certain ordinance of the city of Saco relating to public health. Defendant pleaded general issue. At conclusion of testimony, case reported to Law Court upon so much of evidence as legally admissible, Law Court to render such judgment as legal rights of the parties require. Judgment for defendant.

Case stated in opinion.

Franklin R. Chesley, city solicitor, and *Emery & Waterhouse,* for plaintiff.

Stone & Stone, Joseph B. Dow. and Robert B. Seidel, for defendant.

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

KING, J. This case comes up on report. It is an action to recover the penalty provided for in the following ordinance of the city of Saco.

"AN ORDINANCE RELATING TO HEALTH.

Be it Ordained by the City Council of the City of Saco, as follows:—

Whenever there is an adequate public sewer or drain built or maintained by the city of Saco in any of the streets, alleys, places or lanes thereof, if the board of health or a majority thereof shall be of the opinion and shall so adjudge the waste water, slops and human excreta upon and incident to the use of any building or buildings or premises, on lots contiguous to any of said streets, alleys, places or lanes in which is any such sewer or drain, but not connected with such sewer or drain through proper and authorized plumbing, are offensive to sight or smell, or are dangerous to life or health, the owner or owners of such house or premises shall forthwith connect said house or premises with said sewer, and shall thereafter drain all wash water, waste water, slops and human excreta from said building or premises into said sewer. And any such owner or owners, who after thirty days' notice in writing from the board of health that said waste water, slops and human excreta are offensive to sight or smell, or are dangerous to life or health, and that he or they must forthwith connect said house or premises with said sewer or drain, shall fail or neglect to make such connections in a manner satisfactory to the board of health; or if such connection has been made, shall thereafter fail or neglect after such notice to cause all wash water, waste water, slops and human excreta to be drained from said buildings or premises into and through said sewer, shall forfeit and pay for each week's failure or neglect, not exceeding twenty dollars to be recovered in an action of debt for the use of the city."

The ordinance is penal. The payment of a material forfeit may be imposed for failure or neglect to comply with its requirements. Its provisions, therefore, are to be strictly construed, and in an action to recover a forfeiture under it full and definite proof

is required of all facts and proceedings necessary to show a case within its terms. See *Eveleth* v. *Gill,* 97 Maine, 315.

The writ is dated December 4, 1914. Among other essential allegations in the declaration it is alleged, that from the first day of October, 1914, to the date of the writ the waste water, slops and human excreta upon and incident to the use of the defendant's premises, situated contiguous to, and not connected with an adequate public sewer maintained by the plaintiff, were offensive to sight and smell and dangerous to life and health, that it was so adjudged by the board of health of Saco, and that on October 16, 1914, a notice in writing from said board of health was served upon the defendant notifying him that it had so adjudged and ordering him to connect said premises with said sewer within thirty days thereafter, and that he failed and neglected to do so and had not done so up to the date of the writ, a period of two weeks after the expiration of said thirty days.

Several objections to the maintenance of the action are interposed by the defendant, but in our view of the case only one of them need be considered.

It was incumbent upon the plaintiff to establish by competent proof that there was, in October, 1914, a board of health of Saco duly and legally constituted, whose alleged action, under the provisions of the ordinance relied upon, becomes a vital part of the plaintiff's case. The local board of health in each city and town in the State is "to be composed of three members appointed by the municipal officers." The members of the board first appointed are to serve for one, two, and three years respectively, and annually after the first appointment the municipal officers are required to appoint a member of such board to serve three years. R. S., c. 18, sec. 24.

The plaintiff claims that Charles W. Pillsbury, J. D. Cochrane, and Jesse D. Haley were the members of the board of health of Saco in October, 1914. It introduced the records of meetings "of the City Government" of Saco showing that in 1913, Charles W. Pillsbury was elected by ballot a member of the board of health for three years, that in 1914 J. D. Cochrane was elected a member of the board for three years, and that in 1915 Jesse D. Haley was elected a member of said board for three years. No other proof

on this point was offered. The defendant confidently contends that the proof made is not sufficient to show that either of those gentlemen was a legally constituted member of the board of health of Saco in October, 1914. But if it should be assumed that the proof sufficiently shows that Pillsbury and Cochrane were legal members of the board of health of Saco in October, 1914, still there is a total lack of proof that Haley was then a member of the board. Indeed, the proof introduced, if competent, only tends to show his election to the board in 1915. No proof was offered that he was a member of the board in October, 1914, by virtue of any previous appointment, and that fact cannot be inferred.

It is not contended, and could not be with reason, that the lack of proof that Haley was a member of the board would not defeat the action, if Pillsbury and Cochrane were legal members, since the ordinance provides that a "majority" of the board may act thereunder. The obvious answer to such a contention would be that if only two members of a board of health are legally appointed they cannot lawfully do acts authorized to be done by a majority of the board, for in such a case no official board of health exists of which they would be a majority.

It was an essential part of the plaintiff's case to establish by competent proof the fact that there was in October, 1914, a board of health of Saco composed of three members each duly and legally appointed and qualified as such member. It has failed to make proof of that fact, and accordingly the entry must be,

Judgment for defendant.

HAZEL M. MESERVE, Pro Ami, *vs.* WILLIAM S. LIBBY.

Cumberland. Opinion October 3, 1916.

Negligence. Negligence of child imputed to parents. Reasonable and due care on part of driver of automobile. What would be reasonable care on the part of child six years old.

The plaintiff, a girl six years of age, while crossing Center street in Portland about noon of August, 1915, was struck and knocked down by an automobile driven by the defendant and thereby her leg was broken and she received other severe bodily injuries. The jury returned a verdict of $600 in her favor and the case comes before the Law Court on the defendant's motion for a new trial.

Briefly stated, the defendant's own story of the accident is that he saw the child crossing the street and stopped his car to avoid a collision with her; that she stopped also nearly ahead of his car and about 12 feet from it; that he assumed that she would wait where she was until he drove by her, and thereupon started his car ahead; that she did not wait but ran forward and the collision occurred before he could again stop the car.

Held;

1. That a reasonably prudent man, under those circumstances, would not have started the car ahead until that little child was safely out of danger; and that the jury did not err in their conclusion that the defendant was negligent.
2. That it cannot be held as a matter of law that this child, six years of age at the time, was or was not old enough to be capable of exercising some care for herself under the circumstances. That was a question for the jury.
3. That if the child was old enough to exercise care for herself, she was required to use only that degree and extent of care which ordinarily prudent children of her age and intelligence are accustomed to use under like circumstances.
4. That it would not be an unjustifiable conclusion for the jury to reach, that the ordinarily prudent child of the plaintiff's age and intelligence, seeing the approaching automobile come to a stop, twelve feet away from her, would, as she evidently did, undertake to go across the street.
5. The question whether the child's parents were negligent in permitting her to be unattended in crossing the street was not involved in the case, unless the jury decided that the child was too young to exercise care for herself.
6. But if that question did arise, we have no hesitancy in saying that a finding by the jury that the parents of the child were not negligent in

allowing her to go unattended from their home across the street in the day time to and from the school-yard playground, ought not to be set aside.

7. Considering the evidence as to the nature and extent of the plaintiff's injuries, the court is not convinced that the damages awarded are excessive.

Action on the case for injuries received by plaintiff through the alleged negligence on the part of the defendant in operating an automobile. Hearing in Superior Court, Cumberland county. Defendant pleaded general issue. Verdict for plaintiff. Defendant filed motion for new trial. Motion overruled.

Case stated in opinion.

W. C. Whelden, for plaintiff.

H. L. Cram, and J. H. Berman, for defendant.

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

KING, J. The plaintiff, a girl six years of age, while crossing Center street in Portland, at about noon of August 14, 1915, was struck and knocked down by an automobile driven by the defendant and thereby received severe bodily injuries, for which she seeks in this action to recover damages. The jury returned a verdict of $600 in her favor, and the case is before this court on defendant's motion for a new trial.

The plaintiff had been, with other children, in the playground of the school yard nearly opposite her father's house on Center street. Miss Marion Murphy was in attendance at the playground as a teacher or social worker, and the plaintiff left Miss Murphy at the gate, close to the sidewalk, to cross the street to her home. When she was near the middle of the street she was struck by the automobile and her leg was broken and she was knocked down upon the paved street badly bruising her mouth, nose, and face. She was picked up by the defendant and taken in his car to the Maine General Hospital where she remained about four weeks, and after that she was treated at the Children's Hospital, going there daily. At the trial, which occurred about seven months after the accident, her father testified that she "walks a little lame in that leg and she is a little hard of hearing." She did not testify.

The defendant testified, that he was driving up Center street in a 1912 Cadillac weighing 4,300 pounds, using the "second speed," that he saw the plaintiff crossing the street when he was "about 50 or 70 feet" from her, "and seeing" as he testified "that if we continued on I would probably come in contact—at least it causes a start to a driver of a machine, so I applied my foot brake and threw my throttle and gas. That brought the car to a stop. Then I saw the little girl come to a stop about the center of the street. . . . Supposing I had the right of way, I started to change gears. . . . I changed from second into low and started to proceed, then the fellow sitting in the seat beside me, in the front seat, he said 'God, she is coming.' When he said that I had just caught a glimpse of her starting down the street on more of a general course. I threw my foot brake and threw my emergency. . . . My brake being locked that held the car, I immediately left the car, which had stopped . . . and I went around and found Mr. Murphy and Mr. Valante (two of the three other men who were riding with him) out there at that time, just lifting the child from the street." In cross-examination he stated that he stopped his car the first time about "12 feet" from the child. "Q. She stopped and you stopped? A. Yes, sir. Q. And she turned and ran into you? A. She turned and ran into me, yes, sir. . . . Q. Did you see her when she turned and ran towards you, or did you not? A. I didn't see her when she started to run towards me. It was while she was running towards me I saw her." He claims that the child was hit by the left side of the automobile near where the mud-guard and running board connect, and that she was picked up about two feet back of the car and to the left. Two of the men who were in the automobile at the time substantially corroborated the defendant's account of the accident. On the other hand, two witnesses, called by the plaintiff, testified that they were near the scene of the accident at the time and saw it. One of them testified that he heard no horn sounded or other warning signal given, and that he did not notice that the speed of the car was lessened until after the collision. The other testified that just before the child was hit "she kind of slowed up, that is, a trifle, and turned partly around. I thought she had seen the auto, but then it was too late."

1. Was the defendant negligent? Did he fail to exercise reasonable care—such care as the reasonably prudent man would have exercised under the same conditions and circumstances? That is the test. The jury decided that he did not exercise reasonable care—that he was negligent. Is that decision clearly wrong? We think not. Certainly the defendant cannot complain if the jury accepted his story of what he did and of the conditions under which he was required to act. Briefly stated his story of the accident is this: That he saw the child crossing the street ahead of him and stopped his automobile to avoid a collision with her; that she stopped also, nearly ahead of his car, but a little on its left and about 12 feet from it; that he assumed that she would wait there until he drove by her, and he thereupon started his car; that she did not wait for him to pass her but started running towards his moving car, and the collision occurred before he could again stop the car. Was it the exercise of reasonable care on his part to start his car forward while the child was nearly in front of it and only 12 feet from it? If, instead of assuming that this little child would remain where she was in the street while he started his car and drove it by her, the defendant had spoken to her, and told her to go on across the street, the unfortunate accident would not have occurred. We entertain no doubt that the evidence amply justifies the conclusion that a reasonably prudent man, acting under those circumstances, would not have started the car ahead until that little child was safely out of danger. It cannot be held, therefore, that the jury manifestly erred in finding negligence on the part of the defendant.

2. The court cannot say as a matter of law that this child, six years of age at the time, was or was not old enough to be capable of exercising some care for her safety under the circumstances. That was a question for the jury. *Grant* v. *Bangor Railway and Electric Co.*, 109 Maine, 133 and cases cited. It is common knowledge, of course, that children of that age do exercise care and caution, and often to a considerable degree. And certainly it cannot be said that the jury clearly erred if they decided that this child was old enough to exercise care for herself. If they so decided, then it follows, from the fact that they found a verdict in her favor, that they also decided that she did exercise reasonable care

under the circumstances, the test being whether she used that degree or extent of care which ordinarily prudent children of her age and intelligence are accustomed to use under like circumstances. Here again we must say, that if the verdict rests upon that finding by the jury, we are not disposed to disturb it. For we think the conclusion is not an unreasonable one, that the ordinarily prudent child of the plaintiff's age and intelligence, seeing the approaching automobile come to a stop, 12 feet away from her, would, as she evidently did, undertake to go on across the street.

We do not know if the jury had occasion to determine whether the child's parents were negligent in permitting her to be unattended in crossing the street; for that question was not involved in the case unless the jury decided that the child was too young to exercise care for herself. But if that question did arise in this case, we have no hesitancy in saying that a finding by a jury, that the parents of this child were not negligent in allowing her to go unattended from their house across the street in the daytime to and from the school-yard playground, ought not to be set aside.

3. It is further contended that the damages awarded are excessive. We do not feel certain that they are, after reading the evidence as to the nature and extent of the plaintiff's injuries. At all events, we are not convinced that the verdict ought to be disturbed for that reason.

Motion overruled.

HERBERT L. PALMER

vs.

THE INHABITANTS OF THE TOWN OF BLAINE, et als.

Somerset. Opinion October 3, 1916.

Demurrer. Misjoinder of party defendant; How to be pleaded.

Action of assumpsit on an account annexed. Each defendant town demurred, assigning as the ground thereof that it had been declared against jointly with the other towns.

Held;

1. The declaration is sufficient to admit proof of a several liability of some one of the defendant towns; and upon such proof, judgment could be entered against that defendant, although a joint liability was not established.
2. A misjoinder of another party defendant is not a good ground of demurrer for a defendant against whom the declaration alleges a good cause of action on a several liability.
3. In the case at bar, it is not possible to determine, until the proof is made, against which of the defendant towns a several liability may be established. And for that reason all of the demurrers should have been overruled.

Action of assumpsit against the defendant towns on an account annexed. Defendants each filed demurrer. Demurrers sustained. Plaintiff filed exceptions to ruling of court sustaining demurrers. Exceptions sustained.

Case stated in opinion.

Manson & Coolidge, for plaintiff.

W. S. Brown, for defendants.

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

KING, J. Action of assumpsit on account annexed containing sundry items, from an examination of which the inference is justifiable that they represent school supplies. Each defendant town demurred assigning as the cause that it had been declared against

jointly with the other two towns. The demurrers were sustained and the case is before this court on exceptions to that ruling.

The language of the declaration is: "for that the defendants at said Pittsfield on the date of the purchase of this writ was indebted to the plaintiff in the sum of one hundred four dollars and seventy-seven cents, according to the account annexed, and then and there in consideration thereof promised the plaintiff to pay him said sum on demand." The only point made in support of the demurrers is the misjoinder of the defendants, the contention being that a municipal corporation cannot incur a joint liability without express legislative authority, and that no such authority is alleged in the declaration.

But the declaration is sufficient to admit proof of a several liability of one of the defendants, and upon such proof being made judgment could be entered against that defendant, although a joint liability was not established. R. S., c. 84, sec. 98. The misjoinder of another party defendant is not a good ground of demurrer for a defendant against whom the declaration alleges a good cause of action on a several liability. *Livermore* v. *County of Norfolk,* 186 Mass., 133. In such a case a demurrer for the other defendant on the ground of misjoinder might be sustained, because the declaration *shows* that the cause of action is not against him. But that is not this case. Here it is not possible to determine, until the proof is made, against which of the defendant towns a several liability may be established. For that reason we think all of the demurrers should have been overruled.

Exceptions sustained.

CARTER, CARTER AND MEIGS COMPANY

vs.

THE STEWART DRUG COMPANY.

Washington. Opinion October 5, 1916.

Public Laws, 1905, Chapter 85, as amended by Public Laws, 1907, Chapter 137, interpreted.

Where, under section 77, chapter 47, R. S., which extends the corporate existence for three years of corporations whose charters expire or are otherwise terminated, no trustees or receivers are appointed, the corporation and its officers may do all things authorized by that section necessary to wind up its affairs.

Where, however, trustees or receivers are appointed, as under section 78 of the same chapter, now repealed, or chapter 85, Public Laws, 1905, as amended, of a corporation whose charter has expired or is terminated or dissolved, section 77 of said chapter becomes inapplicable and the corporation and its officers are without power to perform any of the acts thereby authorized.

The case of Moody v. Development Co., 102 Maine, 365, does not constrain the court to declare unconstitutional chapter 85, Public Laws of 1905, as amended by chapter 137, Public Laws of 1907.

Where, under chapter 85, Public Laws 1905, as amended, a receiver has been appointed for a corporation and the corporation dissolved upon a bill in equity, such corporation can take no action regarding a suit at law, pending when such bill was filed, after the entry of the decree of dissolution.

Whether in such case at law the receiver shall appear or not, and what action he shall take upon appearance, if ordered, must be determined by the equity court in which the bill is pending.

Action of assumpsit on account annexed to recover for goods sold and delivered to defendant company. Attachment was made of defendant's stock in trade and receiptor given to sheriff. Within thirty days of date of writ and attachment, proceedings were instituted under Public Laws, 1905, chapter 85, as amended by Public

Laws, 1907, chapter 137. Under these proceedings, a decree was entered appointing a receiver for defendant corporation. At a subsequent term of court, the attorney for the defendant company filed a motion to dismiss the pending suit, which motion was dismissed pro forma by the Justice presiding. To which ruling defendant took exceptions. Exceptions overruled.

Case stated in opinion.

C. B. & E. C. Donworth for plaintiff.

H. H. Gray, for defendant.

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

BIRD, J. This is an action of assumpsit for the recovery of the price of merchandise sold defendant by plaintiff. The writ was dated September ninth, 1915, and returnable at Machias on the second Tuesday of October next following. Upon the eleventh day of September, 1915, sundry goods of the defendant, to the value of four hundred dollars, were attached upon the writ and service made upon defendant. A receipt for the goods attached was given the officer, executed by the defendant and one Cummings and one Whitney. This receipt was in the alternative and of the usual form. On the first day of October, 1915, a bill in equity, brought under the provisions of c. 85 of the Pub. Laws of 1905, as amended (Pub. Laws 1907, c. 137) was filed by Fred T. Stewart and another against the defendant in this suit. Upon this bill an injunction was issued October twenty-ninth, 1915, as provided in c. 85 of the Public Laws of 1905, and on the ninth day of November, 1915, a decree was entered appointing a receiver of defendant corporation. By this decree all attachments made within thirty days before the first day of October, 1915, the date of filing the bill in equity were dissolved and, on the twenty-eighth day of December next following, the defendant corporation was by decree dissolved.

At the May term, 1916, of the court at Machias, the defendant corporation filed its written motion to dismiss the action brought against it by Carter, Carter and Meigs Company upon the ground that, since the commencement of the action, the defendant corporation had been dissolved and a receiver appointed to close its

affairs. The court below ruled pro forma that the motion be dismissed and to this ruling defendant had exceptions.

By c. 400 of the Public Laws of 1839, it was enacted:

Sec. 1. That all corporations, whose charters shall expire by their own limitation, or be annulled by the forfeiture or otherwise, shall be continued bodies corporate for three years from such time, for the purposes of prosecuting and defending suits by or against them, or gradually settling and closing their concerns, or disposing of their property, and of dividing their capital stock, and for no other purpose.

Sec. 2. That when the charter of any corporation shall expire or be annulled, any creditor or stockholder of such corporation may apply to the Supreme Judicial Court, which shall have jurisdiction in chancery of such application and may appoint one or more persons as trustees to take charge of the estate and effects of such corporation, with power to collect the debts and property of the same, and to prosecute and defend in the name thereof all necessary suits in law.

These sections of c. 400 of the Pub. Laws, 1839, became 24 and 25 of c. 76 of the Revised Statutes of 1841 and without substantial change. In 1843, in *Reed* v. *Frankfort Bank,* the court had occasion to construe c. 139 and c. 190 of the Private and Special Laws of 1841, which repealed the charter of the Frankfort Bank and provided for the appointment of receivers who were empowered to prosecute any action then pending against the bank and to use the name of the bank in any suit necessary to enable them to collect any debts due the bank. The plaintiff Reed had commenced his action and attached the property of the bank some time prior to the days on which the acts became operative. The court says that "the bank having ceased to exist, excepting so far that the receivers could prosecute any suit pending in its name; and could use the name of the bank in any suit which might be necessary to enable them to collect any of the debts due to the bank, there is no party whom the plaintiff can prosecute or take judgment or execution against, unless it be in a court of equity." The bank as such has no longer power to sue or to be sued. 23 Maine, 318, 321. In *Whitman* v. *Cox,* 26 Maine, (1846) 335, 340, where the same acts were under consideration it is said that it has been

adjudged in *Reed* v. *Frankfort Bank,* supra, that the acts repealing the charter of the bank, and providing for the distribution of its funds by receivers, incapacitated it any longer to sue or be sued in a court of law, otherwise than to promote the object confided to the receivers. And the opinion continues, "The bank has ceased to exist as a corporate body, in reference to suits instituted against it by those claiming to be its creditors. It had been deprived of its power to transact business, and its funds were transferred to receivers, against whom alone its creditors could prefer their claims, and they (the creditors) could insist upon nothing more than a pro rata dividend of those funds. To such a case the statutes giving corporations three years to wind up their concerns are inapplicable. The Frankfort Bank, after the appointment of receivers, had no concerns to wind up. The receivers had the whole control of its affairs. It had become in effect a nonentity." In the case last cited service of the writ in the suit against the bank was made after the charter of the bank had been repealed and receivers appointed and their duties defined. Both of the cases cited receive the approval of the court in *Rankin* v. *Sherwood,* 33 Maine, 509, 510. See also *Hunt* v. *Ins. Co.,* 55 Maine, 290, 295, 296.

And where the surrender of a charter of a corporation is accepted by the Legislature and its affairs are to be wound up in the manner provided in sections 19 and 20 of chapter 46 of the Revised Statutes (1857), now sections 77 and 78 of c. 47, R. S. (1903), and trustees are appointed under the latter sections, it has been held that "The corporation ceases for the purpose of business and the trustees in its place, and with its rights, are to perform such acts as are necessary to close up its affairs. They represent the corporation." *Piscataquis etc. Ins. Co.* v. *Hill,* 60 Maine, 178, 182.

In *Cooper* v. *Curtis,* 30 Maine, 488, 490 and *Mariners' Bank* v. *Sewall,* 50 Maine, 220, 221, no provision for the appointment of trustees or receivers was made in the acts of the Legislature terminating the corporations and it was held that under a provision extending the corporate capacity thereafter gave the corporations perfect existence for three years, for winding up their affairs. So in *Shore Line R. R. Co.* v. *Railroad,* 92 Maine, 476, 482. See also *Foster* v. *Essex Bank,* 16 Mass., 245, 274.

Section twenty-four of chapter seventy-six, R. S., 1841 (c. 400 § 1, Pub. Laws, 1839) was slightly changed in phraseology in the revision of 1857 and, as thus changed, has become § 77 of c. 47, R. S. of 1903. The change, however, apparently for the purpose of condensation has not changed the law. We find no such intention on the part of the Legislature. *French* v. *Co. Commissioners,* 64 Maine, 583, 585; *Taylor* v. *Caribou,* 102 Maine, 401, 405; *Cummings* v. *Everett,* 82 Maine, 260, 264.

Section 77, c. 47, R. S., must be regarded as a provision restricted to the case of a dissolved corporation administering and winding up its own affairs and as granting the necessary powers to enable it to do so. When, however, a receiver was appointed under § 78 of c. 47, R. S., 1903 (§ 2, c. 400, Priv. & Sp. Laws 1839) the winding up of the corporation was entrusted wholly to him and section 77 became inapplicable. This section (78) was repealed by c. 85 of the Pub. Laws of 1905, under which the court in equity is proceeding in the case of *Stewart* v. *The Stewart Drug Co.* Briefly this chapter provides for the issuance of an injunction restraining the corporation, its officers and agents, among other things, from exercising any of its privileges and franchises, for its dissolution, and, at the ordering of the injunction or during its continuance, for appointment of a receiver or receivers to wind up the affairs of the company, who shall at all times be subject to the order and control of the court. "Such receiver shall have the power, among others granted, to institute and defend suits at law or in equity in his own name as receiver and to demand, collect and receive all property and assets of the corporation." Under this act, as under § 78, c. 47, R. S., now repealed, it is the opinion of the court that section 77, c. 47, R. S., extending the existence of the corporation for three years is inapplicable.

Premising that we consider both the injunction and the receivership decreed in the case of *Stewart* v. *The Stewart Drug Co.* as permanent and not temporary, a decree of dissolution having been entered, we conclude that the defendant in the case under consideration had no standing in court and no power to make any motion regarding the prosecution or disposal of the case at law. See *Milwaukee etc. Ins. Co.* v. *Sentinel Co.,* 81 Wis., 207; 15 L. R. S., 627. See also *Rosenbaum* v. *Credit System Co.,* 61 N. J. L., 543, 546.

It is claimed, however, that c. 85, Pub. Laws, 1905, is unconstitutional, that it violates that provision of the Federal Constitution which empowers Congress to establish uniform laws on the subject of bankruptcies throughout the United States. In support of this contention *Moody* v. *Development Co.,* 102 Maine, 365, announced February 5, 1907, is relied upon, the conclusion in that case being that the act of 1905 never had any life and never went into operation because it violated the provision of the Federal Constitution regarding bankruptcies.

In 1907, by c. 137 of the Public Laws of that year, the act of 1905 was amended by striking out the provisions barring all claims not proved within the period fixed by order of court. The amendatory act was approved March 26, 1907, and it was evidently the judgment of the Legislature that the amendment met and overcame the objections set forth in *Moody* v. *Development Co.,* supra. Undoubtedly the expression of the court was to the effect that an insolvency law enacted during the existence of a Federal Bankruptcy Act, was inoperative but capable of coming into full force upon the repeal of the Bankruptcy Act. But, as stated, it was the judgment of the Legislature that the amendment of 1907 freed the act of 1905 from its unconstitutional features and such appears to have been the opinion of this court as witnessed in *Folsom* v. *Smith,* 113 Maine, 83, 86; *Van Oss* v. *Petroleum Co.,* Id., 180; *Spear* v. *Lime Co.,* Id., 285; *Craughwell* v. *Trust Co.,* Id., 531. We conclude, therefore, that *Moody* v. *Development Co.,* supra, does not constrain the court to hold the amended law unconstitutional.

The corporation and its officers having been enjoined from exercising any of its privileges and franchises, a receiver having been appointed and a decree of dissolution entered it has been held that pending suits against the corporation abated. *Pendleton* v. *Russell,* 144 U. S., 640, 645. Whether there be any peculiar circumstances excepting this case from the rule is a question for the equity court decreeing the dissolution. Whether the receiver shall appear or not and what action he shall take upon appearance, if directed, must be determined by that court. In the solution of these questions the case of *Mitchell* v. *Gooch,* 60 Maine, 110, may be suggestive.

The exceptions are overruled.

ROBERT H. HASLAM *vs.* FRED A. PERRY, Adm'r.

Androscoggin. Opinion October 10, 1916.

Part payment as renewing outlawed account. Burden of proof as to such alleged payments.

In an action of assumpsit, brought by the plaintiff against the administrator of his brother's estate to recover $1350., the balance due on an alleged loan made nearly thirty years ago, it is

Held;

1. That, although the evidence is weak and rather unsatisfactory, there may be sufficient to substantiate the plaintiff's claim that the loan was made, fourteen hundred dollars in 1886, and five hundred dollars in 1887.
2. That at the expiration of six years from the date of the original loan the Statute of Limitations intervened and continued to be a bar to the enforcement of the claim for fifteen years longer, before any alleged payment was made.
3. That the intentional part payment of debt constitutes an acknowledgment of its existence and a renewal of its obligation, however old the debt may be.
4. That the evidence fails to convince the Court that the intestate ever intentionally made partial payments on this outlawed claim or in any way acknowledged its existence or renewed the obligation. The facts and circumstances negative rather than confirm the plaintiff's contention.

Action of assumpsit to recover certain sums of money alleged to be due and owing to the plaintiff from defendant's intestate. Defendant pleaded general issue and brief statement, setting forth statute of limitations. Case reported to Law Court upon certain agreed statements and admissions. Judgment for defendant.

Case stated in opinion.

Edgar M. Briggs, for plaintiff.

Ralph W. Crockett, for defendant.

SITTING: CORNISH, KING, BIRD, HALEY, PHILBROOK, MADIGAN, JJ.

CORNISH, J. The plaintiff seeks to recover from the administrator of the estate of James K. Haslam the sum of thirteen hundred and fifty dollars, balance due on money loaned. Robert H. Haslam and James K. Haslam were brothers. The former lived in Massachusetts, the latter at one time in Cleveland, Ohio, and later in Lewiston, Maine, where he died on April 2, 1913. The debt was created, as the plaintiff claims, by three checks, introduced in evidence, drawn in North Adams, Mass., on the Berkshire National Bank by R. H. Haslam & Co., and made payable to the order of James K. Haslam, the first on August 6, 1886, for four hundred dollars, the second on November 26, 1886, for one thousand dollars, and the third on April 6, 1887, for five hundred dollars. The first and second bear the indorsement of Jas. K. Haslam, the third that of "Jas. K. Haslam for Haslam & Co." As these checks were paid the transfer of the nineteen hundred dollars from the plaintiff to his brother is proved.

The plaintiff claims that these sums constituted a loan. There is no other written evidence of the fact than the checks themselves. No note was given, and no letter or memorandum is produced. The checks were drawn about thirty years ago, and twenty-seven years prior to the death of James K. Haslam. Silence reigned for over twenty years, a situation which in itself naturally suggests either that the checks did not represent a loan or that, if they did, the debt was subsequently paid. Common business experience raises a doubt. But the plaintiff's wife, the admissibility of whose evidence we shall consider later, testified to the loan of the money and to the circumstances under which the checks were sent. The son, Robert T. Haslam, also states that his uncle admitted the indebtedness in a conversation with him. On the whole, taking the unexplained checks, and this oral testimony, we think there is sufficient evidence to substantiate the plaintiff's claim that the loan was made, fourteen hundred dollars in 1886 and five hundred dollars in 1887.

But the statute of limitations intervened at the expiration of six years from the date of the respective checks and continued to be a bar to the enforcement of the claim for fifteen years longer, when on February 1, 1908, as the plaintiff claims, the silence was broken and his brother made him a partial payment of one hundred and fifty dollars, on September 12, 1910 of two hundred and fifty dol-

lars, and on January 30, 1911 of one hundred and fifty dollars, a total of five hundred and fifty dollars, all on account of the old loans, thereby removing the bar of the statute, and reviving and renewing the liability. R. S., ch. 83, sec. 103. It is familiar law that the intentional part payment of a debt constitutes an acknowledgement of its existence and a renewal of its obligation; it matters not how old the debt may be. *Sinnett* v. *Sinnett,* 82 Maine, 278; *Pond* v. *French,* 97 Maine, 403.

These alleged partial payments are evidenced by three joint and several promissory notes, all dated at Taunton, Mass., and payable to the order of the Bristol County National Bank from which institution the money was borrowed. The original notes are not in evidence, but none of them has been paid and by agreement the renewal notes are offered as being substantially the same as the originals. These notes bear the following signatures, and in the order given, viz: that of February 1, 1908, R. H. Haslam, J. K. Haslam & Co., J. K. Haslam, R. T. Haslam; that of September 12, 1910, R. H. Haslam, R. T. Haslam, J. K. Haslam and J. K. Haslam & Co.; and that of January 30, 1911, R. H. Haslam, R. T. Haslam, J. K. Haslam & Co., J. K. Haslam and Clinton V. Sanders. R. T. Haslam is the son of the plaintiff and while his name appears on the renewal of the note of February 1, 1908, he testifies that it was not on the original of that date, but was added at some subsequent renewal.

In order to connect these notes with the original loan and to convert them into intentional partial payments thereof, the plaintiff introduced the testimony of his wife and of his son, R. T. Haslam. If seasonably objected to, the testimony of the wife would have been inadmissible. R. S. Ch. 84, sec. 112, par. II; *Berry* v. *Stevens,* 69 Maine, 290; *Hubbard* v. *Johnson,* 77 Maine, 139; *Hollowach* v. *Priest,* 113 Maine, 510. No objection however was made to the testimony, and we think the defendant has waived the right to object now. True, the case is reported to the Law Court upon so much of the evidence as is legally admissible, but there is an admission by the parties themselves that the depositions taken to be used at the hearing before the commissioners on insolvency "may be used at this trial with the same effect as though taken to be so used." Further it is stipulated by counsel in the caption to the wife's deposition that it "may be used as her deposition by

either party in the hearing before commissioners . . . or before any other court on any appeal from said commissioners." And the counsel for the defendant in his brief refers to the wife's testimony and characterizes it as the only direct evidence of the particular transaction. Under these circumstances we think the evidence of the wife is properly before this Court for consideration.

Her testimony is in substance that James K. Haslam raised these three sums on these notes and turned them over to her husband, the plaintiff, in recognition and part payment of the old loan, and that they were used for the education of their son, Robert T. Haslam. The son corroborates this.

But so many facts and circumstances militate against this claim that we find ourselves unable to accept it. It may be that the money was used for the education of the son, especially as his name appears upon the notes, but we do not think they were partial payments on the old checks. In the first place these three notes upon which the plaintiff relies are not the only ones given to the same bank bearing the signatures of the plaintiff and of James K. Haslam whom, for the sake of convenience, we will call the defendant. They are only three out of nine, and all nine apparently pertain to a certain course of business between the parties. Exactly what that was does not appear. Whether the money was raised for the benefit of the plaintiff or of the defendant, or both, is merely a matter of conjecture; but the fact is prominent that a series of nine joint and several notes were given by the plaintiff and the defendant between May 17, 1907, and January 30, 1911, none of which was paid, all of which were renewed from time to time and are still in existence. They aggregate seventeen hundred and eighty-five dollars. They are substantially the same in form, and vary in amounts from $100 to $485. Of these nine the plaintiff claims the proceeds of the third, seventh and ninth to have been payments to him on account of the loan made more than a quarter of a century before. Then why not the other six?

It is significant that on every note the first signer is R. H. Haslam, the plaintiff, followed in four by J. K. Haslam & Co. and J. K. Haslam, and in five by J. K. Haslam and J. K. Haslam & Co., followed also in three by R. T. Haslam, and in one, the alleged payment note of January 30, 1911, by an outside party one Clinton

V. Sanders. Both the wife and son testify that the notes were sent to the defendant at Lewiston, signed by him and then returned and signed by the plaintiff. The notes themselves disprove this and the prima facie presumption is that the parties were successive signers in the order in which their names appear. *Coolidge* v. *Wiggin,* 62 Maine, 568.

It is evident that both the plaintiff and the defendant between 1907 and 1911 were borrowing money frequently from the bank on their joint and several notes, with the plaintiff as the first maker. Some one was in need of funds and the need was growing. It is hardly credible that three of these notes, similar in general terms to all the others, were given by the defendant to hire money with which to pay off a portion of his brother's outlawed indebtedness when he was unable to pay off his own indebtedness already due to the bank, and when his financial condition was continually growing worse and ended in an insolvent estate at his death. In a letter written to the plaintiff under date of March 7, 1913, the defendant encloses two renewal notes, one of which was the renewal of one of these alleged payment notes and the other was not. He treats both alike but insists on the signature of Robert T. to the payment note, and also reveals his financial straits.

Moreover we find no indorsement of these alleged payments upon any of the original checks, which we would expect to find if such payments had been made. Instead we find that the words "as loan" have been written into the original checks, but the evidence shows that these words were inserted not at their inception but in February or March, 1913, twenty-six or twenty-seven years after the checks were drawn, and a few days or weeks prior to the defendant's death. The son states that they were written in by his father in the presence of the defendant, but he could have no personal knowledge of the fact because he also testifies that he never saw the checks until the summer of 1914. Moreover if they were inserted with the knowledge and consent of the defendant as a part of a business transaction between the two brothers, it is strange that no deduction was made or credit given for the five hundred and fifty dollars which, according to the plaintiff's contention, had been paid on account prior to that time. And it is equally strange that the parties did not put the indebtedness in the form of a

promissory note if they were then having a business settlement. We cannot regard the insertion of these words in any other light than as very damaging to the plaintiff's cause, and we fear that James K. Haslam never saw them.

In conclusion we need only say that the burden rested upon the plaintiff to convince this court of the legality of his claim against his brother's estate. This he has failed to do and the entry must therefore be,

Judgment for the defendant.

JULIA COTE, Pro Ami, *vs.* JAY MANUFACTURING COMPANY.

Androscoggin. Opinion October 10, 1916.

Fellow-servant doctrine. Interpretation of Public Laws of Maine, 1909, Chapter 256, section 2 as bearing on the question of negligence. Liability where one performs work or labor outside of regular scope of duties and is injured thereby. Proof necessary under allegation that "servant was incompetent." What is meant by "incompetence."

The plaintiff, a girl fourteen years of age, was injured while in the defendant's employ. She was working at the rear end of a machine used for the manufacture of skewer sticks. Her contention is that the machine clogged, that one La Pointe, who operated and controlled the machine, stopped it; that she was clearing out the knives attached to the central set of cylinders when La Pointe, without giving her any warning, started the machine, and her hand was caught and severed at the wrist. Upon defendant's motion to set aside a verdict rendered in favor of the plaintiff, it is

Held;

1. It was no part of the plaintiff's duty to remove the clog. That was a part of the operation of the machine, and was the sole duty of the operator.
2. The plaintiff was performing an uncalled for and inexcusable act, one entirely disconnected from the service for which she was employed and which she was accustomed to perform.

3. Even assuming the plaintiff's contention as to the facts to be true, the fellow servant rule precludes recovery unless the defendant could be proven guilty of negligence either in employing La Pointe or in retaining him in its employ.
4. In order to maintain this proposition, the plaintiff must prove first, that La Pointe was in fact incompetent, and second, that the defendant knew that fact or, by the exercise of reasonable diligence, should have known it.
5. Although the original employment of La Pointe when only thirteen years of age was in contravention of Pub. Laws, 1909, chapter 257, section 2, yet it did not create any evidence of negligence here, because at the time of the accident he had attained the legal age, and the question of competency must relate to the time of the injury and not to the time when the employe first assumed his duties.
6. Incompetence in the law of negligence means want of ability suitable to the task, either as regards natural qualities or experience, or deficiency of disposition to use one's natural abilities and experience properly.
7. That even if La Pointe had been in some way negligent at the time of the injury, his incompetency cannot be established by that single act. It is admissible evidence, but not of itself sufficient.
8. Upon the question of actual incompetence, the evidence is negligible, and the verdict was manifestly wrong.

Action on the case to recover damages for personal injuries received by plaintiff while in the employ of the defendant company. Verdict for plaintiff. Defendant filed motion for new trial and exceptions to certain rulings of presiding Justice. Motion sustained. Verdict set aside.

Case stated in opinion.

McGillicuddy & Morey, for plaintiff.

Newell & Woodside, for defendant.

SITTING: CORNISH, KING, BIRD, HALEY, PHILBROOK, MADIGAN, JJ.

CORNISH, J. The plaintiff, a girl fourteen years of age, was injured on November 21, 1914, while in the defendant's employ. She was working at the rear end of a machine called a planer, used in the manufacture of skewer sticks. This machine was equipped with two cylinders at the front, turning inward and carrying the stock, in shape like a lath, into the machine, with two cylinders near the center supplied with rapidly revolving knives, which cut and planed the stock, and with two cylinders at the rear, turning outward and delivering the finished sticks, in shape like a lead

pencil, at the sorting table. The knive-cylinders were covered by a removable box.

One Louis LaPointe, a boy then fifteen years old, worked at the front of the machine. He operated and had charge of it. He started and stopped it by means of a rope connected with a shipper on the floor below, and he fed in the stock. In case of clogging in the knive cylinders he removed the box and remedied the trouble with the aid of a stick, sometimes when the machine was in operation, and sometimes after he had stopped it.

About two feet from the rear and a little at one side was a table upon which the sticks which came from the machine were sorted. The plaintiff worked at this rear end, taking the sticks as they fell from the last cylinders, sorting them upon this table and placing them in different compartments. This was her job. She had nothing whatever to do with the operation or control of the machine. Her duty was solely with the harmless product.

The first important question is, what was the cause of the accident. The plaintiff claims that the machine clogged, that LaPointe stopped it, that she in the discharge of her duties was cleaning out the knives with a stick, that LaPointe, without giving her any warning, started the machine and her hand was caught. The fellow servant rule would preclude recovery, even if this state of facts existed, unless the defendant could be proven guilty of negligence in employing LaPointe or retaining him in its employ, and it is upon this theory of negligence in retaining an incompetent servant that the plaintiff rests her case.

The defendant, on the other hand, contends that when the machine clogged on the day in question, LaPointe removed the cover and endeavored to free the clog while the machine was in motion; that failing in this he bent down and pulled the rope to throw off the speed; that after the belt was unshipped the knives continued to revolve for a time; that the plaintiff placed her hand among the knives before they came to a full stop, and while he was bending down; that it was no part of her duty to free this clog and her act in attempting to do so was purely voluntary and inexcusable.

Upon this issue of the cause of the accident the jury must have found in favor of the plaintiff. But the finding cannot be sustained. No one saw the occurrence except these two actors. So far as oral

testimony is concerned we have that of the interested plaintiff on one side and of LaPointe on the other. But the situation itself speaks. The rope which threw the speed on or off was pulled but once. The machine had been in operation, therefore the movement stopped it. Moreover it was found at rest when the superintendent came and extricated the plaintiff from the cylinders. If the plaintiff's statement is true that LaPointe stopped and then started the machine, it would have been in motion when the plaintiff was removed from her perilous position. But it was still. This fact settles the controversy between the plaintiff and LaPointe and proves the truth of the latter's version of the accident.

The evidence is also overwhelming that it was no part of the plaintiff's duty to remove the clog. That was a part of the operation of the machine and was the sole duty of the operator. LaPointe was the operator. The plaintiff herself admits it. The removal of any obstruction devolved upon him. She was employed simply to sort the sticks. The superintendent and LaPointe both so testify, and another girl, who had sorted upon this machine for two years, about half the time with LaPointe as operator, corroborates both. This testimony is entirely consonant with the probabilities. The plantiff says that during her two weeks' work she had frequently cleaned the knives when the machine had been stopped. LaPointe says she had attempted it but once and then he had forbidden her doing it again. On this first and important point, in view of all the facts, we see no escape from the conclusion that the plaintiff was performing an uncalled for and inexcusable act, one entirely disconnected from the service for which she had been employed and which she was accustomed to perform.

We might well stop here and ignore the second necessary point in the plaintiff's chain of proof, the alleged negligence of the defendant in retaining an incompetent servant. If the accident was in no way due to the negligence of LaPointe, it is entirely immaterial whether he was competent or incompetent. That question, strictly speaking, is beside the issue.

But as it is argued by the learned counsel on both sides we will consider it briefly, assuming for this purpose the truth of the plaintiff's version, and that some negligent act on her fellow servant's part was the cause of her injuries. This proposition involves two

elements; first, that LaPointe was in fact incompetent, and second, that the master knew that fact or by the use of reasonable diligence should have known it. *Robbins* v. *Street Railway,* 107 Maine, 42.

Upon the question of actual incompetence the evidence is negligible. True when LaPointe was first employed by the defendant on this machine he was only thirteen years of age and his employment was in direct violation of P. L. 1909, ch. 257, sec. 2, which prohibits the employment of children under fourteen years of age in manufacturing and mechanical establishments. Had this accident happened before LaPointe reached the age of fourteen, the fact of illegal employment would have been competent though not conclusive evidence on the question of defendant's negligence resulting from a failure of duty on his part. *Jones* v. *Coöperative Association,* 109 Maine, 448. So, too, the plaintiff was employed when under fourteen in contravention of the same statute and had she, before reaching the age of fourteen, received injuries whose proximate cause was the violation of the statutory duty of the employer, then the effect of that statute upon the measure of the defendant's liability would have arisen. *Berdos* v. *Tremont Mills,* 209 Mass., 489. But this statute is not involved here because both the plaintiff and LaPointe had passed their fourteenth birthday when the accident happened, the plaintiff by nine days and LaPointe by more than a year. The question of competency must relate to the time of the injury and not to the time when the employe first assumed his duties. *Chicago &c. R. R. Co.* v. *Sullivan,* 63 Ill., 293; *Harvey* v. *R. R. Co.,* 88 N. Y., 481.

Again, even if LaPointe had been in some way negligent at the time of the injury, his incompetency cannot be established by that single act. It requires more than that. "Incompetence in the law of negligence means, want of ability suitable to the task, either as regards natural qualities or experience, or deficiency of disposition to use one's natural abilities and experience properly." This definition has been approved by this court in *Robbins* v. *Street Railway,* supra, where many acts of dereliction in the past had been brought to the knowledge of the employer. The evidence here is void of any facts showing such incompetence. LaPointe, from his testimony, seems to have been an intelligent boy of fifteen. The machine was very simple, both in construction and operation. It

required no high degree of skill. Nor was he inexperienced. He had operated this same machine continuously for ten months or a year, and was perfectly familiar with it. There is no proof that he had been inattentive or careless at any time in the past, or that any accident had happened before. There is nothing to indicate that he did not thoroughly understand the working of the machine and was not perfectly competent to run it. The learned counsel for the plaintiff criticises LaPointe's conduct in attempting to clear the machine when in motion, but LaPointe contends that this is a proper method, and the superintendent approves of it. It is not for the court to say, in view of the uncontradicted evidence, that removing a clog with a stick instead of shutting down the machine each time was in and of itself a negligent act. There is no evidence that LaPointe had ever disobeyed any rules or failed to carry on his work in a workmanlike manner. In fact, his record is clean. The evidence of incompetence is insufficient to support a verdict. *Mishou* v. *M. C. R. R. Co.*, 106 Maine, 150. *McCafferty v. M. C. R. R. Co.*, 106 Maine, 284-293.

It is unnecessary to consider the second element involved in this branch of negligence, that is, the knowledge of the servant's incompetence on the part of the employer. There is absolutely nothing to show that the defendant knew or should have known that LaPointe was incompetent, even if in fact he had been. The second element, like the first, lacks proof.

Further discussion is needless. The accident was deplorable, and the injury to the plaintiff most serious. It is natural that the jury should have been actuated by sympathy. But a careful study and analysis of the evidence in the light of all the circumstances fails to attach a legal liability to the defendant.

The entry must therefore be,

Motion sustained.
Verdict set aside.

B. EARLE BITHER *vs.* JUSTIN E. PACKARD.

Kennebec. Opinion October 13, 1916.

Action for money had and received, equitable in its nature. Rule as to unconscionable contracts.

This is an action for money had and received, by which the plaintiff seeks the recovery of money paid to the defendant, the payment of which was induced, as alleged by plaintiff, by duress, the illegal and unjust advantage taken by defendant of plaintiff's financial needs and condition and by reason of an unconscionable contract or agreement, which was void or voidable and without consideration or any adequate consideration.

As a general rule, where money has been received by a defendant under any state of facts which would in a court of equity entitle the plaintiff to a decree for the money, when that is the specific relief sought, the same state of facts will entitle him to recover in an action for money had and received.

There may be such unconscionableness or inadequacy in a bargain as to demonstrate some gross imposition or some undue influence; and in such cases courts of equity ought to interfere, upon the satisfactory ground of fraud. But then such unconscionableness or such inadequacy should be made out as would (to use an expressive phrase) shock the conscience, and amount in itself to conclusive and decisive evidence of fraud. And where there are other ingredients in the case, of a suspicious nature, or peculiar relations, between the parties, gross inadequacy of price must necessarily furnish the most vehement presumption of fraud.

In case of fraud, as a general rule, the party defrauded must act with promptness on discovery of the fraud. But in case of that species of fraud involving undue influence or oppression, time does not begin to run against the injured party until he is emancipated from the dominion under which he stood at the date of the transaction.

Where there is nothing to be done by the plaintiff to place the defendant in statu quo, the action for money had and received is in itself a rescission as well as a demand.

Interest, upon the principles of the common law, is to be allowed where the law by implication makes it the duty of the party to pay over the money to the owner without previous demand. Where it was obtained and held by fraud, interest should be calculated from the time it was received.

Judgment may be entered for the plaintiff for the sum of $8200. with simple interest at six per cent per annum upon each of the payments of $200.

from the dates when respectively made, to be cast by the clerk of the Superior Court, to the day of the entry of judgment.

Action of assumpsit under a count for money had and received to recover of defendant certain sums of money paid by plaintiff to defendant. Plaintiff alleged that payments so made to said defendant were under duress and on account of illegal and unjust advantage taken by defendant of plaintiff's condition. Defendant pleaded general issue. At close of testimony, by agreement of counsel, case reported to Law Court for its determination upon so much of the evidence as legally admissible. Judgment for plaintiff.

Case stated in opinion.

E. M. Thompson, for plaintiff.

S. & L. Titcomb, and Andrews & Nelson, for defendant.

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

BIRD J. This is an action for money had and received by which the plaintiff seeks the recovery of money paid to the defendant, the payment of which was induced, as alleged by plaintiff, by duress, the illegal and unjust advantage taken by defendant of plaintiff's financial needs and condition and by reason of an unconscionable contract or agreement which was void or voidable and without consideration or any adequate consideration.

At the conclusion of the evidence, the case was withdrawn from the jury and reported to the Law Court for determination upon so much of the evidence as is legally admissible.

From the testimony of the plaintiff it appears that at about the age of thirteen years, being without a home, he came from a distant part of the State, upon the invitation of his aunt, the wife of defendant, to Augusta where defendant then, and has since, resided. For a year he lived without expense to him, in the home where his aunt and uncle lived. The plaintiff was thereafter absent from Augusta for the period of a year. He then returned to Augusta where, boarding at various places and paying all his expenses from his earnings, he attended the grammar and high schools, from the latter of which he graduated at the age of twenty. After his

graduation he was variously employed at Augusta, chiefly a clerk or salesman, until the time of the transaction which gave rise to the present suit. During the five or six years next preceding this transaction, he was clerk in the drug store of one Means and then of one Burns who purchased the store of the common law assignee of the former. On the twenty-eighth day of August, 1911, the plaintiff bought a house for a home. He paid on account of the purchase $900, which he had saved and obtained from the defendant a loan of $1,200 to complete the purchase. To secure the loan he gave defendant his note for the amount payable in monthly payments of $20 with interest at 6 per cent. Plaintiff sought and defendant gave advice as to the desirability of the purchase.

On the sixth or tenth of November, 1911, Mr. Burns by whom he was then employed as clerk, became dissatisfied and offered to sell plaintiff his stock and business for the sum of seven thousand dollars. The plaintiff at once sought the advice of defendant and his aid in obtaining the necessary money, if the latter approved the purchase. The defendant took the matter under consideration and later gave his approval and on Saturday, November 18, 1911, informed plaintiff that he could loan him the necessary funds, the plaintiff to include in the notes to be given by him therefor, the sum of $200 for board of the plaintiff some thirteen years before. To these terms plaintiff agreeing, on Monday, November 20, 1911, Burns gave his bill of sale of the stock of goods and good will of the business to Bither for which defendant paid him seven thousand dollars. Plaintiff immediately thereafter gave to defendant his note for two thousand dollars on demand, with interest at the rate of seven per cent and secured the same by second mortgage of his home and a note for fifty-two hundred dollars payable on demand with interest at the same rate and a mortgage as security for the last named note upon the property sold him by Burns. This mortgage provided for possession in the mortgagor until the mortgagee "shall consider it for his interest to take possession under this bill of sale, after default of payment. . . ."

Four or five days later, November 25 or 26, the defendant called upon plaintiff and told him that under the circumstances he thought it no more than fair that he should have a partnership in the business. The plaintiff expressed his disapproval of partnerships but

said that if defendant would have a partnership agreement drawn up, he would think it over and give his answer later. It may be inferred from plaintiff's testimony that plaintiff shortly after the partnership proposition was made, declined it. Up to this time plaintiff says that the relations between defendant and himself were pleasant and cordial and he had found defendant in his dealings with him a just man. On the thirteenth of December following, defendant had an interview with plaintiff in the cellar of his store. The defendant upbraided him for ingratitude, stated that he had used him mean and said that the plaintiff must give him an agreement to pay him two hundred dollars per month while in business, as his share of profits under the proposed partnership, or he would foreclose his mortgages, take all plaintiff had and ruin him financially, and that he enforced his demand by violent and profane language and a threatening manner. On cross examination plaintiff admits that defendant made the alternative proposition to pay a certain sum for his trade and employ him at a stated wage thereafter. The plaintiff finally in fear, as he states, of financial undoing, yielded and agreed to sign such agreement as defendant proposed and both repaired to the office of the attorney of defendant where an agreement under seal was prepared which both parties executed.

By this agreement the plaintiff binds himself to pay the sum of $200 to defendant on the twentieth day of December, 1911, and on the like day of each succeeding month so long as he carries on or is engaged in the drug business, and in case of his desire to retire from or sell the drug business, to give the first option of purchase to defendant upon certain terms set forth and defendant agrees that he will not demand payment of the sum of $7000 advanced by him to plaintiff so long as the latter "fulfills his agreements as specified in items one and two of this indenture and so long as said Bither shall pay the interest on said seven thousand dollars when due." The plaintiff testifies that he executed this agreement under fear of financial downfall and destruction induced by the threats of the defendant. Either on the day of the execution of the agreement of December 13, or on the following day, he sought, apparently in consequence of defendant's demand for an assignment of the existing lease of the store, a modification of the agreement and a

new indenture was drawn which was executed by both parties to the suit on the fifteenth day of December, 1911. Reciting the existence of the mortgage to secure the sum of $7,000, Bither agrees that the assignment of the lease of the store may run to defendant and to pay defendant the rents by the lease reserved and defendant agrees that Bither shall carry on the drug business, that he is the owner and manager of the business free from intervention of Packard but subject to his legal rights, that when the sum of $7,000, has been paid the lease shall be reassigned to Bither and that he will not demand payment of such sum so long as Bither fulfills all his agreements.

The plaintiff made his first payment under the agreement of December 13, 1911, on the twentieth day of December next following and continued such monthly payments until that payable in April, 1915, was paid. He testifies that each of these payments was made under the influence and by reason of the threats and fear which he claims induced the agreement of December 13, 1911.

The defendant, who is about tweny-six years older than plaintiff testifies that at the outset of the negotiations between him and plaintiff for a loan wherewith to purchase the business of Burns, he suggested on the day the matter was first broached, November 16, 1911, that he should have one-half of the profits and that later on the same day in the cellar of his house an equal partnership was agreed upon and that he, the defendant, was to have partnership papers drawn; that on Sunday, November 19, he caused a memorandum for the drawing of such an agreement to be made, that he exhibited the paper to plaintiff on the morning of November 20; that the plaintiff said "I don't see but that is all right;" that the plaintiff said that Burns was desirous of being released from his agreement to sell; that defendant then said "if that is the case it won't do to ask him to give us a bill of sale as a partnership . . . it would give him an excuse to back out. We better have it drawn up in your name and then after we get rid of Burns we can go into partnership as agreed." The defendant did not speak of it again for a week when he states plaintiff said he had decided not to have a partner. "The interview was closed abruptly." "I was mad and didn't want to do any business while I was mad." Upon cross examination defendant was asked if the

fact that Mr. Burns was around the store interfered with completing his transaction with Mr. Bither and he replied, "Well, because I in a way was deceiving him, I didn't want him to think we were putting up a job to get his place away." And, later, speaking of Burns and the transaction, he said, "He might think it was kind of underhanded." The matter of partnership was not again brought up by defendant. On the thirteenth of December, defendant, in the cellar of the store made plaintiff an offer of a certain sum for his trade with Burns and of a certain sum per week for work for him or, "if you want the business, you give me $200 a month for my share of the net income, one-third of the net profits, and you can own the business, or I shall demand my money, as the note is on demand, and I shall take possession as soon as the law will allow me to." To this plaintiff replied, as defendant states, "well you have got me crimped and I have got to give you $200." "I said 'No you haven't. You can take $1,200 and a salary of $25 a week and I will take the business.' He said 'I want the business and will give you $200 a month if you won't foreclose, won't demand your money.'" The defendant, as he says then went alone to the office of his attorney to have an agreement drawn.

Defendant further testified that the lease under which Burns occupied the store was not mentioned by him and plaintiff until the bill of sale and mortgages had been made; that he understood the lease was to be assigned to Bither and that later on the twentieth of November, at the office of the attorney of Mr. Burns, it was arranged that the lease be assigned to defendant.

We find no evidence that plaintiff's knowledge of the situation was supplemented by the advice of counsel, upon full knowledge of the facts, much less by full and complete advice and instruction. And while it is probably immaterial, we are unable to conclude upon the evidence that the matter of a partnership was agreed upon, as claimed by defendant before the transactions of the twentieth of November, 1911. That the agreement of December 13, 1911, was unconscionable and shocking to the conscience must be apparent. Treating the payment of two hundred dollars per month or twenty-four hundred dollars a year as interest, it afforded a rate of .33 per cent, which necessarily increased with each partial payment made and which, with the interest payable on the notes,

made an initial rate of .40 per cent. Considered as a payment in consideration of forbearance it is equally shocking. Nor should it be overlooked that the agreement was to be in force not so long as the plaintiff was indebted but "so long as he carries on or is engaged in the drug business."

The court is also of the opinion that in making the indenture of December fifteen, 1911 and the monthly payments of $200 under the indenture executed two days earlier, the plaintiff continued under the influence of the threats and oppression of defendant which induced the plaintiff to become party to the earlier indenture.

The principles of law covering the case are, we believe, well established. It is elementary law that when one person has in his possession money which in equity and good conscience belongs to another, the law will create an implied promise upon the part of such person to pay the same to him to whom it belongs, and in such cases an action for money had and received may be maintained. This form of action is comprehensive in its reach and scope and, though the form or proceeding is in law, it is equitable in spirit and purpose and the substantial justice which it promotes renders it favored by the courts. It lies for money paid under protest, or obtained through fraud, duress, extortion, imposition or any other taking of undue advantage of the plaintiff's situation, or otherwise involuntarily and wrongfully paid. Where the defendant is proved to have in his hands the money of the plaintiff, which ex aequo et bono, he ought to refund, the law conclusively presumes that he has promised to do so, and the jury are bound to find accordingly, and, after verdict, the promise is presumed to have been actually proved. *Mayo* v. *Purington,* 113 Maine, 452, 455-456.

A person induced by fraud, to enter into a contract under which he pays money, may at his option, rescind the contract and recover back the price, as money had and received. *Garland* v. *Spencer,* 46 Maine, 528, 530.

It has been held that the action for money had and received being an equitable remedy, lies generally where a bill in equity will lie, and that decisions therefore, in chancery which recognize the principle may be justly held to sustain it. *Culbreath* v. *Culbreath,*

7 Ga., 64. 50 Am. Dec. 375, 381. This has been thought, however, to be too broad and indefinite a statement. The better rule is that laid down in *Moore* v. *Mandelbaum,* 8 Mich., 433, 448, to the effect that as a general rule, where money has been received by a defendant under any state of facts which would in a court of equity entitle the plaintiff to a decree for the money, when that is the specific relief sought, the same state of facts will entitle him to recover in an action for money had and received. "We do not mean to say there are no exceptions to this rule, standing upon some rule of policy or strict law, in peculiar cases such as money wrongfully recovered upon a judgment which remains unreversed . . . or where there is a special agreement still open and unperformed." See 2 R. C. L. p. 778.

In *Woodman* v. *Freeman,* where the bill prays the cancellation of certain instruments procured by fraud and the repayment of money, the payment of which was induced by the same fraud, the court after stating the elementary principle that a court of equity may rescind a conveyance or contract which has been procured by fraud, when a proper case for it has been presented, says that the court may also give relief by compensation or damages in sundry classes of cases which it enumerates and among them the case "when a contract or conveyance is properly set aside or rescinded under circumstances requiring that some compensation should be made to one of the parties to adjust the equities and do complete justice." 25 Maine, 530, 537, 542, 543. *Piscataquis etc. Ins. Co.* v. *Hill,* 60 Maine, 178, 184.

In the case of *Chesterfield* v. *Janssen,* 2 Ves., 155, Lord Chancellor Hardwicks, having asserted the undoubted jurisdiction of equity to relieve against every species of fraud, enumerates four classes of fraud, three of which are as follows: "1. Then fraud, which is dolus malus, may be actual, arising from facts and circumstances of imposition; which is the plainest case. 2. It may be apparent from the intrinsic nature and subject of the bargain itself; such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other; which are unequitable and unconscientious bargains; and of such even the common law has taken notice; for which, if it would not look a little ludicrous might be cited 1 Lev. 111.

James v. *Morgan*. A 3d, kind of fraud is, which may be presumed from the circumstances and condition of the parties contracting; and this goes further than the rule of law; which is, that it must be proved, and not presumed; but it is wisely established in this court to prevent taking surreptitious advantage of the weakness or necessity of another; which knowingly to do is equally against conscience as to take advantage of his ignorance; a person is equally unable to judge for himself in one as the other." This statement has been approved, unchanged by the courts and text writers to the present day. *Prudential Ins. Co.* v. *Lachance,* 113 Maine, 550, 555.

There may be such unconscionableness or inadequacy in a bargain as to demonstrate some gross imposition or some undue influence; and in such cases courts of equity ought to interfere, upon the satisfactory ground of fraud. But then such unconscionableness or such inadequacy should be made out as would (to use an expressive phrase) shock the conscience, and amount in itself to conclusive and decisive evidence of fraud. And where there are other ingredients in the case, of a suspicious nature, or peculiar relations, between the parties, gross inadequacy of price must necessarily furnish the most vehement presumption of fraud. 1 Sto. Eq. Jur. § 246. See also Kerr Fr., 187. Hence it is, that even if there be no proof of fraud or imposition, yet, if upon the whole circumstances, the contract appears to be grossly against conscience, or grossly unreasonable and oppressive, courts of equity will sometimes interfere and grant relief, although they certainly are very cautious of interfering unless upon very strong circumstances. *Prudential Ins. Co.* v. *Lachance,* supra.

As between mortgagor and mortgagee, while the former by a voluntary agreement subsequent to the mortgage transaction may convey his equity and all rights to the latter, yet if such subsequent agreement is procured by fraud, oppression or undue influence on the part of the mortgagee, equity will set aside the conveyance. *Russell* v. *Southard,* 12 How. 138, 154; *Villa* v. *Rodriguez,* 12 Wall., 323, 339; *Reed* v. *Reed,* 75 Maine, 264, 272.

And where the holder of notes payable on demand and secured by mortgages upon all the property of another threatens immediate action upon his notes and the financial ruin of such other unless

the latter pay additional interest upon the loan, making the rate grossly usurious, or make payments of money unconscionable in amount for forbearance, we have no doubt a court of equity would equally grant relief. We are unable to distinguish between the case of a mortgagor conveying his equity to the mortgagee by reason of the commanding position of the latter and the weakness and inexperience of the former and a mortgagee whose notes are payable on demand, who threatens immediate demand unless the mortgagor undertakes to pay him an exorbitant sum for forbearance.

In the case of fraud as a general rule, the party defrauded must act with promptness on discovery of the fraud. But in case of that species of fraud involving undue influence or oppression time does not begin to run against the injured party until he is emancipated from the dominion under which he stood at the date of the transaction. The objection of time is removed so long as the dominion or undue influence which vitiated the transaction is in full force. Kerr Fr., 311 and cases cited. So where a transaction is vitiated at its inception by undue influence or by oppression, pressure or constraint, confirmation induced by undue influence or oppression, pressure or constraint or by a continuation merely of the influence of the original transaction, operates as nothing and is unavailing. If an independent legal advisor be employed, it will be assumed that he had satisfied himself before approving of the transaction, that it was for the benefit of his client to approve it. Kerr Fr., 297, 298. See also Ward's Pollock on Contracts, 769, 770.

Or as otherwise stated "unless it is clear that the will of the injured party was relieved from the dominant influence under which he acted or that the imperfect knowledge with which he entered into the contract was supplemented by the fullest assistance and information, an affirmation will not be allowed to bind him nor will time be allowed to run against him, 9 Cyc., 464.

To constitute a confirmation the act must have been done with that intention by one who was not under the influence of the previous transaction and with a knowledge of its invalidity. *Rau* v. *Von Zedlitz,* 132 Mass., 164, 168.

Where there is nothing to be done by the plaintiff to place the defendant in statu quo, the action for money had and received is

in itself a recission as well as a demand; *Frye Pulpwood Co.* v. *Ray,* 114 Maine, 272, 275. *Hunt* v. *Nevers,* 15 Pick., 500, 505. *Hunter* v. *Peaks,* 74 Maine, 363.

Interest, upon the principles of the common law, is to be allowed where the law by implication makes it the duty of a party to pay over money to the owner without previous demand. Where it was obtained and held by fraud, interest should be calculated from the time when it was received; *Dodge* v. *Perkins,* 9 Pick., 368, 388.

Judgment may be entered for the plaintiff for the sum of $8,200 with simple interest at six per cent per annum upon each of the payments of $200 from the dates when respectively made, to be cast by the clerk of the Superior Court, to the day of the entry of judgment.

So Ordered.

STATE OF MAINE, by Complaint, *vs.* GEDEON MAHEU.

Kennebec. Opinion October 16, 1916.

Right of municipalities to enact Ordinances for protection of health. Scope and limitations of Court relative to Municipal Ordinances. When an Ordinance may be declared invalid.

Section 9 of an Ordinance of the City of Waterville, known as the Meat Code, provides as follows:

"Section 9. That no person or persons shall sell or offer for sale in this city any meat intended for human consumption, whether slaughtered within such district or elsewhere, unless the same has first been inspected and approved by the meat inspector or assistant inspector or board of health of the city of Waterville, except meats, bearing the inspection stamp of the United States department of agriculture."

The respondent purchased five fresh pork shoulders from a wholesale dealer in Auburn, Maine, by whose private inspectors the meat had been inspected. It was shipped in due course to the respondent at Waterville and was placed in his market for sale without being inspected in Waterville as provided in the Ordinance above recited.

The respondent filed a general demurrer to a complaint brought under this section and the demurrer was overruled. Upon exceptions to this ruling and upon an agreed statement of facts, it is *Held;*

1. When a municipal ordinance is passed under a general law authorizing municipalities to make regulations for the health, safety and welfare of the people, the Court may declare the ordinance invalid if it contravenes the State or Federal Constitution or an existing statute, or if in their judgment it is unreasonable, even though it may conflict with neither constitution nor statute.
2. Section 9 is not in conflict with either the State or Federal Constitution, nor with any statute of this State.
3. It is also reasonable both as to the particular subject matter and to the method of enforcement.
4. In the absence of a general law regulating the subject throughout the State, each city or town has the right to insist upon inspection by its own officials. The inspection by private inspectors is without legal force.

Complaint and warrant for violation of what is known as the meat code or ordinance of the city of Waterville, Maine. Respondent adjudged guilty and fined by Judge of municipal court. Appeal entered to Superior Court, Kennebec county, where demurrer was filed by respondent. Demurrer overruled by presiding Justice. Respondent filed exceptions. Exceptions overruled. Judgment for State.

Case stated in opinion.

W. H. Fisher, county attorney, for State.

C. A. Blackington, and George C. Wing, for respondent.

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

CORNISH, J. Complaint for violation of section 9 of an ordinance of the city of Waterville known as the meat code. This section provides:

"Section 9. That no person or persons shall sell or offer for sale in this city any meat intended for human consumption, whether slaughtered within such district or elsewhere, unless the same has first been inspected and approved by the meat inspector or assistant inspector or board of health of the city of Waterville, except meats, bearing the inspection stamp of the United States department of agriculture."

The respondent was found guilty in the municipal court and on appeal to the Superior Court filed a general demurrer, which was overruled. The case comes before this court on respondent's exceptions to the overruling of the demurrer and upon an agreed statement. From these it appears that the respondent purchased five fresh pork shoulders from the Merrow Brothers Company of Auburn, Maine. The meat had been duly inspected by the inspectors of the Merrow Brothers Company. It was shipped in due course to the respondent at Waterville and was placed in his market for sale without being inspected in Waterville in accordance with the terms of the ordinance above recited.

The single question involved is the validity of this section in question.

The general nature, character and extent of what is known as the police power has been so clearly defined by this court in numerous and recent cases that it needs no further discussion here. *B. & M. R. R. Co.* v. *Co. Commissioners,* 79 Maine, 386; *State* v. *Robb,* 100 Maine, 180; *State* v. *Starkey,* 112 Maine, 8. The right of a municipal corporation in the exercise of this power to enact reasonable ordinances for the purpose of promoting the health of its citizens is settled. The scope and limitations of the supervisory authority of the court over municipal ordinances are also well established. When a municipality has been given by the Legislature in express language the power to enact a particular ordinance in a prescribed manner, the courts may not adjudge the ordinance to be invalid merely because it is deemed unreasonable. Its reasonableness or unreasonableness is a matter of legislative discretion. The Legislature having exercised that discretion in the passage of the authorizing act, their action is not subject to review by the court. Such ordinances so expressly authorized can be declared invalid by the court only when they are in violation of the Constitution, State or Federal. *State* v. *Mayo,* 106 Maine, 62.

But when a municipal ordinance is passed under a general law authorizing municipalities to make regulations for the health, safety and welfare of the people, the courts may declare the ordinance invalid if it contravenes the Constitution or an existing statute, or if in their judgment it is unreasonable or discriminatory, even though it may conflict with neither Constitution nor statute. 1 Dill.

Mun. Corp. sec. 328; *Munson* v. *Colorado Springs,* 35 Col., 506; 9 Ann. Cas., 970.

In short, an ordinance may be invalid, first, when it is unconstitutional, whether authorized in express or general terms; second, when it conflicts with an existing statute, if authorized in general terms, but not if authorized in express terms, as in the latter case the special authorizing act takes precedence of the general law; and third, if authorized in general terms, it may be declared void as being unreasonable or discriminatory even though it contravenes neither constitution nor statute.

Let us apply these general principles to the ordinance under consideration.

Section 9 requires all meat sold or offered for sale for human consumption in the city of Waterville, wherever slaughtered, to be inspected and approved by the meat inspector or assistant inspector or board of health, except meats bearing the inspection stamp of the United States Department of Agriculture.

We think this provision is valid. It is not in conflict with the Federal Constitution as an interference with interstate commerce. *Minnesota* v. *Barber,* 136 U. S., 313, because it expressly excepts duly inspected meat brought from other states. It does not contravene the Constitution of Maine. It is authorized under the general statute granting municipalities the power to make by-laws or ordinances, not inconsistent with law, respecting infectious diseases and health. R. S., ch. 4, sec. 93, par. II, and in cities regulating the sale of fresh meat and fish, R. S., ch. 4, sec. 93, par. XI.

We also think it is reasonable both as to the particular subject matter and as to the method of enforcement. *Austin* v. *Murray,* 16 Pick., 121; *State* v. *Robb,* 100 Maine, 180. Reasonableness under the circumstances is a judicial question, all honest and substantial doubts being resolved in favor of the municipal power. The test of reasonableness cannot be expressed by any ironclad rule. No hard and fast definition can be coined. It is here, as always, a relative term. Is the ordinance an appropriate measure for the promotion of the public health, safety or welfare? Does it have a real and substantial relation to that object? These are proper inquiries, and in this case they can be readily answered in the affirmative. Is the method of enforcement also reasonable and

practical? This must also be answered in the affirmative, because the section simply requires inspection and approval by the duly constituted officers of the city.

The respondent attacks the ordinance as unreasonable because it does not recognize as sufficient a prior inspection by any other city or authority in this State. We cannot yield to this contention. In the absence of a general law enacted by the Legislature, regulating the subject throughout the State, each city or town has the right to insist upon inspection by its own officials. It may well be that the system varies as to its reliability and efficiency in different places, being strict in one locality and lax in another, but it certainly cannot be deemed oppressive or discriminatory if in the absence of a general statute each city takes the necessary steps to inspect its own meat supply. The question of official inspection elsewhere does not however arise in the case at bar, because this meat had not passed an official inspection in the city of Auburn, but merely the private inspection of the firm of Merrow Brothers Company, the vendors.

Ordinances essentially the same as section 9 have received the sanction of the courts. *State* v. *Starkey,* 112 Maine, 8; *Trigg* v. *Dixon,* 96 Ark., 199, 23 Ann. Cas., 509, and note containing voluminous citations. Section 9 contains within itself the essential elements of a complete ordinance, *State* v. *Robb,* supra, and as this complaint is brought for the violation of that section, and as we hold that section to be valid, the entry must be,

Exceptions overruled.
Judgment for the State.

FRANCES R. HURLEY *vs.* LUCY C. FARNSWORTH, Admx.

Knox. Opinion October 19, 1916.

Discretion of presiding Justice in regard to rule of Court XLIV.

Exceptions by plaintiff to order of presiding Justice dismissing action upon motion of plaintiff.

Held;

1. Rule XLIV of this court provides that cases remaining on the docket for a period of two years or more, with nothing done, shall be dismissed for want of prosecution, unless good cause be shown to the contrary. Whether a cause be good or otherwise must be a question of fact to be determined within the discretion of the presiding justice.
2. Exceptions lie to rulings upon questions of law only, and not to findings upon questions of fact. And a bill of exceptions, to be available, must show clearly and distinctly that the ruling excepted to was upon a point of law and not upon a question of fact; nor upon a question in which law and fact were so blended as to render it impossible to tell on which the adverse ruling was based.

Action on the case to recover for merchandise sold to defendant's testate. Case entered in Supreme Judicial Court, April term, 1909, Knox county; continued from term to term until April term, 1912, at which term a referee was appointed. Case was not heard by referee and at April term, 1914, the following docket entry was made: "To be heard before the September term, 1914, or dismissed." At September term, 1915, defendant filed motion asking that case be dismissed in accordance with entry upon the docket. Case dismissed by presiding Justice, to which ruling plaintiff filed exceptions. Exceptions overruled.

Case stated in opinion.

Foster & Foster, and A. S. Littlefield, for plaintiff.

Heath & Andrews, and J. H. Montgomery, for defendant.

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

PHILBROOK, J. This action was entered at the April term, 1909. According to the docket entries it slumbered for a period of three

years. In April, 1912, a referee was appointed. For two more years the plaintiff neglected to prosecute her cause. At the April term, 1914, the entry was made "To be heard before September term, 1914, or dismissed." The plaintiff claims that there was correspondence with the referee as to assigning a date for hearing, and that conference with reference thereto was had with defendant's attorney, and contended also that no assignment and hearing was had because of the request of the defendant's attorney, and that the latter agreed and consented to this arrangement. These facts are denied by counsel for defendant. Plaintiff further contended that upon a statement of these facts the case was continued at the September term, 1914, although no special entry thereof was made upon the docket. This is also denied by defendant. Before the January term, 1915, so plaintiff says, the referee declined to act and requested that another be appointed in his place. The January term, 1915, and the April term of the same year were both allowed to pass without any action being taken to obtain a hearing either before a jury, the court or a referee. No testimony is contained in the record but the statement of the case is taken from the bill of exceptions. As above noted, the defendant denies the contentions made by the plaintiff, and at the September term, 1915, upon motion of the defendant, the action was dismissed. The plaintiff claimed that the defendant waived the docket entry, but the Justice ruled that the waiver was not supported by evidence. The decision was a question of fact, within the discretion of the Justice to pass upon.

It should be noted that Rule XLIV provides that cases remaining on the docket for a period of two years or more, with nothing done, shall be dismissed for want of prosecution unless good cause be shown to the contrary. Whether the cause be good or otherwise must be a question of fact, and a decision of such fact must be also within the discretion of the presiding Justice. In short, we see no ruling of law involved which can be properly made the subject of exception.

"Exceptions lie to rulings upon questions of law only, and not to findings upon questions of fact. And a bill of exceptions, to be available, must show clearly and distinctly that the ruling excepted to was upon a point of law and not upon a question of fact; nor

upon a question in which law and fact were so blended as to render it impossible to tell on which the adverse ruling was based." *Laroche* v. *Despeaux,* 90 Maine, 178.

Finally the plaintiff urges that if the questions involved were within the discretion of the presiding Justice there was an abuse of discretion. We cannot sustain this claim.

Exceptions overruled.

WILLIAM M. WARREN, Judge of Probate,

vs.

EDWARD LEONARD, JR., et al.

Penobscot. Opinion October 19, 1916.

Action on Probate Bond. Chancering Probate Bond. Effect of evidence showing that executor, or administrator, had sent list of securities and had paid dividends accruing to said lists. Form of judgment to be rendered. Right to chancer bond when party has, by tortuous act, withheld certain evidence.

Action against principal and surety upon a bond given by the principal as administrator, with will annexed, and for the benefit of said estate. The case comes to us on report.

The defendant surety concedes that there has been a technical breach of the bond, at least; that the actual plaintiff, who succeeds the principal defendant as administrator d. b. n. c. t. a. is entitled to recover in this action for such breach, for the benefit of the estate, at least nominal damages; but contends that the damages recoverable are only nominal. The principal defendant is not represented and presents no argument.

Held;

1. That a breach of the bond in suit having been shown, for which the surety on the bond is liable, judgment must be entered against the surety for the penalty of the bond, but execution is to issue under said judgment for so much only of the penalty of said bond as equals the amount which the court finds due the estate from the delinquent administrator, with interest thereon and costs.

2. A list of securities belonging to the estate, although made by the original executor, if examined by the administrator de bonis non and approved by him, and if for a long period of time he sends the dividends accruing and the coupons maturing from such securities to a beneficiary under the will, may be regarded as being adopted by the administrator as a true list, and become proper evidence against him for the purpose of charging the assets in his hands as belonging to the estate of which he is administrator.

Action of debt on probate bond. Defendant pleaded general issue and brief statement. At close of testimony, questions of law having arisen, case was reported to Law Court. Judgment for plaintiff for the full amount of the bond with interest on that sum from the date of the writ, July 16, 1915, together with costs.

Case stated in opinion.

Matthew Laughlin, for plaintiff.

George E. Thompson, and James D. Maxwell, for defendant.

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

PHILBROOK, J. Action against principal and surety upon a bond given by the principal as administrator, with will annexed, of the goods and estate not already administered, which were of Sarah B. Copeland, late of Bangor, deceased testate, and for the benefit of said estate. The case comes to us on report.

The defendant surety in its brief concedes that there has been a technical breach of the bond, at least; that the actual plaintiff, Matthew Laughlin, who succeeds the principal defendant as administrator d. b. n. c. t. a. is entitled to recover in this action for such breach, for the benefit of the estate, at least nominal damages; but seriously contends that the damages recoverable are only nominal. The principal defendant is not represented by counsel and presents no argument in his own behalf.

On the last Tuesday of October, 1891, Edwin Leonard, father of the principal defendant, was appointed executor of the last will and testament of Sarah B. Copeland, without bond. This executor died May 22, 1908, not having completed administration of the estate. On the twenty-eighth day of September, 1909, the principal defendant, Edwin Leonard, Jr., was appointed administrator

c. t. a. d. b. n. of the Copeland estate and gave the bond which is the subject of this suit. In compliance with the statute, Leonard being a resident of New Jersey, Charles H. Bartlett of Bangor was appointed agent of Leonard and the appointment was accepted. On the twenty-fifth day of May, 1915, Leonard, Jr., was removed from office and Laughlin appointed in his place. No inventory of the Copeland estate was ever filed by Leonard, Sr. or Leonard, Jr.

In *Cook* v. *Titcomb,* 115 Maine, 38; 97 Atlantic Reporter, 133, this court held that a breach of the bond in suit having been shown, for which the surety on the bond is liable, judgment must be entered against the surety for the penalty of the bond, but that execution was to issue under said judgment for so much only of the penalty of said bond as equals the amount which the court finds due the estate from the delinquent administrator, with interest thereon and costs. Whether such execution shall be for a nominal or substantial sum, and if substantial how great that sum shall be, seems to be the only issue in the case at bar.

The plaintiff claims that under the peculiar circumstances of the present case the bond in question should not be chancered, but that the judgment should be for the full amount of the penal sum. This he claims for two reasons, first, because the amount of the defalcation has been shown to be greater than the amount of the penal sum, and, second, because where one by his own tortious act has withheld the evidence by which the nature and extent of his wrong doing may be alone determined, every presumption is to be taken against him. In support of his first claim he offers the testimony of Hattie Ann Leonard, a life beneficiary under the Copeland will, who says that after the death of Leonard, Sr., there was shown to principal defendant before his appointment as administrator, a list of securities belonging to the Copeland estate, that he examined and approved of the list, and that for four or five years after his appointment as administrator he sent her, as beneficiary of the income, the dividends and coupons that accrued from that list. It appears that the list in question was one made by Leonard, Sr., about two years before his death and consequently made more than two years before Leonard, Jr., was appointed administrator. The list itself was offered in evidence as an exhibit, subject to the objection of the defendant. Standing alone such a

list would be inadmissible under the hearsay rule, but taken in connection with the undisputed testimony of Miss Leonard that the defendant examined and approved of the list, and for at least four years after his appointment as administrator sent her the dividends and coupons which accrued from such list, we think it admissible. It was a list made by Leonard, Sr., and was competent evidence against him in any suit by or against him in his representative character. *Founce* v. *Grey,* 21 Pick., 243; *Lawson* v. *Powell,* 31 Ga., 681; 79 Am. Dec., 296. It was proper evidence against him for the purpose of charging the assets in his hands as belonging to the estate of which he is the administrator. *Floyd* v. *Wallace,* 31 Ga., 690. As already intimated this would not have made the list admissible in this case if the evidence had halted at that point. Such is not the fact. The deliquent administrator examined the list, approved of it, sent dividends and coupons accruing in accordance with that list. By all these acts he adopted the list and made its statements his own as much as they had formerly been his predecessor's in the trust relationship. As that list would be evidence against his predecessor who made it originally, so must it be against him who made it his by adoption.

Moreover, during the four years in which he was sending the coupons and dividends to Miss Leonard, it does not appear that he ever questioned the accuracy of the list or denied that the securities named therein came into his possession. But on the contrary, by sending the coupons and dividends, as above stated, he confirmed the accuracy of the list and his knowledge of its contents. Such conduct is certainly strong evidence in support of the claim of the plaintiff, and equally inconsistent with that of the defendant, as to the number and character of the securities which came into the possession of the defendant administrator.

In the trial court below there was produced by the surety, and delivered to the attorney for the plaintiff, stocks and bonds belonging to the estate and valued at eight thousand four hundred eighty dollars. From the evidence contained in the list which we have had under discussion, and from all other evidence in the case, it would appear that the value of the missing securities exceeds fifteen thousand dollars, a sum more than twice the amount of the penal sum named in the bond.

As we have already said, the real controversy between the parties is conceded to be the amount of the execution, and under the testimony as we understand it that sum should be for the full amount of the penal sum named in the bond with interest and costs, and even that will not fully reimburse the loss to the estate.

The finding of the court will be, judgment for plaintiff, execution to issue for the full amount of the bond, six thousand dollars, with interest on that sum from the date of the writ, July 16, 1915, together with costs.

So ordered.

FLORA L. BARBER, Liblt., *vs.* WILLIAM W. BARBER.

Cumberland. Opinion October 19, 1916.

Exceptions to discretion of court vacating or changing any decree or order previously made. Libel for divorce. Power of court to modify its decrees. Power of court to dismiss a libel for divorce.

1. The court has full power, of its own motion, to amend, correct or vacate a decree of divorce, during the term at which the decree was made. And it may do so without notice to the libellant.
2. When the court has made a decree of divorce, and afterwards during the same term has vacated the decree, a petition to discharge the vacating order is addressed to the judicial discretion of the court, to the exercise of which exceptions do not lie.
3. When the court has heard a libel for divorce, has made a decree of divorce, and afterwards during the same term has revoked the decree, it is not error to dismiss the libel at a subsequent term, if no further evidence on the merits be offered.

Libel for divorce entered at March term, 1916, Superior Court, Cumberland county. Hearing was held on libel, April term, 1916, on the fourth day of term. The presiding Justice granted a decree of divorce. On the seventeenth day of the same term the presiding Justice vacated the decree granting the divorce. At May

term, 1916, motion filed asking that the court vacate its order revoking the decree of divorce. Hearing was held and the petition was denied and court ordered the libel dismissed. To this ruling exceptions were filed by libelant. Exceptions overruled.

Case stated in opinion.

William A. Connellan, Jacob H. Berman, and Benjamin L. Berman, for libelant.

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

SAVAGE, C. J. On the fourth day of the April term, 1916, of the Superior Court for Cumberland county, a decree of divorce was made and filed. On the seventeenth day of the term, the Justice of the court of his own motion, and without notice to the libelant, vacated the decree, on the ground of fraud and false swearing in its procurement. At the May term following, the libelant filed a motion praying that the court vacate its order vacating the original decree. The hearing was had, and evidence was taken, after which the Justice denied the petition and dismissed the libel. Thereupon the libelant excepted to the original order vacating the decree, and to the denial of the motion to vacate the decree and to the order dismissing the libel.

The first exeeption was irregularly taken. It was taken to an order made at a previous term. Exceptions do not lie in such cases. R. S., ch. 79, sects. 55; 84. But in this case it matters little. The proposition of law respecting the power of the court in the premises is open to consideration under the second exception. For, if the court was without power to vacate the decree, it was its duty to rescind or discharge that order, upon the libelant's petition.

It is undoubted law that the power of a court over its judgments, during the entire term at which they are rendered, is unlimited. It has full power to amend, correct or vacate a decree or judgment. During the term, the judgment is still in fieri, as it is said. It is subject to the further action of the court. Freeman on Judgments, 3d Ed., sect. 90; *Doss* v. *Tyack,* 14 How., 297; *R—* v. *R.,* 20 Wis., 347; *Taylor* v. *Lash,* 9 Iowa, 444; *Townsend* v.

Chew, 31 Md., 247. This rule applies as well to divorce decrees as to other judgments. *Gato* v. *Christian,* 112 Maine, 427; *Carley* v. *Carley,* 7 Gray, 545; *Danforth* v. *Danforth,* 105 Ill., 605; *Brown* v. *Brown,* 53 Wis., 29. In general, divorce decrees are open to attack in the same manner and upon the same grounds as other judgments. *Adams* v. *Adams,* 51 N. H., 388; *Edson* v. *Edson,* 108 Mass., 590; *Leathers* v. *Stewart,* 108 Maine, 96; Freeman on Judgments, 3d Ed., sect. 489.

It has been held that during the term the court of its own motion may vacate a decree of divorce. *Brown* v. *Brown,* supra; *Weber* v. *Weber,* 153 Wis., 132. And we see no good reason why this should not be so. It is true that it is usually done on motion. But it is a power which the court should exercise, if justice requires, whether there be a motion or not. And we do not doubt that the court has such power.

The libelant however urges strongly that the court could not rightfully exercise that power in her case without notice to her. We are not persuaded that this view is the correct one. The Justice had heard the case. His first decision and decree favorable to the libelant gave her no fixed right. It was subject to change during the term. During the term it was ambulatory. The order vacating the decree left the case pending on the docket. The libelant was deprived of no right. She might have asked for and had another hearing on the libel. Under such circumstances we do not think notice to show cause was necessary, as a matter of law. *Gato* v. *Christian,* supra.

Whether, under all the circumstances, the vacating order should have been discharged, leaving the decree of divorce in full effect, was necessarily a matter of judicial discretion, to the exercise of which exceptions do not lie, unless the discretion was manifestly abused. This is so well settled that it requires no citation of authorities to sustain it. We discover no abuse of discretion in this case. By reason of certain circumstances which appeared in the case, it is evident that the Justice did not believe the testimony of the libelant and her witnesses given at the hearing on the motion. We have read the evidence and conclude that the Justice was warranted in his disbelief.

As to the exception to the order dismissing the libel, only this need be said. The case had been fully heard, on the merits, the previous term. The Justice concluded at the April term that the libelant was not entitled to a divorce. He might have dismissed the libel at that time. No further evidence was offered, except that upon the motion. Nothing remained but to dismiss the libel.

Exceptions overruled.

FRANK J. MAHEU *vs.* L'UNION LAFAYETTE.

Kennebec. Opinion October 19, 1916.

Effect on members of associations of change in its by-laws. Fraternal associations. Right to amend and change by-laws.

The agreed statement shows that the defendant is a fraternal benefit association, whose principal object is to establish by monthly contributions by the members "a benefit fund for sick associates, and after their death for the heirs."

The plaintiff is a member. It does not appear that any benefit certificate was issued to him. But at the time he became a member, under the by-laws, sick members were entitled to benefits at the rate of $5. a week for thirteen weeks in each year. After the plaintiff became ill and after he had received $325. as sick benefits the defendant amended its by-law so as to limit the total amount any sick member would be entitled to receive to $325. or $5. a week for sixty-five weeks. And the defendant relying upon the amended by-law refuses to pay any more sick benefits to the plaintiff.

Held;

1. That when a member of an association has become ill and his right to sick benefits has attached, the society cannot defeat his right and repudiate its existing obligation by amending its by-laws.
2. Such an amendment is wholly unreasonable and void, as respects liabilities already incurred.

Action to recover sick benefits for a period of thirteen weeks at five dollars per week. Case entered at Superior Court, Kennebec county, and reported to Law Court upon agreed statement of facts. Judgment for plaintiff. Damages to be assessed at nisi prius.

The case is stated in the opinion.

F. W. Clair, for plaintiff.

P. A. Smith, for defendant.

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

HANSON, J. The agreed statement shows that the defendant is a fraternal benefit association, whose principal object is to establish by monthly contributions by the members "a benefit fund for sick associates, and after their death for the heirs." The plaintiff is a member. It does not appear that any benefit certificate was issued to him. But at the time he became a member, under the by-laws, sick members were entitled to benefits at the rate of $5 a week for thirteen weeks in each year. After the plaintiff became ill, and after he had received $325, as sick benefits, the defendant amended its by-law so as to limit the total amount any sick member would be entitled to receive to $325, or $5 a week for sixty-five weeks. And the defendant, relying upon the amended by-law, refuses to pay any more sick benefits to the plaintiff. The plaintiff contends that the amendment, adopted after he became ill, does not affect his rights.

We think the plaintiff's contention must be sustained. We are not called upon to consider the general question whether a fraternal benefit society may, by amendment of its by-laws increase its assessment rates, or reduce its sick or death benefits, so as to affect existing members. The authorities seem to be divided irreconcilably on this question. The leading case in support of the power is *Reynolds* v. *Royal Arcanum,* 192 Mass., 150. The leading case opposed is *Wright* v. *Maccabees,* 196 N. Y., 391.

The question here is whether after a member has become ill, and his right to sick benefits has attached, the society can defeat his right and repudiate its existing obligation by amending its by-laws. If so, it is an easy way to discharge liabilities. We think it cannot. Such an amendment is wholly unreasonable and void, as respects liabilities already incurred. *Becker* v. *Berlin Beneficial Society,* 144 Pa. St., 232, is exactly in point.

Judgment for plaintiff.

Damages to be assessed at nisi prius.

FREDERICK L. BELL *vs.* ELBRIDGE A. FLANDERS.

Piscataquis. Opinion October 19, 1916.

Agreements made subsequent to original agreement but not incorporated in deed or writing. Deeds.

This suit was brought to recover damages from the defendant for breach of an oral agreement to purchase and convey to the plaintiff certain water rights in the land of a third party and is before this court on report.

Held;

1. The evidence fails to support the allegations in the declaration or to authorize the court in this case to make an exception from the established rule, that when parties have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties and the extent and manner of their undertaking was reduced to writing, and all oral tstimony of a previous colloquium between the parties or of conversation or declarations at the time when it was completed, or afterwards, as it would tend in many instances to substitute a new and different contract for the one which was really agreed upon, to the prejudice, possibly of one of the parties, is rejected.

Action on the case to recover damages for alleged failure of defendant to purchase and convey to plaintiff certain water rights in land adjoining property of plaintiff, which was purchased from defendant's testate. Defendant pleaded the general issue and also brief statement setting up the statute of frauds. At the conclusion of the testimony, the case was reported to the Law Court with certain stipulations. Plaintiff nonsuit.

The case is stated in the opinion.

Henry Hudson, for plaintiff.

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

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

HANSON, J. This suit was brought to recover damages from the defendant for breach of an oral agreement to purchase and convey to the plaintiff certain water rights in the land of a third party, and is before this court on report. The defendant died pending the action and his executrix comes in to defend. The declaration contains two counts, each stating the plaintiff's claim substantially as follows:

"In a plea of the case for that the said defendant on the 24th day of January, A. D., 1913, being seized in fee of two tracts or parcels of land situate in the town of Sangerville, county of Piscataquis and State of Maine, containing one hundred and four acres more or less known as the Doyle farm in said town, in consideration that the plaintiff would purchase from said defendant said tracts of land and pay therefor the sum of sixteen hundred dollars the said defendant then and there as a part of the consideration for the conveyance of said farm then and there promised said plaintiff that he would purchase from one Folsom a spring from which the water formerly was taken to the buildings on said farm and lay from said spring to the dwelling house on said farm a water pipe of sufficient size to carry the water from said spring to said house, and would dig the ditch in which to put said pipe and cover said pipe and do all that was necessary to do in order to take said water from said spring to said house; the said plaintiff says that relying upon the promise of said defendant to purchase said spring and lay said pipe as heretofore set out he did buy said farm from said defendant on said 24th day of January, A. D. 1913, and did pay therefor the full purchase price of sixteen hundred dollars for said farm, and said defendant did on said 24th day of January, A. D., 1913, convey said farm to said plaintiff; but the said defendant did not regard his promise made as aforesaid to purchase said spring and lay said pipe as set out heretofore, but utterly refused and still refuses so to do; by reason whereof the said defendant became liable to pay to said plaintiff the sum of two hundred dollars, and then and there promised said plaintiff to pay him said sum, yet though often requested has neglected and refused so to do."

The defendant pleaded the general issue, and by brief statement says "that the contract, if any, between said plaintiff and Elbridge

A. Flanders was for the sale of lands, tenements and hereditaments, or of some interest in or concerning them and said contract is not in writing."

On account of the death of Elbridge A. Flanders, the plaintiff's evidence was confined to three witnesses,—Mrs. Folsom, the owner of the spring, her daughter, and Mr. J. W. Crosby, the attorney who wrote the deed. Mrs. Folsom testified under objection, to conversations with Mr. Flanders in which she says that Mr. Flanders stated that "he had agreed to put running water in Mr. Bell's house and barn, and he wanted to know what I was going to take for the water." Her daughter's testimony is substantially the same. Each of these witnesses states further that, afterwards, Mr. Flanders "came over with Mr. Bodge and asked us if we understood him to say he had agreed to put running water in Bell's house and barn. I told him I did, and told him what he said; and he said he did not have any recollection of it; he could not recollect it at all."

Mr. Bodge's account of this interview contradicts these witnesses. His version is that Mr. Flanders denied making such agreement with Mr. Bell, and asserted "that what I did tell Mr. Bell was, 'Mrs. Folsom and I are on good terms, and there is some water there you could have in your buildings, and if I can make a good trade for you, as you want it, I shall do it.' "

The deed described in the declaration was made with great care, and contains several reservations and exceptions, but makes no mention whatever of water rights as set out, or any consideration therefor; which, taken with the testimony of Mr. J. W. Crosby, leaves the case without sufficient evidence that Elbridge A. Flanders agreed to purchase the spring as claimed. It appears from the testimony of Mr. Crosby that a list of personal property included in the sale was made by him when he was present with the parties settling the terms of the contract; that later there was correspondence between Mr. Crosby and the plaintiff in relation to the payments, and during the negotiations no mention was made of water rights being included in the sale. It further appears from the testimony of Mrs. Folsom and her daughter that the interviews to which they testify took place "after the farm had been sold," and no date is fixed, with reference to the execution of the deed, when the alleged agreement was made.

The evidence therefore fails to support the allegations in the declaration, or to authorize the court in this case to make an exception from the established rule that, when parties have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties and the extent and manner of their undertaking was reduced to writing, and all oral testimony of a previous colloquium between the parties or of conversation or declarations at the time when it was completed, or afterwards, as it would tend in many instances to substitute a new and different contract for the one which was really agreed upon, to the prejudice, possibly, of one of the parties, is rejected. Greenleaf on Evidence, Vol. 1, sec. 275; *International Harvester Co.* v. *Fleming,* 109 Maine, 104.

The entry will be,

Plaintiff nonsuit.

WILBUR G. BRACKETT, Petitioner,

vs.

HENRY H. CHAMBERLAIN, Administrator.

Lincoln. Opinion October 23, 1916.

Appeals from decree or finding of Commissioners on disputed claims. Duty of Court in interpretation of Statutes where omission by mistake is clearly evident. Right of claimant to bring action after hearing and finding of Commissioners. Revised Statutes 1883, Chapter 64, Section 53, and Revised Statutes, 1903, Chapter 66, Section 54, explained.

A petition for leave to bring an action for money had and received against the defendant as administrator of the solvent estate of Robert A. Brackett, deceased. The petitioner filed his claim against the estate and commissioners were appointed under R. S., ch. 66, sc. 54. From their decision in

favor of the claimant, the administrator appealed, but the claimant-petitioner failed to seasonably bring his action and presented his petition for leave to bring such action. The administrator filed a motion to dismiss the petition, which was overruled. To this ruling, exceptions were allowed.

Held;

1. That the failure to include section 15 of chapter 66, R. S. 1883, in section 53 of c. 64, R. S. 1883 was a clear case of accidental omission or mistake which it is the duty of this court to repair, although the same omission is found in the revision of 1903, and that section 15 of chapter 68, R. S. 1903, is to be included in the enumeration of the sections of that chapter in section 54 of chapter 66, R. S. 1903.
2. The fundamental rule in the construction of statutes is that the Legislative intention must prevail whenever that intention can be ascertained, and the construction should be such as to secure harmonious operation as a whole.
3. In considering the action of the Legislature, the presumptions against unreason, inconsistency, inconvenience, and injustice are not to be overlooked.
4. A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute, unless it be within the meaning of the makers.

Petition in vacation to Justice of Supreme Court asking leave to bring an action for money had and received against defendant as administrator. At return term, defendant filed motion to dismiss the petition. After hearing, the Justice presiding overruled the motion to dismiss, to which ruling defendant filed exceptions. Exceptions overruled.

Case stated in opinion.

George A. Cowan, for plaintiff.

J. W. Brackett, for administrator.

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

BIRD, J. This is a petition for leave to bring an action for money had and received against the defendant, as administrator of the solvent estate of Robert A. Brackett, deceased. The defendant filed a motion to dismiss the petition which the presiding Justice overruled. The case is here upon the exceptions of the defendant to this ruling.

It appears from the record before this court that the petitioner duly presented his claim for four hundred and twenty-three dollars, against the solvent estate of intestate to his administrator, who, deeming the claim to be exorbitant, unjust or illegal, made application for the appointment of commissioners as provided in § 54 of c. 66, R. S. (§ 53, c. 64, R. S., 1883). After due proceedings had, the commissioners appointed, awarded the petitioner or claimant, the sum of three hundred and twenty-three dollars and their report was filed and accepted. The administrator seasonably filed and perfected upon his part, an appeal from the decision of the commissioners. The claimant upon receiving the statutory notice of the appeal immediately notified his counsel by letter and directed him to take appropriate action. The letter was never received by counsel and, when he did receive notice of the appeal and the instructions of his client, the period within which an action for money had and received could be brought had elapsed. Thereupon the claimant filed his petition as under § 15 of c. 68, R. S., asking leave to commence an action as therein provided.

The provision of statute allowing the appointment of commissioners upon exorbitant claims against solvent estates had its origin in c. 115 of the Pub. Laws of 1859. By it, it was enacted that "sections five, six, seven, eight, eleven, twelve, thirteen, fourteen and fifteen of chapter sixty-six of the Revised Statutes (1857) shall apply to such claims and the proceedings thereon." Sections five to eight, both inclusive of c. 66, R. S. (1857) regarding insolvent estates, refer to the proceedings before the commissioners, while the remaining sections—eleven to fifteen, both inclusive—gave a right of appeal from decisions of such commissioners and regulated the proceedings thereon. These sections comprised all the provisions respecting appeals at that time to be found in the chapter of the revised statutes relating to insolvent estates. While the last enumerated sections provided for the granting of leave to a claimant, who, by accident or mistake, had omitted to give seasonable notice of an appeal or after notice, had omitted further to prosecute his appeal, to commence an action within a certain period, neither of these sections gave the claimant the right to ask leave to bring such action where, upon the appeal of the administrator or any other interested party, the claimant had by accident

or mistake omitted to bring such action. In 1872 an act entitled "An act relative to claims against insolvent estates" was passed by the Legislature which has become, without material change, section 15 of chapter 66, R. S., 1883 and of chapter 68, R. S., 1903.

It gives the claimant who has omitted to bring his action, the same right to ask leave of the Supreme Judicial Court by petition to bring his action for money had and received in case of appeal by the administrator, etc., as in case of his own appeal.

Neither § 53 of c. 64, R. S., 1883 nor § 54 of c. 66, R. S., 1903, relating to the appointment of commissioners to consider exorbitant claims against solvent estates made § 15 of c. 66, R. S., 1883, or § 15 of c. 68, R. S., 1903, by express terms applicable to such claims.

No reason is perceived why they should not. Indeed there is every reason why they should. The evident intent of the Legislature of 1859, was to make all the provisions of the chapter of the revised statutes regarding appeals from the decisions of commissioners on claims against insolvent estates applicable to appeals from the like decisions on exorbitant claims against solvent estates. All then existing were made so. The act of 1872, c. 36, was to repair an omission in the matter of appeal from decisions of the former class. It was in effect an amendment of the provisions regarding appeals. *State* v. *Chadbourne,* 74 Maine, 506, 508.

The amendment of § 12 and § 11 of c. 66 of the Revised Statutes of 1857 by c. 201, Pub. Laws, 1868 and c. 113, § 10, Pub. Laws of 1870 respectively, became a part of the respective sections, to which the public acts cited expressly referred, in the revision of the statutes made in 1871 and the amended sections were expressly made applicable to appeals from the decisions of commissioners on claims against solvent estates. R. S., 1871, c. 64, § 51.

The act of 1872, however, made no express reference to any section of the Revised Statutes and in the revision of the statutes made in 1883 became a distinct section (15) of that portion of the chapter on insolvent estates regulating appeals. The commissioner on that revision omitted the new section (15) from those made applicable to appeals from the decisions of commissioners on claims against solvent estates, R. S., 1883, c. 64, § 53, while including those amended, as we have seen, in 1868 and 1870. See Resolves,

1881, c. 26, Resolve for revision and consolidation of Public Laws. Had the commissioner on the revision of 1883 made c. 36 of the Public Laws of 1872 a part of section 13 of c. 66 of his revision, where it can be cogently urged it should have been placed, it could not successfully be contended that the Legislature adopting the revision would have refused to make such section applicable to appeals from decisions of commissioners upon claims against solvent estates. The failure to include section 15 of c. 66, R. S., 1883, in section 53 of c. 6, R. S., 1883, was a clear case of accidental omission mistake which it is the duty of this court to repair, although the same omission has been perpetuated in the revision of 1903. We conclude that section 15 of c. 68, R. S. (1903) is to be included in the enumeration of sections of that chapter in section 54 of c. 66 of the same revision. See *State* v. *Chadbourne,* 74 Maine, 506.

If there could be any doubt as to the conclusion reached, it disappears in the light of § 26, c. 68, R. S. (Pub. Laws, 1873, c. 116, § 1) which is as follows: "When commissioners appointed under section fifty-four of chapter sixty-six have reported on any claims submitted to them, and their report has been accepted without appeal, it is final, notwithstanding the estate afterwards proves insolvent. . . . The amount awarded by the first commissioners shall be entered by the Judge on the list of debts entitled to dividends." The effect of the statute, if our conclusion be not right, is to place the claim against a solvent estate, subsequently declared insolvent, in a different class from a claim against an insolvent estate, so far as the results of accident or mistake are concerned. In one case an administrator may invoke the action of commissioners and appeal from their decision, and, if the claimant fails to bring his action from accident or mistake, he is without remedy, while in the latter, if the administrator appeals from the decision of commissioners appointed in an insolvent estate, the claimant is afforded a remedy for his accident or mistake.

It cannot be that such inequality was intended by the Legislature, especially in view of the fact that the legislation of 1873, was one year later than the act of 1872 (Pub. Laws, 1872, c. 36).

The fundamental rule in the construction of statutes is that the legislative intention must prevail whenever that intention can be

ascertained. *Lyon* v. *Lyon,* 88 Maine, 395, 401; *State* v. *Kaufman,* 98 Maine, 546, 548. The construction should be such as to secure harmonious operation as a whole. We are aware that we have held that where part of a clause is omitted in revision, the part omitted cannot be revived by construction; *Pingree* v. *Snell,* 42 Maine, 53, 55; and that when a statute is revised and a provision contained in it, is omitted in the new statute, the inference to be drawn from such a course of legislation, would be that a change in the law was intended to be made. If the omission was by accident, it belongs to the Legislature to supply it. *Buck* v. *Spofford,* 31 Maine, 34, 36. To the same effect as the case last cited is *Union Ins. Co. v. Greenleaf,* 64 Maine, 123, 129, where, however, in applying the rule it is stated that the case suggests nothing doubtful or obscure. But neither of these cases presents the aspect of the case before us. In considering the action of the Legislature, the presumptions against unreason, inconsistency, inconvenience and injustices are not to be overlooked. Endlich on Stats., c. IX; *Cummings* v. *Everett,* 82 Maine, 260, 264, 265.

In construing a section of the National Bank Act, regarding suits or actions thereunder, the Supreme Court of the United States held that the omission of the word "by" contained in a prior enactment, was accidental, remarking that it was not to be supposed that Congress intended to exclude the associations from suing in the courts where they can be sued, and held that suits might be so brought by the associations. *Kennedy* v. *Gibson,* 8 Wall, 498, 506. A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute unless it be within the meaning of the makers. *Oates v. National Bank,* 100 U. S., 239, 244. See also *Mobile Savings Bank* v. *Patty,* 16 Fed., 751, 752. Farnum's Appeal, 107 Maine, 488, 491; *Georgetown* v. *Hanscome,* 108 Maine, 131, 133; *Brickett* v. *Haverhill Aqueduct Co.,* 142 Mass., 394, 398.

Exceptions overruled.

MINNIE B. WILSON *vs.* ABBIE WILSON.

Cumberland. Opinion October 27, 1916.

Chapter 33, Public Laws of Maine, 1913, interpreted. In actions against parents, rule of law as to right to show what motive guided in advising the separation of husband and wife.

Action brought by a married woman under the provisions of Chapter 33, Public Laws of 1913, against her husband's mother for alienating the affections of her said husband. Motion by defendant to set aside verdict.

Held;

1. In actions brought by the husband against the wife's parents for alienation of affections, the parent may not with hostile, wicked or malicious intent break up the relations between his daughter and her husband, yet he may advise his daughter, in good faith, and for her good, to leave her husband, if he, on reasonable grounds, believes that the further continuance of the marriage relation tends to injure her health, or to destroy her peace of mind, so that she would be justified in leaving him; and if the parent acts in good faith, for the daughter's good, upon reasonable grounds of belief, he is not liable to the husband.
2. The same rule applies in actions brought by the wife, under the above statute.
3. Applying this rule to the evidence in this case the verdict of the jury is so manifestly wrong that justice requires that it be set aside.

Action on the case brought by plaintiff to recover damages for alienation of the affections of her husband, defendant being his mother. Defendant pleaded general issue. Verdict for plaintiff in the sum of five hundred dollars. Defendant filed motion for new trial. Motion sustained. New trial granted.

Case stated in opinion.

Harry E. Nixon, and Jacob H. Berman, for plaintiff.

Carroll W. Morrill, for defendant.

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

PHILBROOK, J. This is an action brought by a married woman to recover damages for alienation of the affections of her husband. The defendant is the mother of that husband. The right to bring such action is founded upon the provisions of chapter 33 of the Public Laws of 1913. Prior to the enactment of those provisions a wife could not maintain such an action in this State, *Morgan* v. *Martin,* 92 Maine, 190, although it was held differently in some jurisdictions. So much of the act as applies to the case at bar reads thus: "Whoever . . . alienates the affections of the husband of any married woman, or by any arts, enticements, and inducements deprives any married woman of the aid, comfort and society of her husband, shall be liable in damages to said married woman in an action on the case brought by her within three years after the discovery of such offense."

The plaintiff recovered a verdict and the defendant, by the customary motion, seeks to have that verdict set aside. At the outset counsel are at variance as to whether in suits brought under this new statute courts and juries are to enquire into the privileges and motives of parental affection, and the parental demeanor of the parent toward the child. The position of the defendant is that in every suit of this character, that is to say, when the defendant is a parent, whether father or mother, and whether the plaintiff is husband or wife, the prime inquiry is, from what motive did the parent act? Was it malicious, or was it inspired by a proper parental regard for the welfare and happiness of the child? On the other hand the plaintiff urges that in this State a married woman could not bring any suit for the alienation of her husband's affections prior to the enactment of the statute above referred to, that the statute is in derogation of the common law and should hence be construed strictly, and that we should therefore disregard the questions of malice, privileges and motives of parental affection, and parental demeanor of the parent toward the child. In support of his contention plaintiff's counsel quotes the terms of the statute "Whoever . . . alienates the affections of the husband of any married woman," etc., and says that this language is to be taken so literally as to preclude the contention of the defendant as to parental rights.

In *Oakman* v. *Belden,* 94 Maine, 280, a suit for alienation of affection of the wife brought by the husband against both father and mother of the wife, no distinction was made or claimed between the parental rights of a father or a mother to advise or properly influence the child to leave her husband's home. And it was there held that although a parent may not with hostile, wicked or malicious intent break up the relations between his daughter and her husband, yet he may advise his daughter, in good faith, and for her good, to leave her husband, if he, on reasonable grounds, believes that the further continuance of the marriage relation tends to injure her health, or to destroy her peace of mind, so that she would be justified in leaving him; and the court there held that if the parent acts in good faith, for the daughter's good, upon reasonable grounds of belief, he is not liable to the husband. This doctrine is well supported by the authorities, many of which are referred to and discussed in the case just cited.

Is there anything in reason and good conscience why these principles and limitations should not obtain in an action brought by the wife under this recent statute? We are of opinion and so hold, that the question should be answered in the negative. The courts of Massachusetts have so held in a very recent case, *Lanigan* v. *Lanigan,* 222 Mass., 198, where the wife was plaintiff. In *Hossfield* v. *Hossfield,* 188 Fed. Rep., 61, a wife brought action against her husband's mother for the same cause set up in the case at bar. It was there held that if the jury found that the separation was brought about by the acts of the mother, the question was, did the mother act with malice or from proper parental regard. If the latter then no liability attached against her. The great weight of authority is along the same line and further citation seems unnecessary.

Applying these principles to the case at bar we have carefully studied the evidence to ascertain whether the jury was justified in finding a verdict for the plaintiff. It seems to be established beyond reasonable controversy that the husband's health was poor, and that that marital intercourse tended seriously to aggravate his physical troubles. There is much testimony to show that the mother had good cause to believe that her boy should live apart from his wife for this and other reasons. We fail to discover that the defendant

has acted with malice in the premises. We must conclude therefore that the verdict was manifestly wrong and that justice requires that it be set aside.

Motion for new trial granted.

WILLIAM R. PATTANGALL, Attorney General,
Will S. Payson, Relator,

vs.

HENRY GILMAN.

Cumberland. Opinion October 29, 1916.

Calendar year and political year. Term of appointing power of Governor.

1. Where the term of the appointing power extends beyond the time when a vacancy arises, a prospective appointment may be made; and, conversely, where the term of the appointing power does not extend until a vacancy arises in the appointive office, no appointment, prospective or otherwise, may be made.
2. Under article 23 of the amendments to the Constitution, providing that the Governor shall be elected biennially and hold office for two years from the first Wednesday in January next succeeding election, the Governor is elected for a political year and not a calendar year, so that the two year term of a Governor whose office began Thursday, January 1, 1913, expired at midnight January 6, 1915, that being the first Wednesday of January, 1915, when his successor's term began, so that his appointment of relator on December 9, 1914, to fill a vacancy occurring in the state board of dental examiners on the first day of January, 1915, by reason of the expiration of the relator's term, on December 31, 1914, was legal.

Information in the nature of quo warranto to determine the title to the office of a member of the board of dental examiners of the State of Maine. Bill answer and replication filed and upon certain agreed stipulations case was reported to Law Court by agreement of parties. Judgment of ouster.

Case stated in opinion.
Scott Wilson, for relator.
Eben Winthrop Freeman, for defendant.

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

HALEY, J. Information in the nature of quo warranto; to determine the title to the office of a member of the board of dental examiners of the State, now held by the respondent, Henry Gilman, and claimed by the relator, Will S. Payson, and is before this court on report. The report shows that the relator, Will S. Payson, was a duly appointed and qualified member of the board of dental examiners of the State of Maine, on the 16th day of December, A. D. 1914, and that his term of office as such member under the provisions of law, expired at midnight on the 31st day of December, A. D. 1914; that on the 9th day of December, A. D. 1914, said Will S. Payson was nominated as a member of said board of dental examiners by the then Governor of the State of Maine, His Excellency William T. Haines, for a term of five years from the first day of January, A. D. 1915, and on the 16th day of said December, 1914, with the advice and consent of his Council, the said William T. Haines appointed the said Will S. Payson a member of said board of dental examiners of the State of Maine, to fill the vacancy occurring in said board on the first day of January, 1915, by reason of the expiration of the term which said Payson was then serving, for the term of five years, beginning on the first day of January, A. D. 1915, and that on the 17th day of December, A. D. 1914, said Will S. Payson subscribed and took the required oath to qualify him as a member of said board of dental examiners for said term of five years, beginning on said first day of January, A. D. 1915; that on the second day of February, A. D. 1915, said Henry Gilman was nominated by the then Governor of the State of Maine, His Excellency Oakley C. Curtis, as a member of said board of dental examiners for the term of five years beginning on said first day of January, A. D. 1915, and on the 9th day of said February, with the advice and consent of his council, said Governor, Oakley C. Curtis, appointed the said Henry Gilman as a member of said board of dental examiners, to fill the vacancy in

said board arising by reason of the expiration of the term of office of the relator, Will S. Payson, at midnight on the 31st day of December, A. D. 1914, for a term of five years beginning the first day of January, A. D. 1915. It is contended that the appointment of said Payson, the relator, by His Excellency William T. Haines, on said 16th day of December, to fill said vacancy was illegal and void. It is admitted that on February 12th, Henry Gilman subscribed and took the required oath to qualify him as a member of said board of dental examiners for said term, and it is admitted that said Henry Gilman was qualified as required by law to fill said office at the time of his appointment and qualification.

The real question is when the term of office of Governor Haines expired, for the authorities are unanimously in favor of the proposition that if the term of the appointing power extends beyond the point of time when the vacancy arises, a prospective appointment may be made; and, conversely, that if the term of the appointing power does not extend until a vacancy arises in the appointive office, no appointment, prospective or otherwise, may be made by that appointing power. The reason is simple; the appointing power cannot forestall the rights and prerogatives of his own successor by appointing successors to office beginning after his power to appoint has itself expired. . . . As said by the court in *State* v. *Sullivan,* 81 Ohio St., 79: "It admittedly is the well established general rule of law that an officer clothed with authority to appoint, cannot, in the absence of express statutory authority, make a valid appointment for a term which is not to begin until after the expiration of the appointing officer." If the term of Governor Haines did not extend beyond the beginning of the vacancy in the board of dental examiners, he had no power to make this prospective appointment. This is clear from the authorities cited. Therefore the principal question is whether or not on January 1, 1915, when this vacancy arose, the office of governor was held by Governor Haines? In other words, when did the term of office of Governor Haines expire? By Article XXIII of the amendments to the constitution it is provided: "The Governor, senators and representatives in the legislature shall be elected biennially, and hold office two years from the first Wednesday in January next succeeding their election." The term of office of Governor Haines

began, as prescribed by the Constitution, Thursday, January 1, 1913, and by the same provision of the Constitution, Governor Curtis's term of office began Thursday, January 7th, 1915. It is the claim of the relator that the words of the Constitution, "shall hold his office for two years from the first Wednesday next following the election," means a political year. And it is the claim of the respondent that the provision should be construed as a calendar year. The term "political year" first appears in our reports in the 6th of Maine, 506, in an opinion of the Justices, and to the question propounded to them as to whether "the executive duties of state, when constitutionally exercised by the President of the Senate, devolve at the end of the political year upon the President of the Senate or the Speaker of the House of the next political year, whichever shall be the first chosen; or whether such executive duty shall continue to be exercised by the President of the Senate until another governor shall be qualified?" And the further question: "When the office of Governor has become vacant, and the exercise of the powers and duties of that office have devolved upon and been exercised by the President of the Senate until the first Wednesday of January terminating a political year, and until another President of the Senate has been chosen and has taken upon himself that office, can the office of Governor be further exercised by the first named President of the Senate, or ought said office of Governor to be then exercised by said last named President of the Senate while he holds that station, and until another Governor is qualified?"

Justice Parris said: "If those who framed it (Constitution) had intended that the president of the preceding senate, exercising the office of governor, should hold over in case of a vacancy of governor the succeeding year, would they not have provided also that the governor for the preceding year holding his office to the end of the political year should hold over in case of vacancy the succeeding year? . . . It is manifest that some clauses of the Constitution will not bear a strict literal construction; for instance the term of office of the governor is one year from the first Wednesday of January. In many cases that period will have been fully completed a number of days previous to the first Wednesday of January of the succeeding year; and, unless by construing the

phraseology to mean a political year, such a construction could be given as would extend the term to include the first Wednesday of the succeeding January. . . . So in case of vacancy in the office of Governor the President of the Senate for the preceding political year, whose term of service as senator expires with the year, but from necessity acts as governor, and the council of the preceding year, continue to act as such under like necessity as above stated, in qualifying the members. . . . Upon every view of the subject which I have been able to take, my mind has come irresistably to the conclusion that the executive duties of the State, when constitutionally exercised by the president of the senate, devolve, at the end of the political year, when so exercised upon the President of the Senate of the next political year, the office of Governor for that year being vacant. In the opinion of the Justices, 70th Maine, 590 and 591, in which opinion the Justices answered this question, "At what date in the year, 1880, do the terms of office of the following state officers, expire: The Governor, the Executive Council, Secretary of State, the Treasurer, the Attorney General and the Adjutant General?" and answered the question: "The Governor's term of office, and also that of his council expired at midnight following the first Wednesday of January, 1880. The terms of the other officers mentioned in this question will expire when their several successors are elected, as provided in the Constitution." At the time the above question was answered the Constitution of the State in regard to the term of the governor was, as now, except that the term was then one year and is now two years.

The 5th amendment of the Constitution, which was ratified in 1845, shows plainly that the people in adopting the amendment considered that the provision in the Constitution as to the term of office of governor related to the political year. The amendment was: "The annual meeting of the Legislature shall be held on the second Wednesday of May in each year; and the governor and other state officers elected for the political year commencing on the first Wednesday of January, 1845, shall hold their offices until the second Wednesday of May, 1846." This amendment changed the beginning of the political year from January to the second Wednesday of May, and it so continued until the 8th amendment,

ratified in 1851, when the people changed the political year as follows: "The annual meeting of the Legislature shall be on the first Wednesday of January in each year; and the governor and other State officers elected for the political year commencing on the second Wednesday of May, 1851, shall hold their offices until the first Wednesday of January, 1852." These two amendments clearly show that it was the intent of the people to elect the Governor and Legislature for a political year and not a calendar year; as it provided that "the Governor and Legislature to be elected shall hold their offices until the first Wednesday of January, 1852," and the succeeding governors, there having been no amendment of the 8th amendment as above, until the 23d amendent was proposed to the people and adopted September 8th, and became a part of the Constitution by Resolve of March, 1880, all held their offices for the term of one year, not a calendar year; but the proper construction to be given to the 8th amendment is for a political year till the first Wednesday of January of each year. In 1880, by the 23d amendment, the term of office of governor was changed so that it is for two years instead of one year; but the language of the Constitution is the same as before the change, except as to expressly providing that he shall hold the office for the term of two years from the first Wednesday in January next succeeding his election, at which time the office passes instantly, by the terms of the Constitution, to the governor-elect for the next two political years. We think this construction is according to the intent of the framers of the Constitution, and as the Constitution has been construed by the courts from its adoption.

It therefore follows that Governor Haines' term of office expired at midnight of January 6, 1915, it being the first Wednesday of January, 1915, and that his appointment of the relator was legal. Opinion of Justices, 70 Maine, 590, 591. As before stated, the appointing power has the right to make a prospective appointment when a vacancy will occur during his term of office, and, as the Governor cannot make an appointment without the advice and consent of his Council, it necessarily follows that they may advise and consent to a prospective appointment, as they did to the appointment of the relator, and the entry must be,

Judgment of ouster.

ORMAND N. GRAY *vs.* EDITH M. CHASE, Executrix.

Hancock. Opinion November 1, 1916.

Action against administrator or executor. Necessary allegations and proof as to presenting claim to administrator or executor.

Exceptions to refusal, as matter of law, to allow an amendment to declaration after sustaining demurrer.

The amendment avers that within eighteen months after the executrix had filed in the Probate Court her affidavit that notice had been given by her of her appointment as executrix, the plaintiff presented to her the claim declared upon; but neither in the original declaration, nor in this amendment, is there any averment that the claim was presented to the executrix in writing. Such averment is necessary.

It follows that the amendment would be demurrable and hence not allowable.

Action of assumpsit against the defendant, as executrix of the estate of Edward E. Chase. Defendant filed demurrer to writ, which was joined by plaintiff. Demurrer sustained by Justice presiding. Thereupon plaintiff filed motion to amend writ and declaration, which motion was denied by the court, to which ruling plaintiff filed exceptions. Exceptions overruled.

Case stated in opinion.

Coggan & Coggan, for plaintiff.

C. J. Dunn, and F. B. Snow, for defendant.

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

PHILBROOK, J. To the plaintiff's declaration the defendant filed a general demurrer which was sustained and the declaration adjudged bad. The plaintiff then filed a motion to amend the writ and declaration. This motion was denied and the amendment disallowed as a matter of law. The case is before us upon plaintiff's exceptions to these rulings.

The amendment avers that within eighteen months after the executrix had filed in the probate court her affidavit that notice had

been given by her of her appointment as executrix, the plaintiff presented to her the claim declared upon; but neither in the original declaration, nor in this amendment, is there any averment that the claim was presented to the executrix in writing. Such averment is necessary. *Stevens* v. *Haskell, et als.*, 72 Maine, 244.

It follows that the amendment would be demurrable and hence not allowable. *Garmong* v. *Henderson,* 112 Maine, 383.

Exceptions overruled.

EDWARD B. BLAISDELL *vs.* INHABITANTS OF TOWN OF YORK.

York. Opinion November 2, 1916.

Effect of former judgment upon the same facts between the same parties. Plea of former judgment. Res judicata.

This action of assumpsit is brought to recover of the defendant for certain services alleged to have been performed by the plaintiff. Defendant pleaded a former judgment in bar. The former judgment is the one directed by this court in Blaisdell vs. York, 110 Maine, page 500.

Held;

1. It is a fundamental rule of law, that conceding jurisdiction, regularity in proceedings and the absence of fraud, a judgment between the same parties is a final bar to another suit for the same cause of action, and is conclusive not only as to all matters which were tried, but also as to all which might have been tried in the first action.
2. In fact, as appears both by the stipulation and the record, the claim now sued was not only embraced in the former declaration but it was considered, and was decided, adversely to the plaintiff, in the former suit. The claim is res judicata. The suit is barred.

Action of assumpsit to recover for the value of certain labor and materials furnished defendant town. The plaintiff, in his writ, seeks to recover for certain labor and materials which it is admitted were part of a claim or account in another action brought by plaintiff against defendant town, said action or suit being reported in

volume 110, page 500, in which case the claim that is now made was disallowed by the court. Defendant pleaded the general issue and brief statement. Case reported to the Law Court. Judgment for defendant.

The case is stated in the opinion.

Cleaves, Waterhouse & Emery, Frank D. Marshall and John C. Stewart, for plaintiff.

James O. Bradbury, and E. P. Spinney, for defendants.

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

HANSON, J. This action of assumpsit is brought to recover of the defendant for certain services alleged to have been performed for it by the plaintiff. The defendant pleads a former judgment in bar. The former judgment is the one directed by this court in *Blaisdell* v. *York,* 110 Maine, 500. The case comes before us on report.

The parties have stipulated and agreed "that the subject matter claim and entire cause of action as set forth in the said pending writ and declaration . . . is that part of the subject matter claim and cause of action that was set forth and included in the writ and declaration of said Edward B. Blaisdell against the inhabitants of said town of York in his said former action reported to said court . . . upon which opinion was written in said 110 Maine, pages 500 to 522 inclusive, though in different form and phraseology, and consists of the same subject matters, items, charges and amounts which said Blaisdell in said former action sought to recover and which the law court in said former action disallowed as being embraced and falling within the alleged supplemental contract as reported in said *Blaisdell* v. *York,* 110 Maine, 500."

The foregoing stipulation is verified by a comparison of the declarations in the two cases, and an examination of the reported case.

This stipulation squarely brings the case within the doctrine declared in *Corey* v. *Independent Ice Co.,* 106 Maine at p. 494, and *Wilson* v. *Lacroix,* 111 Maine, 324. In the latter case the court used this language: "It is a fundamental rule of law, that con-

ceding jurisdiction, regularity in proceedings and the absence of fraud, a judgment between the same parties is a final bar to any other suit for the same cause of action, and is conclusive not only as to all matters which were tried, but also as to all which might have been tried in the first action."

In fact, as appears both by the stipulation and the record, the claim now sued was not only embraced in the former declaration, but it was considered, and was decided, adversely to the plaintiff, in the former suit. The claim is res judicata. The suit is barred.

Judgment for the defendant.

RACHEL YORK *vs.* HERBERT L. WYMAN.

Somerset. Opinion November 6, 1916.

Jurors. Statements made to or in the presence of jurors. Rule of law as to whether juror was or was not influenced by statements. Presumption as to statements made in presence of juror.

Special motion by the defendant who asks that the verdict against him be set aside, and a new trial granted, because of the misconduct of a member of the jury which rendered that verdict.

The court places its seal of condemnation, not alone upon the attempts of parties by word or deed to influence or prejudice jurors outside the court room, but also upon the indiscretion of their friends along the same line. And we have not stopped to inquire whether the attempt was successful, nor whether the mind of a juror was actually influenced, but only whether or not the mind of a juror might have been influenced by the attempt, or whether the attempt might have any tendency to influence the mind of a juror.

In the present case a man, related to the plaintiff by marriage, stated to or in the presence and hearing of a juror, according to the testimony of one witness, that the defendant and his wife, both being material witnesses, had "lied like hell and that he hoped the woman (meaning the plaintiff) would get the case." To which the juror replied "that he thought so, too, and as far as he was concerned they would." According to the testimony of another witness the man stated "that Wyman and his wife had swore to

a lie, or to that effect, and that the case should be decided to the woman" (meaning the plaintiff); and that the juror replied "I think so too."

The juror had not only listened to attacks upon the credibility of material witnesses, but he had also uttered statements, before the cause had been finally submitted to the panel, indicating a fixed purpose on his part as to how he would vote when the verdict was under consideration. For either of these reasons the defendant's motion should be sustained.

Action of assumpsit. Verdict for plaintiff. After verdict, knowledge came to defendant that certain statements had been made by a relative of the plaintiff to, or in the presence of, a juror who was then sitting on said case, to the effect that the defendant and his witnesses were not telling the truth. After verdict, defendant filed a special motion for new trial, and hearing was held before the presiding Justice. After a full hearing, case was reported to Law Court for determination. Motion sustained. New trial granted.

Case stated in opinion.

Merrill & Merrill, for plaintiff.

George W. Gower, for defendant.

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

PHILBROOK, J. This case comes to us upon a special motion by the defendant who asks that the verdict against him be set aside, and a new trial granted, because of the misconduct of a member of the jury which rendered that verdict.

From the testimony presented in support of the motion it appears that while the case was still pending, and before the arguments of counsel had been made or the presiding Justice had delivered his charge to the jury, a member of the panel was at a livery stable in the town where the trial was in progress, for the purpose of stabling his horse. While there, a man, related to the plaintiff by marriage, stated to or in the presence and hearing of this juror, according to the testimony of one witness, that the defendant and his wife, both being material witnesses, had "lied like hell and that he hoped the woman (meaning the plaintiff) would get the case." To which the juror replied "that he thought so too, and as far as

he was concerned they would." According to the testimony of another witness the man stated "that Wyman and his wife had swore to a lie, or to that effect, and that the case should be decided to the woman" (meaning the plaintiff); and that the juror replied "I think so too."

This incident did not come to the knowledge of the defendant, or his attorney, until after the verdict had been rendered.

More than once, and in no uncertain language, we have placed the seal of condemnation, not alone upon the attempts of parties by word or deed to influence or prejudice jurors outside the court room, but also upon the indiscretion of their friends along the same line. And we have not stopped to inquire whether the attempt was successful, nor whether the mind of a juror was actually influenced, but only whether or not the mind of a juror might have been influenced by the attempt, or whether the attempt might have any tendency to influence the mind of a juror. *Heffron* v. *Gallupe,* 55 Maine, 563; *Bradbury* v. *Cony,* 62 Maine, 223; *Belcher* v. *Estes,* 99 Maine, 314; *Shephard* v. *L. B. & B. Railway,* 101 Maine, 591; *Driscoll* v. *Gatcomb,* 112 Maine, 289. In a sister jurisdiction we find *Nesmith* v. *The Clinton Fire Insurance Company,* 8 Abbott Practice Report, N. Y., 141, cited in *Bradbury* v. *Cony,* supra, where it was proved that during the trial of an action in which there was much conflicting evidence, a juror listened to the statements of a third party, attacking the credibility of the defendant's witnesses. The court held that when it appears that the jury have been approached in such a manner as might have influenced the verdict, it should be set aside, without reference to the source or the motive of the interference. This latter case bears strong resemblance to the one at bar. In *Cilley* v. *Bartlett,* 19 N. H., 312, one of the parties, in the presence and hearing of one or more of the jury, asserted in the most positive terms that the testimony of one of the most material witnesses for his opponent was utterly and absolutely false. He claimed that he did not know any one of the jury was present at the time, but the Justice who announced the opinion of the court said, "Whether he knew this fact or not, is not a matter that can be readily proved. But there will be no security for the proper administration of justice if a party, while his case is on trial, can be permitted to make statements denouncing his

opponent's witnesses, during the adjournment, after the jury have separated, whether he is aware of the presence of a juror or not. . . . The presumption is that when jurors hear such statements they are more or less affected by them." In that case new trial was granted for the reasons just given.

But we do not stop with the phase of the case already discussed. The testimony shows statements made by the juror which should not be overlooked. In *Cooper* v. *Carr* 161 Mich., 405, also reported in 126 N. W., 468, it was stated as a well known rule that where, during the progress of the trial, and before the submission of the case, a juror has made statements outside the jury room concerning the case, or evidence offered therein, indicating a fixed opinion unfavorable to the moving party, or ill will towards him, it is ground for a new trial. In *Tomlinson* v. *Derby,* 41 Conn., 268, a new trial was ordered because one of the jurors sitting on the case assented to a statement made to him outside the jury room, by a person other than a juror, to the effect that if the trial should continue fifteen or twenty days, and the plaintiff should recover five thousand dollars, he would have nothing left after paying the expenses of the suit. The same juror, at another period of the trial, said substantially to another person, not a juror, that if the plaintiff should recover five thousand dollars there would be nothing left after paying the expenses of the case. In *Wightman* v. *Butler County,* 83 Iowa, 691, also reported in 49 N. W., 1041, a juror informed one not connected with the case "that he had made up his mind how he should decide it, and that the lawyers could not change him." This statement was made before the evidence was closed and the court ordered a new trial.

Many other authorities might be cited but we deem it unnecessary to go farther. Either the possible influence upon the mind of the juror by the statements made in his hearing as to the credibility of the defendant and his wife, or his own statement indicating a fixed purpose on his part as to how he would vote when the verdict was under consideration, would afford grounds for sustaining the defendant's motion.

Motion granted.
New trial ordered.

FENETTA MCDOUGALL *vs.* WENDELL RICKER, et als.

Androscoggin. Opinion November 6. 1916.

Poor debtor's bond. Common law bond. Right of Notary Public, who is not a Justice of the Peace, to act as one of the justices in a poor debtor hearing. Rule of law where the third justice is chosen and one of the three justices leave before final decision. Section 49, Chapter 114 of Revised Statutes of Maine. Statutory bond.

This is an action of debt upon a bond given by the defendant to release him from arrest upon execution. He pleaded the general issue with brief statement claiming that he had performed one of the conditions of the bond by disclosing before two justices of the peace within the time provided by statute and by the terms of the bond. The case is before us on exceptions to the direction of a verdict for the defendant.

The bond in question having been approved in writing by the attorney for the creditor, such approval is a sufficient compliance with the statute requiring, among other forms of approval, that the instrument be "approved in writing by the creditor."

Where two justices have been chosen and a third justice is called in, because of a disagreement as to the law governing the case but no disagreement as to the facts, it is not necessary that the debtor should be re-examined under oath upon the facts by the third justice.

When the three justices take part in the discussion of the law and upon the agreement of the third justice with one of the others that the oath should be administered, that is the final decision, in which all have taken part, and the withdrawal of a justice after this final decision has been made does not invalidate the proceedings even though the oath be administered and the certificate signed by the remaining justices only.

By virtue of the provisions of chapter 58, Public Laws, 1905, a notary public may act as one of the magistrates, with all the powers of a justice of the peace, in a poor debtor's disclosure.

Action of debt on a poor debtor's six months bond executed in accordance with section 49, chapter 114, Revised Statutes of Maine. Defendant pleaded general issue and brief statement, setting forth that he had complied with one of the conditions of the bond. At conclusion of the evidence, presiding Justice directed a verdict for

the defendant, to which ruling and order, as well as to other rulings, plaintiff filed exceptions. Exceptions overruled.

Case stated in opinion.

Jacob H. Berman, and Benjamin L. Berman, for plaintiff.

McGillicuddy & Morey, for defendants.

SITTING: CORNISH, KING, BIRD, PHILBROOK, MADIGAN, JJ.

PHILBROOK, J. This is an action of debt upon a bond given by the defendant to release him from arrest upon execution. He pleaded the general issue with brief statement claiming that he had performed one of the conditions of the bond by disclosing before two justices of the peace within the time provided by statute and by the terms of the bond. The case is before us on exceptions.

At the trial below, after the conclusion of the evidence, the presiding Justice directed a verdict for the defendant, to which an exception was allowed and, while other exceptions were allowed and were included in the bill of exceptions, the plaintiff in the argument presented to us stated that he would argue only the exception to the direction of a verdict. He claims that the evidence did not disclose a legal performance of the condition of the bond by the defendant, for the following reasons: I. There was no hearing and examination as required by R. S., chapter 114; II. The court was illegally constituted and therefore had no jurisdiction.

It appears that the examination at first proceeded before two magistrates, one chosen by the creditor and one by the debtor, and upon their failure to agree, as to whether the oath should be administered to the debtor, a third magistrate was called in. The evidence seems to establish the fact that upon the arrival of the third justice the debtor was not again sworn in his presence nor was the latter examined by or in the presence of the third justice. A conference between the three magistrates was held, in which the disagreeing justices stated to the third justice the testimony already given in the examination, and concerning which they agreed as to the facts but differed as to points of law involved. The third justice agreed with the one called by the debtor. The one called by the creditor thereupon withdrew and the two remaining justices administered

the oath to the debtor. As already stated, the creditor claims that this proceeding was illegal and of no effect because the debtor was not again sworn and examined in the presence of the third justice, and because the oath was administered by two of the justices after the third had withdrawn.

This brings us to a consideration of *Ross* v. *Berry,* 49 Maine, 434. In that case two justices were chosen and upon their disagreement a third was called in. The court thus constituted proceeded with the disclosure but, before it was concluded, the justice selected by the creditor refused to act any further and withdrew. The creditor also withdrew, leaving a protest. The two remaining justices finished the examination, adjudicated upon it, administered the oath to the debtor and gave him a certificate. It was held that this proceeding was not a legal fulfillment of a statute bond, that the court having been constituted of three members all must act until a final decision, although a majority only make the decision. It has been noted that in the above case there was a dissent, but the dissenting opinion states that the writer concurred in the opinion of the majority that the justices who administered the oath to the debtor had no jurisdiction of the matter, under the statute, after their associate had refused to act. The dissent was upon another branch of the case.

But *Ross* v. *Berry,* supra, differs from the case at bar on the facts. In the former the creditor's justice withdrew before a determination of the questions involved. Not so in the case at bar. In the testimony of the creditor's attorney we find that "after they had decided to give him the oath" the justice withdrew. And again he testified "We both stated the facts, and both agreed on the facts; Judge Brann thinking the law one way, and I ruled the law the other way, and Judge Curran decided with the associate justice, and that overruled me and I withdrew." This was the final decision. Nothing more remained to be decided. All three justices had taken part in the action which led to that final decision. The administration of the oath was not a decision and the majority acted, as they were permitted by law to do, in administering the oath and signing the certificate.

The claim that the debtor should have been re-sworn and examined by the third justice has no merit in the present case.

There was no disagreement as to the facts. The controversy was one of law and that did not necessarily require a further examination of the debtor. He was not there to testify upon points of law.

At this point we should note a contention of the defendant, namely, that the bond in suit was only a common law bond, and not a statutory bond. He bases his contention upon the fact that the bond was approved by the creditor's counsel and not by two justices of the peace, and confidently relies upon *Gould* v. *Ford,* 91 Maine, 146, as sustaining his contention. He must have failed to make a critical examination of that case and of the statute relating to approval of such bonds. As to approval of bonds by justices the statute requires that the approving magistrates shall be chosen one by the debtor and the other by the creditor, his agent or attorney, in the county where the debtor is arrested or imprisoned. In *Gould* v. *Ford,* supra, the court said: "In this case the sureties on the bond appear to have been approved in writing by two disinterested justices of the peace and of the quorum, but there is nothing in their certificate of approval or elsewhere in the bond to indicate by whom either of these justices was selected. As it does not appear that the justices approving the bond were selected according to the directions of the statute, it cannot be treated as a statute bond and it can only be held good at common law." But this does not require that such bonds be alone approved by justices, even when all statutory steps are taken relating thereto. For the bond may be also "approved in writing by the creditor." In the case at bar the approval was done by the attorney for the creditor. That such approval is sufficient is well settled. *Poor* v. *Knight,* 66 Maine, 482; *Scribner* v. *Mansfield,* 68 Maine, 74. We must hold that the bond in suit is a statutory bond, and not one good only at common law, hence the conclusions drawn by the court in *Gould* v. *Ford,* supra, are not applicable to the case at bar.

But another claim of the plaintiff remains to be examined. It appears that the creditor selected a member of the legal profession with the understanding on the part of all that he was a justice of the peace, but before the hearing began it occurred to the mind of the person so selected that his commission as a justice had expired and he so informed the parties, but added that he was a notary public. Both attorneys then agreed that he should hear the dis-

closure in his capacity as notary public. Not now discussing the legal right of the creditor to retract or nullify his own agreement, we think that chap. 58, of the Public Laws of 1905, disposes of that claim. By that enactment the Legislature declared that notary publics "may do all things that justices of the peace are or may be authorized to do." Hence we conclude that the debtor performed one of the conditions of his bond, a statutory bond, and that the mandate must be,

Exceptions overruled..

VIRGINIA ALLEN, Admrx.,

vs.

THE AROOSTOOK VALLEY RAILROAD COMPANY.

Aroostook. Opinion November 6, 1916.

Pleadings under Public Laws of Maine, 1913, Chapter 27. Rule of law as to duty owed to a licensee or trespasser. Duty owed to an invitee.

Action on the case for wrongful injuries causing the death of John E. Allen, plaintiff's intestate. Allen had charge of loading and shipping potatoes and of the fitting of cars for the same. He was in the employment of the Aroostook Potato Growers Association and not of the defendant. On the day of the accident, after a car had been lined, the stove set and the funnel attached and secured by a workman, the intestate went on top of the car, came in contact with the heavily charged trolley wire, which at this point was only one foot above the top, and was instantly killed. The car had been placed in this position on the side track by the defendant. The case is before this court on report.

Held;

1. Whether it was negligence on the part of the defendant to allow its trolley wire to remain in such an unusual and dangerous position without warning to the plaintiff depends upon the legal relation existing between the parties, and the defendant's duty to the deceased at the time.

2. This measure of duty varies according as the deceased was an invitee or a mere licensee or trespasser.
3. If he was an invitee the defendant owed him the duty of having the top of the car reasonably safe or of giving him ample warning if it was unsafe.
4. If he was a trespasser, or a mere licensee, the defendant owed him no higher duty than to abstain from wantonly injuring him.
5. Giving full weight to the evidence and considering it in the light of all the circumstances, we are of opinion that the deceased was at best a mere licensee, that the defendant was guilty of no breach of duty toward him and that in accordance with well settled legal principles the plaintiff has no valid cause of action.

Action on the case to recover damages for the death of the plaintiff's intestate, alleged to have been caused through the negligence of the defendant. Defendant pleaded general issue and brief statement setting forth that at the time the plaintiff's intestate met his death, he was not in the exercise of due care. At conclusion of testimony, case was reported to Law Court to determine all questions of law and fact involved, and stipulation was made as to amount of damage in case the Law Court should find the plaintiff entitled to recover. Judgment for defendant.

Case stated in opinion.

A. B. Donworth, and R. W. Shaw, for plaintiff.

John B. Roberts, C. F. Daggett, and W. R. Pattangall, for defendant.

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

CORNISH, J. Case for wrongful injuries causing the immediate death of John E. Allen, plaintiff's intestate. The following facts are fairly deducible from the evidence. Allen was, at the time of his death, and had been for several years prior thereto, in the employ of the Aroostook Potato Growers Association. He bought potatoes for a local branch and had charge of the loading and shipping, employing the necessary men therefor. The preparation of a car for shipment in cold weather consisted in the construction of a false lining on the bottom and sides with a six inch air space for circulation, the placing of a stove in the center between the doors, with the stove pipe passing horizontally through a tem-

porary fire board placed in the door and into an elbow pipe extending up past the eaves of the car. The top of the funnel is secured by wiring it either to the roof of the car or to the side beneath the eaves, and should extend, according to the rules of the road, a distance of from six to twelve inches above the eaves. By arrangement with the Association, the defendant had placed one of its empty box cars on a siding in the town of Caribou, near the Tuttle potato house. It was to be lined and fitted at that point by Allen, or under his direction, and then was to be taken by the defendant to Paul's siding, a distance of about two miles, for loading. On Saturday, November 14, 1914, both Allen and his workman Randall were engaged in putting in the lining. On Monday forenoon Randall and another workman continued the work and set up the stove. Immediately after dinner on Monday Randall alone set up the funnel and attached the wire, thus completing the job. In doing this he used a portable ladder which he placed against the side of the car. Allen seems to have done no part of the work on Monday, although he was at the potato house while the work was going on. At the point where the car was placed on the track it was directly beneath a trolley wire of the defendant carrying a voltage of at least twelve hundred volts. This trolley wire was attached by means of a cross wire to the corner of the potato house and thence ran along to the next regular pole. This reduced the space between the top of the car and the trolley wire to about one foot while the usual distance on the defendant's line was about six or eight feet.

On Monday afternoon, November 16th, shortly after the wiring had been completed, Allen climbed up to the roof of the car by means of the stationary iron rounds near the end. No one saw him start and he had told no one of his purpose. No one saw him on his way up, but as the upper part of his body rose above the top of the car he was seen by two boys who were on the railroad track forty-one feet away, and on the opposite side of the car. When he came into view they state that he seemed to be standing on the top rung of the ladder, that he reached out and grasped the brake wheel with his right hand, then slipped in some way and his left hand struck the trolley wire. This made the fatal connection and his death followed instantaneously. Con-

siderable testimony was introduced by the defendant for the purpose of showing that death was due to natural causes, but we think that in view of the situation and circumstances we are warranted in holding that it was due to the electric shock.

The negligence charged is "in allowing said dangerous wire to be in such an unusual and unexpected position, and negligently failing and omitting to notify said intestate of said dangerous position." This question must be considered in the light of the defendant's duty to the deceased at the time. It matters not whether the wire was so placed as to be safe or unsafe as to the employees of the company who had occasion to come into proximity to it in the performance of their duties. Allen was not an employee or servant of the company and it was not in law negligence as to him, to maintain the wire in its low position unless there was a failure of duty on the part of the defendant with respect to the legal relation existing between them. As to what that legal relation was the parties differ, but on whatever hypothesis the plaintiff's claim may rest we are unable to discover a legal ground for recovery.

The deceased may have been an invitee, a licensee or a trespasser, and the measure of duty on the part of the defendant varies accordingly.

If Allen went to the top of the car on business connected with the business in which the defendant was engaged and in the ordinary and natural performance of his work in fitting the car, so that the defendant knew or by the exercise of reasonable care and diligence should have known that his work would take him into that locality, then he was there by implied invitation of the defendant, and in that event the defendant would owe him the duty of having the top of the car and its surroundings reasonably safe, or of giving him ample warning if the condition was unsafe. This is the plaintiff's contention.

If, on the other hand, he had no business on the top of the car, and went there for the purpose of releasing the brake so that the car could be moved a short distance down the siding to take on wood, and if the releasing of the brake and the moving of the car were under the exclusive control of the defendant and its servants, then the deceased was a trespasser, or at best a mere licensee, and

the defendant owed him no higher duty than to abstain from wantonly injuring him. *Parker* v. *Portland Pub. Co.*, 69 Maine, 173; *Dixon* v. *Swift*, 98 Maine, 207; *Stanwood* v. *Clancy*, 106 Maine, 72; *Elie* v. *St. Ry. Co.*, 112 Maine, 178. This is the contention of the defendant.

Assuming the plaintiff's contention that he was an invitee to be true, right of recovery by no means follows in this case. The wire in question was in full view both from the ground and at the top of the car. It was broad daylight and the deceased could not have failed to see it and its precise location if he had looked. From his experience he must have known that it was the trolley wire which propelled the cars and was necessarily of high and perilous voltage. There was no trap. The danger was an open one. To grasp the wire voluntarily would have been the height of carelessness and would have sustained the burden of proving contributory negligence thrown upon the defendant by its pleadings under P. L., 1913, ch. 27. To slip upon the moist roof and grasp the wire involuntarily in falling, as the testimony of the eye witnesses indicates, would seem to render the occurrence an accident for which neither party should be held at fault. *Powers* v. *Wyman & Gordon Co.*, 99 Maine, 591.

But we must not stop with an assumption of facts. We should go farther and determine them. The evidence in support of the plaintiff's contention as to implied invitation, or of the defendant's as to trespass or license, though somewhat meagre, is ample to compel a conclusion in favor of the defendant.

The burden rests upon the plaintiff on this issue, and we are of opinion that that burden has not been sustained. The learned counsel for the plaintiff argues that the deceased was going upon the top of the car to ascertain whether the wire was properly fastened and whether the top of the funnel was at the regulation height. But this is almost wholly an assumption. There is no evidence of the fact. It does not appear that Allen had done this before or that he had considered it necessary. He said nothing to Randall about it. He had left the job for Randall to complete and Randall had completed it. The fastening of the wire was a simple matter and required neither skill nor minute inspection. Moreover he could have ascertained while standing on the ground

whether the top of the pipe was within the regulation limits. To climb to the top of the car for either purpose seems quite unnecessary.

On the other hand there is evidence that while the work was in progress the suggestion had been made that it would be well to drop the car down to the potato house for the purpose of taking on wood. Someone in the group had made the suggestion, and by a process of elimination Mr. Allen seems to have been the person. To drop the car down it was first necessary to release the brake, and the testimony of the boys as to what Allen was doing at the time of the accident strengthens the defendant's claim that he was carrying the suggestion into effect. His hand was upon the brake wheel immediately prior to the accident. The evidence further shows that the defendant's servants alone had authority to release the brake or move the car. It was set in place by them and should be moved by them. Mr. Allen had no right to interfere.

On the whole, giving full weight to all the evidence and considering it in the light of the circumstances, we are forced to the conclusion that at the time of the accident the deceased was either a trespasser or at best a mere licensee, that the defendant was guilty of no breach of duty towards him and that in accordance with well settled legal prinriples the plaintiff has no valid cause of action.

The entry must therefore be,

Judgment for defendant.

JOHN KOLASEN *vs.* THE GREAT NORTHERN PAPER COMPANY.

Somerset. Opinion November 6, 1916.

Assumption of risk. Dangers which ought to have been seen and appreciated by workmen. Duty of employer towards servants in providing a safe place in which to work. Duty of employer as to giving warning of hidden dangers. Rule of law where employee worked around a machine to which was attached a set screw and of which the employee had no knowledge.

Action for personal injuries. The plaintiff was painting near the ceiling of a dimly lighted alcove of the screen room in the defendant's mill, in close proximity to a rapidly revolving shaft. To this shaft had been attached a collar seven or eight inches in diameter, from which projected a set screw about three-fourths of an inch. The collar had been attached ten years before for the purpose of running a machine, had served its purpose for two or three years and had then been abandoned. But the defendant had not removed it and it had been allowed to remain in disuse. While in the performance of his work the plaintiff's clothing was caught in the set screw and he was drawn violently around the shaft receiving grievous and permanent injuries. He recovered a verdict in the sum of $12,000. At a previous trial, the presiding justice ordered a non suit. Plaintiff's exceptions to this order were sustained by this court and the action was sent back for trial before a jury.

Upon defendant's motion for a new trial it is *Held;*

1. That the evidence at this trial is practically the same as at the first. The defendant introduced no testimony except the affidavit of a witness for the plaintiff given on the day of the accident, tending to contradict the witness' testimony at the time. This was admissible for the purpose of impeaching the credibility of the witness, but can be given no other nor further weight.
2. That under these circumstances, the same question is before this court as before. If the plaintiff is not entitled to recover as a matter of law, the non suit would have been sustained. The reversal of the non suit then is logically followed by the denial of this motion now.
3. That upon the evidence the verdict is not clearly wrong. The jury could well find the existence of a dangerous feature, which was not visible to an observing operative, one that was not made known to him and one which the employer should have known and in fact did know, evidence tending to prove negligence on the part of the defendant.

4. That owing to the plaintiff's inexperience, ignorance of the exact situation and lack of warning, the jury were justified in finding that he was himself in the exercise of due care and had not assumed the risk.
5. That the question of excessive verdict is not argued by the defendant. The plaintiff's injuries were lamentable. Both arms and both legs were broken and there were injuries to the back and one eye. The plaintiff has been subjected to many operations, is wholly incapacitated from labor and is a physical wreck. The verdict is large, but we do not feel warranted in disturbing it.

Action on the case to recover for personal injuries. Defendant pleaded general issue. Verdict for plaintiff in the sum of twelve thousand dollars. Defendant filed motion for new trial. Motion overruled. Judgment on the verdict.

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, BIRD, HALEY, PHILBROOK, JJ.

CORNISH, J. Action on the case for personal injuries. It is before this court a second time.

At the first trial a non suit was ordered at the close of the plaintiff's evidence, and exceptions to this order were sustained. *Kolasen* v. *The Great Northern Paper Co.,* 114 Maine, 400.

Upon a second trial the jury returned a verdict in favor of the plaintiff in the sum of twelve thousand dollars. The case is now before this court on a motion for new trial on the general ground that the verdict is against the evidence. The evidence is practically the same as at the first trial. The defendant submitted no testimony whatever except the affidavit of a witness for the plaintiff, a fellow workman, who at this trial testified that he had no recollection of having cautioned the plaintiff about being careful when he was at work around belts and pulleys. In this affidavit, made on the date of the accident, he states that when he had been working with Kolasen he had told him "to be careful about working around belts and pulleys and not get caught." This however is not evidence of the fact itself. It was a statement made by a witness out of court

at variance with his testimony on the stand. As such it was admissible for the purpose of impeaching his credibility, but can be given no other or further weight. *Barnes* v. *Rumford,* 96 Maine, 315, 322.

The situation therefore is this. This cause was sent back for trial because the court was of the opinion, to quote its language, "that the facts relating to the question of liability of defendant should have been submitted to the jury." The cause has now been submitted to a jury and a verdict rendered for the plaintiff. Upon the same evidence as before the defendant now asks that the verdict of the jury be set aside. In other words it asks the court to now hold as a matter of law that the plaintiff cannot recover. This question has in effect been passed upon in the previous decision. If the court had then been of opinion that the plaintiff could not recover as a matter of law, it would have sustained the non suit and would not have ordered a submission to the jury. It is the same question as before in another form, and the refusal of the non suit then is logically followed by the denial of this motion now.

It is not improper to add however that we have carefully reviewed the evidence in the light of the argument of the learned counsel for the defendant, and we see no occasion to change the opinion formerly expressed.

The doctrine of the so-called "Set screw cases" is strenuously urged by the defendant as a complete defence to this action. But we do not so regard it. The principles applicable to the correlative duties of master and servant respecting revolving shafts and set screws form a part of the great body of the law of negligence and do not, or at least should not, constitute an exception thereto. There is nothing sacred about a set screw. It takes its place in the same category as other mechanical appliances and devices. The same rules must apply to all. These rules are set forth in a comparatively recent set screw case in this State. *Podvin* v. *Manufacturing Company,* 104 Maine, 561, relied on by the defendant. The duty of the master with respect to furnishing reasonably safe machinery and a reasonably safe place in which the servant can work is thus restated: "The plaintiff claims that the risk was upon the defendant, because it did not have the set screws so

countersunk or otherwise fixed as to remove all danger of injury from them. This claim is not well founded. It is not the legal duty of an employer of labor upon machines to provide and use the safest possible or even safest known machines. There must be no weakness, no want of repair, no dangerous feature, not visible to an observing operative or made known to him and such as the employer should have known. If such a machine be provided the employer has done his full legal duty in that respect."

The liability resting upon the servant touching the assumption of risk then follows in these words: "But the plaintiff further claims that the risk was upon the defendant and had not been assumed by her because her attention had not been called to the set screws and to the danger of injury from them. This claim is also without foundation. An operative by agreeing to operate and operating a particular machine, without stipulation to the contrary, assumes the risk of injury not only from those features of the machine called to his attention but also from those open to observation." These are familiar principles of law, and the test of defendant's liability in each case must be, was there a danger which in view of the plaintiff's experience, intelligence and capacity was not appreciated by or apparent to him, or which should have been apparent to him by the exercise of reasonable care and diligence on his part? If there was not, there was no negligence in exposing him to it; if there was, then the duty devolved upon the employer to give him the necessary information and warning.

The application of this rule and test to the peculiar facts and circumstances of each case determines liability or non liability, not the mere fact that the dangerous feature complained of is a set screw. Each case must be decided on its own merits. In *Podvin* v. *Manufacturing Company,* the facts clearly showed want of liability and the court so held. The set screws were a part of the machine which the plaintiff herself operated. They were open and exposed to observation and plainly visible to anyone making the most cursory examination. They were not in any obscurity, being well lighted from a window a few feet away. The plaintiff was an experienced woman fifty-nine years of age and had operated this same machine with the set screws unchanged for a period of fifteen years. She had seen it in motion and at rest. It was her

duty to clean around the gears and wheels and set screws as often as twice a week and oftener if necessity required it. She was entirely familiar with the machine in every part, and the court held that under this state of facts she had assumed the risk and could not recover when, as she was reaching down one day to pick up a fallen bobbin from the floor, her hair became entangled in the set screws.

In the case at bar the facts are quite different, and the jury could well find that a dangerous feature existed here which was not visible to an observing operative, one that was not made known to him, and one which the employer should have known and in fact did know. That dangerous feature was the collar seven or eight inches in diameter placed midway of a long shaft with a set screw projecting three-fourths of an inch therefrom. The collar had been attached ten years before for the purpose of running a machine, had served its purpose for two or three years and then had been abandoned. But the defendant had never removed it, and it had been allowed to remain in disuse for nearly eight years. It was near the top of a room that was dimly lighted and the set screw was invisible when the mill was in operation and the shaft revolving at its normal speed of one hundred and forty revolutions a minute.

The plaintiff, Kolasen, was a foreigner, twenty years of age, who had been in this country a little over four years. He was unacquainted with machines or machinery. His work for the most part had been that of a common laborer. He had never worked upon or in connection with any machine except upon a barker in the wood room for a period of four months. He had been a member of the painting crew a little more than a year, ten months of that period engaged in outside work and a little more than two months in the various rooms of the mill. He had been painting in this screen room about two weeks, but in the dimly lighted portion known as the alcove only a portion of a day. To quote the former opinion, p. 402, "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 in the set screw and he was thrown violently around the shaft, receiving 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."

Taking all these undisputed facts into consideration the jury evidently found that the defendant did not exercise that full measure of care devolving upon it, and also that the plaintiff was himself in the exercise of due care and had not assumed a risk of which he had, and could be held by the exercise of due diligence to have, no knowledge. We are unable to say that these conclusions are wrong.

The question of excessive verdict is not discussed by the defendant, and therefore needs no extended consideration. The injuries were lamentable. Both arms and both legs were broken, and there were injuries to the back and one eye. The plaintiff has been subjected to many operations, is wholly incapacitated from labor and is now a physical wreck.

The amount is large, but we do not feel warranted in disturbing it.

The entry will be,

Motion overruled.
Judgment on the verdict.

STATE OF MAINE *vs.* EDWARD E. GOOGINS.

York. Opinion November 9, 1916.

Common Law rule in criminal cases as to motion after verdict. Procedure after motion has been overruled in criminal cases. Rule of law as to motions after verdict in criminal cases as changed by Public Laws, 1909, Chapter 184, and Public Laws, 1913, Chapter 18.

Exceptions do not lie to the overruling of a motion for new trial in a criminal case.

Where, in a criminal case, a motion for a new trial is filed and overruled, the respondent may appeal when he has been convicted of murder, or of any offense punishable by imprisonment for life, or of any other crime amounting to a felony.

The entry upon the docket on the overruling of a motion for new trial of "Exceptions allowed" does not constitute an appeal.

Respondent was indicted, tried and found guilty of violation of Public Laws of Maine, 1913, chapter 5. After verdict, respondent filed motion for new trial, which was overruled by the presiding Justice, and the record shows that the respondent's counsel "filed exceptions" to the ruling of the court. Appeal not taken according to statute, case dismissed. So ordered.

Case stated in opinion.

Hiram Willard, for State.

Robert B. Seidel, for respondent.

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

BIRD, J. The defendant was indicted and, upon trial, found guilty of a violation of c. 5 of the Public Laws of 1913, which prescribes punishment by imprisonment not exceeding two years, or by fine not exceeding one thousand dollars. After conviction, defendant filed a general motion for new trial which was overruled by the presiding Justice. The docket entries which are made part of the record sent to this court, so far as pertinent to the matter

in question are as follows: "Motion that verdict be set aside filed 20d—Motion overruled—Exceptions allowed." The record consists of copies of the motion for new trial, of the indictment and of the docket entries and a transcript of the evidence submitted to the jury. No bill of exceptions is found. But if otherwise, the case would be improperly here. At common law the action of the Judge at nisi prius upon a motion for new trial, to whom alone such motion could be addressed, was final. The defendant had the right neither to a bill of exceptions nor to an appeal. And such was the case in this State until the year, 1889. The enumeration of the cases which may come before the Law Court found in c. 79, § 46, R. S., does not include exceptions to the ruling of the trial Judge in denying a motion for new trial in a criminal case. See *State* v. *Hill,* 48 Maine, 241, 243; *State* v. *Perry,* 115 Maine, 203; *State* v. *Steeves,* 115 Maine, 220.

A right of appeal from such ruling in cases of conviction of murder or in which the sentence may be imprisonment for life was afforded by c. 152, Pub. Laws, 1889. By c. 184, Pub Laws, 1909, and c. 18, Pub. Laws, 1913, the right of appeal was extended to all other cases amounting to a felony. R. S., c. 135, § 27. In the case under consideration, however, no appeal has been taken and the case must be dismissed.

So ordered.

ERNEST E. GRAFFAM *vs.* TOWN OF POLAND.

Androscoggin. Opinion November 9, 1916.

Fellow-servant doctrine. Road commissioner acting in the capacity of a public officer. Rule as to liability of town when its road commissioner, without interference or special direction, was building a piece of roadway and a person is injured by his negligence.

While the plaintiff was working as a laborer in the construction of a section of State aid highway in the defendant town, September 4, 1914, he was hit and severely injured by flying pieces of rock caused by the blasting of a boulder in the highway. This action is to recover damages for his injuries. After the evidence of liability was offered a non-suit was directed, and the case comes up on exceptions to that ruling.

The section of State aid highway where the accident occurred was being rebuilt or improved under the provisions of chapter 130 of the Public Laws of 1913, and one Forest O. Emery, who was then the road commissioner of the defendant town, had immediate charge of the work. The plaintiff contended at the trial that the work of constructing the highway was being carried on by the defendant town and that Mr. Emery was its representative and agent for whose negligence in prosecuting the work the town is liable. And he offered proof to show that the accident was caused by Mr. Emery's negligence in exploding the blast without having it properly covered, and without any notice or warning to him that the blast was to be made.

Held;

1. It is clear from the evidence that Mr. Emery was not constructing this section of highway in his capacity as road commissioner of the defendant town.
2. But if he had been constructing the way in that capacity without any interference or special direction by the town, he would then have been acting as a public officer, and while so acting he would not have been in legal contemplation the servant or agent of the town, and the town would not be liable for his wrongful or negligent acts, though done in the course and within the scope of his employment.
3. The evidence is not sufficient to establish that the defendant town itself was carrying on the work of constructing this section of State aid highway and that Mr. Emery was its servant and agent in prosecuting the work. On the other hand, the evidence is plenary that the State Highway Commission had full charge and control of the work from its commencement to its end.

4. If, however, it could have been established that Mr. Emery had charge of the work as the defendant's agent, even then the plaintiff's action could not be maintained, inasmuch as it clearly appears that Mr. Emery was a fellow servant of the plaintiff in doing the alleged negligent acts which caused the plaintiff's injuries.

Action on the case to recover damages for personal injuries. Defendant pleaded general issue. After the evidence on the question of liability was offered, court directed a nonsuit; to which ruling plaintiff filed exceptions. Exceptions overruled.

Case stated in opinion.

William A. Connellan, and Robert J. Curran, for plaintiff.

John A. Morrill, for defendant.

SITTING: CORNISH, KING, BIRD, HANSON, PHILBROOK, MADIGAN, JJ.

KING, J. While the plaintiff was working as a laborer in the construction of a section of State aid highway, in the defendant town, September 4, 1914, he was hit and severely injured by flying pieces of rock caused by the blasting of a boulder in the highway. This action is to recover damages for his injuries. After the evidence of liability was offered a nonsuit was directed, and the case comes up on exceptions to that ruling.

The section of State aid highway where the accident occurred was being rebuilt or improved under the provisions of chapter 130 of the Public Laws of 1913, and one Forest O. Emery, who was then the road commissioner of the defendant town, had immediate charge of the work. The plaintiff contended at the trial that the work of constructing the highway was being carried on by the defendant town and that Mr. Emery was its representative and agent for whose negligence in prosecuting the work the town is liable. And he offered proof to show that the accident was caused by Mr. Emery's negligence in exploding the blast without having it properly covered, and without any notice or warning to him that the blast was to be made. On the other hand, the defendant denied that it was carrying on the work and contended that the work was being done by the State Highway Commission.

By c. 130, Public Laws of 1913, a State Highway Commission was established, and provision was made for the building and permanent improvement of State and State aid highways. So far as material to the determination of the questions involved in this case, the provisions of that act may be thus briefly referred to. If any town desires State aid for the improvement of its State aid highways it may raise and appropriate, in addition to the amounts regularly raised and appropriated for the care of ways, highways and bridges, a sum not exceeding an amount fixed by the act on the basis of the valuation of the town. The municipal officers of such town are to file with the commission suggestions for the improvement during the next calendar year of its State aid highways, setting forth the location thereof and the improvements desired. The commission is to report back to the municipal officers, on or before the 20th day of February following, its recommendations in respect to the work suggested, and that report is to be submitted to the voters of the town at its next regular meeting, with a proper article in the warrant for the meeting, under which the voters are to vote "yes" or "no" on the question of the appropriation of the necessary money to secure the State aid. If the town makes an appropriation for the purpose, the commission is to be forthwith notified thereof, and if it approves the action of the town, in whole or in part, it then apportions to that town for that State aid highway improvement a sum fixed by the act and the money appropriated by the town for the purpose with the amount apportioned by the commission "shall constitute a joint fund" for the improvement of that State aid highway. The act provides that the town's share of the joint fund shall be paid forthwith to the State treasurer on requisition of the commission as the work progresses. The commission has full power in the letting of all contracts for the construction of all State aid highways except as otherwise provided, and shall make all surveys, plans, estimates, specifications and contracts for all proposed work, and shall, except as otherwise provided, advertise for bids for the same, with the right to reject any and all bids. It is also provided that the commission after making surveys, plans and estimates for proposed construction of State aid highways, may, when deemed by it advisable, make contracts with such town according to such

survey and specifications and upon terms satisfactory and under control of the commission without advertising said contracts for bids.

The municipal officers of the defendant town on December 22, 1913, filed with the State Highway Commission on a blank furnished by the commission for the purpose, suggestions for the improvement of a section of the State aid highway therein. The blank as filled out and filed contained the following: "Whom do you recommend as competent to take charge of the work? F. O. Emery. His post office address is West Poland." February 5, 1914, the commission reported to the town its recommendations concerning the matter, describing the section of highway which it designated for improvement. And at its annual meeting of March 9, 1914, the defendant town "Voted to raise and appropriate the sum of $666.00 for the improvement of the section of State aid road as outlined in the report of the State Highway Commission, in addition to the amounts regularly raised for the care of ways, highways and bridges." It is admitted that the town took no other action in its corporate capacity touching the matter.

The State Highway Commission caused the section of highway to be surveyed and laid out by its engineer, Mr. Buzzell, and plans and specifications to be made for the proposed improvements. Mr. Emery testified that he "was called on by Mr. Buzzell to come on to that piece of road and see it laid out." The plaintiff introduced the following paper.

STATE OF MAINE.
STATE HIGHWAY COMMISSION,
ESTIMATE OF QUANTITIES.
STATE AID ROAD.

To Municipal Officers:

Town of Poland,

Improvements to consist of the following items: All work is to be done in a manner to conform to instructions, specifications, plans and profile. E. C. Buzzell, Fryeburg, Maine, will represent the State highway department in directing the manner of carrying on the construction work.

(Here follows detailed specifications of the work.)

Notify this office and inspector one week before starting work on what day you propose to begin. Joint Fund $1,278.72. Work in charge of F. O. Emery, W. Poland.

Inclosures

STATE HIGHWAY COMMISSION,
P. L. HARDISON
Asst. Engineer in charge of State Aid.

Referring to that paper Mr. Emery, the plaintiff's witness testified: "That is the paper that they sent me before commencing my work on the State road." "Who sent it to you? A. It came from the State. Q. From the State Highway Commission? A. Yes."

Mr. Emery employed the men and teams to do the work and had the immediate charge of them, receiving his orders as to the manner of doing the work from Mr. Buzzell who inspected it as it progressed. On September 19, 1914, Mr. Emery sent his first report of the cost of the work to the State Highway Commission and thereafter he made weekly reports to it of his pay-roll and other expenditures. Each month the municipal officers of the defendant town furnished Mr. Emery the necessary funds to pay the expenses incurred including his own wages. After the work was completed the State treasurer sent the defendant a check for the amount appropriated by the State for the work, less the State's expense for plans, engineering, and inspection.

It is clear that Mr. Emery was not constructing this section of highway in his capacity as road commissioner of the defendant town. The work was being done under the instructions of the State Highway Commission and in accordance with plans and specifications furnished by it. That commission determined what improvements should be made and the manner of making them. But if Mr. Emery had been constructing the way in his capacity as road commissioner, without any interference or special direction by the town, he would then have been acting in the capacity of a public officer, and while so acting he would not have been in legal contemplation the servant or agent of the town, and the town would not be liable for his wrongful or negligent acts, though done

in the course and within the scope of his employment. *Small* v. *Danville,* 51 Maine, 359; *Goddard* v. *Harpswell,* 84 Maine, 499; *Bryant* v. *Westbrook,* 86 Maine, 450; *Bowden* v. *Rockland,* 96 Maine, 129.

But the plaintiff contends that the defendant town itself was carrying on the work of constructing this section of State aid highway and that Mr. Emery was its servant and agent in prosecuting the work. We do not think the proof sustains that contention. The extent of the evidence so far as it shows that the town took any part in the enterprise of improving the highway, is this: The municipal officers filed with the State Highway Commission suggestions for the improvement of a section of State aid highway in the defendant town under the provisions of the statute of 1913, and, in answer to an inquiry by the commission, they recommended Mr. Emery as a competent person to take charge of the work; the town voted an appropriation of $666 for the work as outlined in the report of the commission submitted to it; Mr. Emery was foreman of the construction, called to it by the commission, by whose instructions and directions he was governed in prosecuting the work; and the municipal officers, in the first instance, issued orders to Mr. Emery on the town treasurer for the necessary funds to pay for the work as it progressed, a final settlement of the joint fund being made between the State and the town after the work was completed.

It must be apparent that this is not enough to show that the defendant town had itself assumed the control and direction of the work of improving the way. It passed no vote to that effect, and appointed no servants or agents to act for it in respect to that work. On the other hand the evidence is plenary that the State Highway Commission had full charge and control of the work from its commencement to its end.

In no view of the evidence in this case can it be brought within the principle of *Woodcock* v. *Calais,* 68 Maine, 244, and similar cases, where the town in town meeting specifically voted to assume charge of certain work and to direct what should be done and the manner of doing it. Here the town took no corporate action other than to appropriate its share of the joint fund for the work.

It is therefore the conclusion of the court that the evidence in this case fails to show that Mr. Emery was acting as the servant or agent of the town in doing what he did in the work of constructing the highway.

But there is another insuperable objection to the maintenance of the plaintiff's action even if it could have been established that Mr. Emery had charge of the work as the defendant's agent and servant.

"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." *Small* v. *Mfg. Co.*, 94 Maine, 551; *Gallant* v. *Great North. Paper Co.*, 114 Maine, 208, 212.

To show the alleged negligence on which his action is based, the plaintiff offered evidence that Mr. Emery assisted in drilling a hole in the boulder, and that he personally inserted therein and exploded the charge of dynamite thereby producing the blast without properly covering the boulder so as to prevent portions of the exploded rock flying through the air. In doing those alleged negligent acts Mr. Emery was the fellow servant of the plaintiff. And it is the settled law in this State that an employer is not liable to an employee for an injury resulting to him through the negligence of a fellow-servant. *Gallant* v. *Great Northern Paper Co.*, supra, and cases cited.

Exceptions overruled.

JONATHAN P. CILLEY *vs.* LIMEROCK RAILROAD COMPANY.
No. 731 (971)

SAME *vs.* SAME.
No. 732 (1048)

SAME *vs.* SAME.
No. 733 (1224)

Knox. Opinion November 11, 1916.

Exceptions. Power of Law Court to dismiss exceptions of its own motion. Rule of law as to renewing motion on a certain state of facts where the same has been previously considered.

While, in strictness, the doctrine of res adjudicata does not apply to the decision of a motion and the court may on proper showing allow a motion once denied to be renewed, a motion once denied on the merits cannot, as a general rule, be renewed on the same state of facts without leave of court.

In this case, there was no express leave of court and none can be implied.

Where there is a substantial diminution of the record as constituted by the bill of exceptions, the law court may, of its own motion, dismiss the exceptions.

At the January term, Knox county, Supreme Court, several actions between the same parties were pending on the docket, to which appearance had been made. The last day of the term a writ of entry and a bill in equity were entered, and the defendant's appearance by counsel was entered on the docket, defendant's attorney claiming that such entry was without authority. At same time a docket entry was made, referring all matters between these parties to Justice Savage as referee. At the hearing before the referee, defendant's attorney objected to having case heard. Referee filed report and presiding Justice accepted same; to which defendant filed exceptions. Exceptions dismissed.

Case stated in opinion.

J. P. Cilley, for plaintiff.
A. S. Littlefield, for defendant.

SITTING: KING, BIRD, HALEY, PHILBROOK, JJ.

BIRD, J. It appears from the bill of exceptions, making use for convenience of the numbers given the cases in the court below, that numbers 971 and 1048 are actions of trespass entered at the January term, 1912 and April term, 1912, respectively of the Supreme Judicial Court for Knox county. Due service of the writs in these cases was made and appearance for defendant duly entered. Number 1224 is a writ of entry. No service was made upon defendant. It was entered at the January term, 1913 and the name of the attorney of defendant was entered upon the docket as appearing for defendant. At the last named term a referee was appointed in these cases and five others pending between the same parties. The defendant claims that the name of its attorney was never entered by its or his authority in number 1224 and that the appointment of the referee in the three cases under consideration was not made by its agreement or that of its attorney but was wholly unauthorized. The bill of exceptions incorporates a motion in each of the three cases, under the oath of defendant's attorney, reiterating with particularity the facts above recited appropriate to the respective cases, and asks that the reports of the referee be not accepted, that the references be stricken off and the cases stand for trial. The motion contains the allegation "that upon the finding by the attorney of the defendant that such entry of reference and (in number 1224) entry of defendant's answer to said writ had been made, he made an oral motion that the court strike off said entries, which motion the court denied and ordered the rule of reference to issue." The motion also alleges that "the defendant at the hearing by the referee protested that it had never assented or agreed that said actions should be referred."

The bill of exceptions discloses that "upon this motion a hearing was had, and the evidence which is made part of these exceptions, together with the reports of the referee in all the cases referred to him, was taken out.

"The presiding Justice, however, did not pass upon any disputed questions or propositions of facts raised, but ruled that the report should be accepted, notwithstanding the objections made thereto, and made an order for the report to be accepted.

"To this order of the presiding Judge, the defendant excepted and now presents his bill of exceptions and prays they may be allowed."

We think it apparent from the bill of exceptions that the ground of exceptions to the order accepting the reports of the referee is the alleged lack of agreement of defendant to the reference and, in number 1224, the further ground that the entry of an appearance for defendant was unauthorized.

But before the rules of reference issued, the defendant, as the motions show, moved that the court strike off the entry of reference in the three cases and the entry of appearance in number 1224. This motion was denied and the rules of reference ordered to issue and it is not apparent that to this denial, a bill of exceptions was presented to the presiding Justice or even that objection was made or exceptions were reserved.

In strictness, the doctrine of res adjudicata does not apply to the decision of a motion and the court may, on proper showing allow a motion once denied to be renewed. *Belmont* v. *Erie R. R. Co.*, 52 Barb, 637; *Buckley* v. *N. Y. C. etc. R. R. Co.*, 42 N. Y. App. Div., 597; 59 N. Y. Supp., 742. And it has been held that a renewal or rehearing of a motion denied by one judge cannot be granted by another. *Dollfus* v. *Frosch*, 5 Hill, 493, 40 Am. Dec., 368. A motion once denied on the merits cannot as a general rule be renewed on the same state of facts without leave of court. *Riggs* v. *Purcell*, 74 N. Y., 370. *Gall* v. *Gall*, 58 N. Y. App. Div., 97; 68 N. Y. Supp., 649; *Johnson* v. *Johnson*, Walker, (Mich.), 3059; *Stacy* v. *Stephen*, 78 Minn., 480; *Jones* v. *Thorne*, 80 N. C., 72; *Corwith* v. *State Bank*, 11 Wis., 430, 78 Am. Dec., 719; *A. B. Dick Co.* v. *Wichelman*, 109 Fed., 81. Here was no express leave of court and none can be implied or assumed as the facts alleged and disputed were not considered by the presiding Justice.

The court is of opinion that defendant is precluded from making the same motion and that for this reason, the exceptions might be overruled. See *Richardson* v. *Wood*, 113 Maine, 328, 330.

The bill of exceptions expressly makes the evidence taken out before the presiding Justice part of the exceptions together with the report of the referee in all the cases referred to him and the transcript of the evidence shows that the docket entries in all eight cases were made part of the case, but neither the reports of the referee nor the docket entries, or copies of them, are a part of, or accompany, the printed case. There was a diminution of the record as settled by the presiding Justice. In *Atwood* v. *N. E. T. & T. Co.,* 106 Maine, 539, the exceptions of the plaintiffs as allowed and presented to the Law Court, made the evidence, including the plans and photographs exhibited, a part of the bill. The evidence, plans and photographs were not filed and were not produced at the Law Court. The defendant moved the dismissal of the exceptions. In the opinion sustaining the motion of defendant it is said: "The plaintiff's claim that the remainder of the bill without the evidence, plans or photographs contains enough to enable the Law Court to determine whether the ruling was correct or not. Whether the Law Court can so determine without the evidence, etc., is a question for the Justice who made the ruling and settled the bill of exceptions. He, not the Law Court, is the Judge in the first instance of what the bill should contain or omit. If the excepting party is not satisfied with the Justice's determination of that question, he should petition the Law Court to establish a proper bill of exceptions. If, instead, he brings to the Law Court the bill settled by the Justice, he must bring the whole of it as so settled,— must comply with all its requirements to be entitled to a hearing. It may be a hardship upon the plaintiffs but the duty was upon them to present to the Law Court the entire bill of exceptions as settled and allowed by the presiding Justice if they desired its consideration." The exceptions were dismissed. In *State* v. *Cady,* 82 Maine, 426, the defendant moved in arrest of judgment for insufficiency of the indictment. The motion being overruled, the defendant excepted. No copy of the indictment appeared in the bill of exceptions. The court says "but the Law Court has not been furnished with a copy of the indictment, and has no means therefore of judging of its sufficiency." No motion was made by the State that the exceptions be dismissed but as they were not argued by defendant they were regarded as waived and were over-

ruled. In *Varney* v. *McCluskey,* an entry in a memorandum book was offered by plaintiff and, subject to objection and exception the entry was read, but at the Law Court the entry did not appear in the printed record nor was the book produced. Although the parties agreed to characterize it as recommendation and objection to its absence was apparently waived, the Law Court refused to consider the exception, and it was overruled, 114 Maine, 205, 206, 207.

It may be objected that plaintiff has not moved the dismissal of the exceptions and has, therefore, waived the diminution of the record. But we do not think this deprives the Law Court of the power to dismiss the exceptions of its own motion. Where appellate courts have the power to issue certiorari in case of diminution of the record, it has been held that they may do so ex mero motu. So we conclude may the appellate court of its own motion dismiss exceptions where there is substantial diminution of the record. Otherwise by agreement of counsel or by the oversight of the party opposing the exceptions, a case may be presented to the appellate court entirely dissimilar to that shown by the bill of exceptions allowed by the Justice below: In the present instance the Justice presiding "did not pass upon any disputed question or propositions of fact raised" by the motion but ordered the reports of the referee accepted. This must have been done upon either the reports or upon the docket entries or both. How can the Law Court, without them, determine whether or not there was error?

The exceptions may be dismissed.
So Ordered.

F. S. ROYSTER GUANO COMPANY *vs.* OSCAR COLE.

Waldo. Opinion November 15, 1916.

Public Laws of Maine, 1911, Chapter 152, relating to foreign corporations, interpreted. Rule of law where the Statutes of any State conflict with or impair the right to regulate commerce under Constitution of United States.

1. The Constitution of the United States gave to Congress the power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.
2. The power so given to Congress to regulate interstate commerce is exclusive as to all matters that admit of and require uniformity of regulation affecting alike all the states.
3. State legislation, except in matters of local concern only, which imposes a direct burden on interstate commerce or interferes directly with its freedom, is invalid because it encroaches upon the exclusive power of Congress to regulate interstate commerce
4. A contract of sale of merchandise between citizens of different states which contemplates the transportation of such merchandise from one state to another is a transaction of interstate commerce.
5. Where a traveling salesman of the plaintiff, a foreign corporation having its place of business in Baltimore, Maryland, but having no place of business in Maine, took from the defendant, a citizen of Maine, an order for 25 tons of fertilizer, for his own use, and the order was sent to and approved by the plaintiff, and the fertilizer was shipped by it from Baltimore to the defendant at Winterport, Maine, and received and accepted by him, such transaction is clearly interstate commerce.
6. If it be a fact that the plaintiff was also engaged in intrastate business in this State, that fact could not change the character of its transaction with the defendant.
7. Every citizen of the United States is entitled under the Constitution to carry on interstate commerce without having the same materially or directly burdened by State regulation.
8. The provisions of chapter 152, Public Laws, 1911, requiring all foreign corporations, with some exceptions, before doing business in this State, to file with the secretary of state its appointment of a resident of the State its attorney upon whom all processes against it may be served and pay therefore a fee of ten dollars, also to file with the secretary of state, upon payment of an additional fee of ten dollars, a copy of its charter, articles

of or certificate of incorporation, a copy of its by-laws, and a certificate setting forth its name, the location of its principal office, the names and addresses of its officers and directors, the amount of its capital stock authorized and issued, the date of its annual meeting, etc., and making its officers and directors subject to penalties and liabilities for failure to comply with the requirements, and also stipulating that no action shall be maintained in any of the courts of this State by any such foreign corporation, so long as it fails to comply with the requirements, is materially and directly burdensome to interstate commerce, and therefore repugnant to the commerce clause of the Constitution.

9. The plaintiff's failure to comply with the requirements of chapter 152, Public Laws of 1911 does not preclude it maintaining this action to enforce its contractual rights directly arising out of and connected with interstate commerce.

Action of assumpsit, with account annexed and money counts, to recover the purchase price of twenty-five tons of fertilizer sold and delivered to defendant. Defendant pleaded general issue and brief statement, setting forth that the plaintiff was a foreign corporation and had not complied with the laws of the State of Maine relative to foreign corporations doing business in this State. Case reported to Law Court upon agreed statement for final determination. Judgment for plaintiff for $862.50 with interest from date of writ.

Case stated in opinion.

Walter A. Cowan, for plaintiff.

Ellery Bowden, for defendant.

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

KING, J. By chapter 152, Public Laws of 1911 every foreign corporation, with some exceptions not material here, which has a usual place of business in this State or which is engaged in business in this State permanently or temporarily without a usual place of business therein, is required, before doing business in this State, to appoint a resident of the State its attorney upon whom all lawful processes against it may be served, and to file such appointment in the office of the secretary of State and pay therefor a fee

of $10. The Act further requires every such corporation before transacting business in this state, upon payment of an additional fee of $10, to file with the secretary of State a copy of its charter, articles of or certificate of incorporation, a copy of its by-laws, and a certificate setting forth its name, the location of its principal office, the names and addresses of its officers and directors, the date of its annual meeting, the amount of its capital stock authorized and issued, the number and par value of its shares and the amount paid thereon to its treasurer. The officers and directors are made subject to penalties and liabilities for false and fraudulent statements and returns and for failure to comply with the requirements of the Act, and it is also stipulated therein that such failure shall not affect the validity of any contract with such corporation, "but no action shall be maintained or recovery had in any of the courts of this State by any such foreign corporation so long as it fails to comply with the requirements of said sections."

The plaintiff is a foreign corporation engaged in the manufacture and sale of fertilizers, having an office in Baltimore, Maryland, but it has no manufacturing plant or office in this State.

This action comes up on report. It was brought in the Supreme Judicial Court for Waldo county, and the plaintiff therein seeks to recover $862.50 as the purchase price of 25 tons of fertilizer sold and delivered by it to the defendant, a resident of Winterport in said county.

The plea is the general issue with brief statement alleging that the plaintiff had not complied with the requirements of chap. 152 of the Public Laws of 1911.

It is urged that non-compliance by the plaintiff with the requirements of the statute can only be taken advantage of by plea in abatement. We will, however, for the purposes of this case, assume otherwise, and come directly to the question whether the plaintiff's failure to comply with the statute prevents it maintaining this action. There are certain principles, now well established by controlling decisions, which will, we think, guide us readily to a proper determination of the question here involved.

The Constitution of the United States gave to Congress the power to regulate commerce with foreign nations and among the several states, and with the Indian tribes. And it may be safely

said that it is the settled doctrine that the power so given to Congress to regulate interstate commerce is exclusive as to all matters that admit of and require uniformity of regulation affecting alike all the states, and that state legislation, except in matters of local concern only, which imposes a direct burden on interstate commerce or interferes directly with its freedom, is invalid because it encroaches upon such exclusive power of Congress. This doctrine has been so often and uniformly stated in the decisions of both the federal and state courts that the citation of authorities in its support seems unnecessary. We will, however, refer to the quite recent decision in *Sioux Remedy Co.* v. *Cope,* 235 U. S., 197, where the court said: "Through a long series of decisions dealing with the scope and effect of the commerce clause it has come to be well settled that a state while possessing power to adopt reasonable measures to promote and protect the health, safety, morals, and welfare of its people, even though interstate commerce be incidentally or indirectly affected, has no power to exclude from its limits foreign corporations or others engaged in interstate commerce, or, by the imposition of conditions, to fetter their right to carry on such commerce, or to subject them in respect to their transactions therein to requirements which are unreasonable or pass beyond the bounds of suitable local protection."

It is plain, therefore, that the correct determination of this case requires something more than merely ascertaining if the plaintiff was "doing business in this State." The fundamental inquiries here are, first, did the plaintiff's cause of action arise out of an interstate commerce transaction or out of an intrastate transaction? and, second, do the requirements of the State statute invoked, when applied to this case, materially or directly burden interstate commerce?

It has been said that the word "commerce" as used in the Constitution is a term of the largest import, and not susceptible to exact and comprehensive definition. Judge Sanborn, in *Butler Bros. Shoe Co.* v. *United States Rubber Co.,* 156 Fed., 1, 17, said: "Importation into one state from another is the indispensable element, the test, of interstate commerce; and every negotiation, contract, trade, and dealing between citizens of different states, which contemplates and causes such importation, whether of goods, per-

sons or information, is a transaction of interstate commerce." Certainly it is beyond question that a contract of sale of merchandise between citizens of different states which contemplates the transportation of such mechandise from one state into another is a transaction of interstate commerce.

From the report, and the briefs of counsel, we find, that on April 8, 1915, the defendant signed a written order directed to the plaintiff for the fertilizer. It was for his own use as a consumer, and was to be paid for by him in December following. The order was taken by the plaintiff's traveling salesman in Maine, one A. J. Clark, of Bangor. Mr. Clark sent the order, with a property statement signed by the defendant, to the plaintiff at its office in Baltimore for approval. The order was approved and the fertilizer was shipped by the plaintiff from Baltimore, Maryland, to the defendant at Winterport, Maine, and it was received and accepted by him. We can entertain no doubt that this was an interstate transaction. It was a contract of sale of merchandise by a corporation in Maryland to a citizen in Maine, which contract contemplated, what was in fact done, that the merchandise was to be shipped from the seller in one state to the purchaser in another state. Such a transaction is clearly interstate commerce. Nor was that transaction any the less interstate commerce because of the fact, offered in evidence by the defendant, that the larger part of the business of the plaintiff's traveling salesman was the taking of orders for its fertilizers from so called local agents in this State to be by them sold to consumers in their respective localities. With such local agents the plaintiff made written contracts, the import of which appears to be an agreement for the consignment of its fertilizers to such local agents for sale. But we are not called upon in this case to decide whether the transactions which the plaintiff had with its so called local agents constituted interstate commerce or only intrastate business. If it be a fact that the plaintiff was also engaged in intrastate business in this State, that fact of course could not change the character of its transaction with the defendant, which plainly was interstate commerce. The plaintiff may have been engaged in both an interstate and an intrastate business. And the principle to be kept in mind as the guide to the correct determination of this case, is.

that the plaintiff had the right to engage in its interstate commerce with the defendant without having the same materially or directly burdened by any state regulation. In *International Text-Book Co.* v. *Pigg*, 217 U. S., 91, 109, the court said: "To carry on interstate commerce is not a franchise or a privilege granted by the state; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and the accession of mere corporate facilities as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject."

Do the requirements of chap. 152 of the Public Laws of 1911 impose a material or direct burden on the plaintiff's right to engage in interstate business? The question is a federal one and in its determination this court is controlled by the decisions of the Federal Supreme Court, so far as applicable. And there are recent decisions of that court which hold that particular state statutes and regulations, found to be similar in all material respects to the statute here invoked, do impose material and direct burdens on interstate commerce. In *International Text-Book Co.* v. *Pigg*, supra, the Supreme Court of the United States had before it the question, whether a Kansas statute, which imposed certain requirements upon foreign corporations, as a condition precedent to obtaining authority to do business in that state, was repugnant to the commerce clause of the Constitution as being an unlawful interference with interstate commerce. And the court held that the state statute was unconstitutional. The Kansas statute was very similar to our statute here invoked. It required such foreign corporations, among other things to file with the secretary of state a statement setting forth its authorized and paid up capital stock, the par and market value of its shares, the postoffice addresses of its share holders and the number of shares held and paid for by each, the names and postoffice addresses of its various officers and directors, etc. And like the Maine Act, the Kansas statute provided that "no action shall be maintained or recovery had in any of the courts of this state by any corporation doing business in this state without first obtaining the certificate of the secretary of state that state-

ments provided for in this section have been properly made." In that case the court, speaking by Mr. Justice Harlan, said:

"In other words, although the Text-book Company may have a valid contract with a citizen of Kansas, one directly arising out of and connected with its interstate business, the statute denies its right to invoke the authority of a Kansas court to enforce its provisions unless it does what we hold it was not, under the Constitution, bound to do; namely, make, deliver, and file with the secretary of state the statement required by § 1283. If the state could, under any circumstances, legally forbid its courts from taking jurisdiction of a suit brought by a corporation of another state, engaged in interstate business, upon a valid contract arising out of such business, and made with it by a citizen of Kansas, it could not impose on the company, as a condition of its authority to carry on its interstate business in Kansas, that it shall make, deliver, and file that statement with the secretary of state, and obtain his certificate that it had been properly made."

In *Buck Stove & Range Co.* v. *Vickers,* 226 U. S., 205, the decision in the Pigg case was expressly approved and followed.

A question in every way similar to the one involved in the case at bar, was before the Supreme Court in *Sioux Remedy Co.* v. *Cope,* 235 U. S., 197. In that case an action was brought in South Dakota by an Iowa corporation to recover the price of merchandise sold by the plaintiff to citizens of South Dakota and to be shipped into that state from Iowa. A plea was interposed by the defendants to the effect that the plaintiff had not complied with a statute of South Dakota prescribing certain conditions to be performed by corporations of other states before they could transact business in that state or maintain any action in the courts of that state. The conditions in the South Dakota statute were almost identical with those in the Maine statute, and included the filing in the office of the secretary of state an authenticated copy of its charter, or articles of incorporation, the appointment of a resident agent upon whom processes against the corporation could be served, and the filing of such appointment with the secretary of state, and the payment of the stipulated fees therefor. The court held, that as applied to the plaintiff's contractual rights directly arising out of and connected with interstate commerce, the conditions imposed

were unreasonable and burdensome, and therefore in conflict with the commerce clause of the Constitution.

In accordance with these controlling authorities our conclusion must be that the requirements of chapter 152 of the Public Laws of 1911 are materially and directly burdensome to interstate commerce, and therefore repugnant to the commerce clause of the Constitution. It follows, therefore that the plaintiff's failure to comply with those requirements does not preclude its recovery in this action to enforce its contractual rights directly arising out of and connected with interstate commerce.

Judgment for the plaintiff for $862.50 with interest from the date of the writ.

ISAAC A. WING *vs.* L. E. BRADSTREET & SONS COMPANY.

Cumberland. Opinion November 16, 1916.

Master and servant. Necessary knowledge of incompetency on part of master, or employer, to sustain liability. Proof necessary under allegation of incompetent servant.

Plaintiff seeks to recover damages for personal injuries sustained through the alleged negligence of defendant company. The special negligence complained of in the plaintiff's writ was that the person running the elevator upon which plaintiff was injured was "An incompetent servant, which fact was known to the defendant."

Held;

1. Incompetency cannot be inferred from a single act of negligence, even if the accident, as the plaintiff claims, showed Pearl Bradstreet a negligent and incompetent servant. Before the master could be held responsible, the evidence must show that the defendant knew, or by the exercise of due care should have known, that he was an incompetent and negligent servant. This must be known, or, by the exercise of due care, should have been known before the accident. Knowledge after the accident is not sufficient.

2. The evidence in this case did not authorize the jury to find that Pearl Bradstreet was incompetent to operate the hoisting engine and elevator at the time of the accident. Their verdict must have been reached by a misapprehension of the evidence, or by bias, prejudice or sympathy for the plaintiff in his misfortune.

Action on the case to recover damages for certain injuries sustained through the alleged negligence of the defendant company. Defendant pleaded general issue, and also filed specifications of defense to be used under the plea of general issue. Verdict for plaintiff in the sum of thirty-three hundred and seventy dollars. Defendant filed motion for new trial. Motion sustained. New trial granted.

Case stated in opinion.

Thomas A. Saunders, and Charles E. Gurney, for plaintiff.

Newell & Woodside, for defendant.

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

HALEY, J. An action on the case to recover for personal injuries received by the plaintiff while in the employ of the defendant. The case has previously been before this court, and is reported in the 114th Maine, 481, at which time a verdict for the plaintiff was set aside. The opinion above referred to states the facts of the case, and it is unnecessary to repeat them. The verdict was set aside because Pearl Bradstreet, of whose negligence the plaintiff complained, if negligent, was a fellow servant of the plaintiff.

At the second trial the plaintiff relied upon the allegation in the declaration that Pearl Bradstreet was an incompetent servant, which fact was known to the defendant. As stated at the trial, "the issue here is the employment of an incompetent and negligent servant, knowing him to be such." The verdict was for the plaintiff, and the defendant brings the case to this court on a motion for a new trial.

It is urged that additional evidence of Pearl Bradstreet's incompetency to operate the hoisting engine and elevator was produced at the second trial, which, with the evidence given at the former trial, proved his incompetency to perform the work in which he was

engaged. As to his physical disability, we reaffirm what was said in the opinion of *Wing* v. *Bradstreet,* supra: "It is urged that he was incompetent on account of the loss of his right leg; but all that he had to do with his foot 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 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 a part of his right leg, falls far short of proof that he was incompetent to operate the engine and elevator."

The plaintiff claims that it is proved that Pearl Bradstreet was an incompetent and negligent servant, because several years before this accident he met with an accident in operating an elevator. The testimony upon this point shows that on the day of that accident, Mr. Bradstreet had been out on a building the defendant was constructing; that it had been snowing, and that when he went into the engine room the engineer wished to be relieved and Mr. Bradstreet took his place; that there was snow upon his boots or shoes; that because of the snow his foot slipped on the brake and entered some part of the machinery which jammed his toes, severing one of them; that from this injury blood poisoning developed and his leg was amputated a few inches above the knee. We do not think that because, in a climate like ours, a person gets snow upon his shoes and slips he should be considered incompetent to operate a hoisting elevator. That was an accident, liable to happen to the most prudent, although not always attended with such unfortunate results, and has no tendency to prove that five years afterwards he was an incompetent servant.

Another fact which the plaintiff claims authorized the jury to find that Pearl Bradstreet was incompetent is that, five years before, he (Bradstreet) was operating a hoisting engine and was given the proper bells to lower the elevator, and he lowered it very swiftly to within two or three feet of the basement floor. No one was injured, and no notice was given him to stop the ele-

vator at any particular place. Assuming that all the plaintiff's brother testifies to is true, it is no proof that Pearl Bradstreet was either incompetent or negligent. The lowering once of a freight elevator, used for the carrying of material for the construction of a building, a few feet below the floor where the fellow-servant wished the elevator to stop, as testified to by the witness, is not evidence of negligence, when there was no accident or danger of any injury to any person. It was an occurrence such as frequently happens with prudent men on both freight and passenger elevators.

The plaintiff introduced the testimony of two witnesses, claiming them to be experts, to prove the incompetency of Pearl Bradstreet to operate the hoisting engine and elevator, and they state that one and one-half years is the time recognized in the business as the time required "to learn to operate a hoisting engine, learn the management of the thing." It is evident that the purpose of this testimony was to lead the jury to believe that one and one-half years was the time necessary to learn to operate a hoisting engine. If that was the purpose, it was such reckless and incredible testimony that it neither proved, nor tended to prove, the statement made by the witnesses. It is so improbable, incredible and contrary to the common knowledge of men that it is entitled to no credence.

The only other evidence of the incompetency or negligence of Pearl Bradstreet, as claimed by the plaintiff, is the inference that is sought to be drawn from the occurrence of the accident complained of. "Incompetency cannot be inferred from a single act of negligence." Even if the accident, as the plaintiff claims, showed Pearl Bradstreet a negligent and incompetent servant, before the master could be held responsible the evidence must show that the defendant knew or, by the exercise of due care, should have known that he was an incompetent and negligent servant. This must be known, or, by the exercise of due care, should have been known before the accident. Knowledge after the accident is not sufficient. *Igo* v. *Boston Elevated R. R. Co.,* 204 Mass., at P. 202; *Montgomery Nat. Bank* v. *Chandler* 144 Ala., 286; *Baulec* v. *N. Y. & Harlem R. R. Co.,* 59 N. Y., 356; 17 Am. Reports, 325.

As the evidence did not authorize the jury to find that Pearl Bradstreet was incompetent to operate the hoisting engine and elevator at the time of the accident, their verdict must have been

reached by a misapprehension of the evidence, or by bias, prejudice or sympathy for the plaintiff in his misfortune, and the mandate must be,

Motion sustained.
New trial granted.

ALVIN H. PERLEY *vs.* EDWIN MCGRAY AND WALTER HUBBARD, Tr.

Penobscot. Opinion November 18, 1916.

Actions on account annexed and accounts stated. Rule of law as to presumption when evidence shows that a letter properly addressed has been mailed. Rule of law where debtor has received certain letters, or statements, showing a balance owed by him.

1. Where the plaintiff declares in account annexed for a balance due according to bill rendered on account of groceries and other supplies furnished defendant by plaintiff from goods in his store and defendant, having neither demurred nor asked a bill of particulars, pleads the general issue which is joined, the existence of the balance declared upon is the only issue raised.
2. Testimony of plaintiff and his common law assignee that statements of account were mailed to all debtors of plaintiff at or about a certain date and the fact that a few days later defendant delivered to the assignee goods, which were included in the account against defendant, justifies the finding as matter of fact that the statement was mailed by the assignee to defendant and received by the latter.
3. The original books of account having been destroyed by fire, a book made by the assignee containing balances of all of the accounts of plaintiff is admissible to show the amount of the balance of the account of defendant at the time of the assignment.
4. The defendant having made no reply to the account mailed to him by the assignee, his silence not being satisfactorily explained, is under the circumstances of this case an admission that the balance shown by the statement is correct.

Action of assumpsit upon an account annexed. Defendant pleaded general issue, and at the conclusion of testimony case was

reported to Law Court upon certain agreed stipulations. Judgment for plaintiff.

Case stated in opinion.

A. L. Thayer, and George H. Worster, for plaintiff.

Gillin & Gillin for defendant.

SITTING: SAVAGE, C. J., CORISH, KING, BIRD, HALEY, PHILBROOK, JJ.

BIRD, J. This is an action of assumpsit upon an account annexed to recover the sum of three hundred twenty-six dollars and fifty-two cents. The account annexed is,

BANGOR, MAINE, July 26, 1915.

EDWIN MCGRAY

To ALVIN H. PERLEY, DR.

1910.

July 1.	Balance due according to bills rendered on account of Groceries and other supplies furnished the said Edwin McGray by the said Perley from the stock of goods belonging to the said Perley in a store conducted by the said Perley in Charleston, Me.	$251 17
	Int. to date of writ	75 35
	Total	$326 52

Upon the account annexed, below the account, is the following statement: "A more particular account annexed cannot be furnished because the books of original entry in which all the items of this account were kept were burned in a fire which destroyed the store and books in August, 1911."

To the declaration the defendant pleaded the general issue and upon the conclusion of the evidence the case was reported to the Law Court upon the following stipulation:

"In the above entitled cause, the case is referred to the Law Court for decision on so much of the evidence as is admissible, the writ and pleadings to be made a part of the report. If the evidence offered by the plaintiff is admissible under the count annexed to the writ, then the court is to give such judgment either

for the plaintiff or the defendant as the evidence warrants. If the evidence offered by the plaintiff is not admissible under the declaration in the plaintiff's writ then a non-suit is to be ordered.

"It is distinctly understood in sending the case forward on report that the defendant waives no rights as to the admissibility of evidence, and the defendant objects to the admission of any evidence which shows an account stated or any settlement or agreement of settlement betwixt the parties and to any and all other evidence offered by the plaintiff.

"It is admitted that on September 30, 1910, Alvin H. Perley, the plaintiff, made a common law assignment for the benefit of his creditors to James H. Webster of all of said Alvin H. Perley's book accounts and other property not exempt from attachment and that on the 4th day of March, 1911, said James H. Webster reassigned to said Alvin H. Perley all of said book accounts except such as had been collected by said James H. Webster."

The plaintiff contends that there may be a recovery on an account stated under a declaration on an account annexed and relies upon *Goodrich* v. *Coffin,* 83 Maine, 324. But in that case the declaration, although in form account annexed, alleged an account stated. *Milliken* v. *Waldron,* 89 Maine, 394, and *Page* v. *Babbit,* 21 N. H., 389, also referred to by plaintiff, are not in point.

The declaration is undoubtedly demurrable. The defendant, however, did not demur nor ask a bill of particulars. Under his pleading, the existence of the balance of account declared upon, is the only issue raised, *Harrington* v. *Tuttle,* 64 Maine, 474, 476. See *Kingsley* v. *Delano,* 169 Mass., 285, 287.

Has plaintiff shown by a preponderance of admissible evidence that such balance was due him? It is in evidence and not denied, or else admitted, that the plaintiff prior to the tenth day of September, 1910 was, and for several years prior thereto had been, engaged in carrying on a general store in Charleston, Maine; that he kept regular books of account, whereon he duly entered all debits and credits of all customers; that upon them was an account against defendant; that on September 30, 1910, plaintiff made a common law assignment to one Webster, to whom his books of account were delivered; that Webster made a "ledger" of the accounts of plaintiff as shown upon the books of the plaintiff at the time

of the assignment; that this "ledger" contained the balances at the time of the assignment of all the accounts of the plaintiff; that among these accounts of the plaintiff was one against defendant, giving the balance as $318.73; that while the title to the accounts was in the assignee, defendant returned to him goods charged for in the account to the amount of $67.56; leaving a balance upon the "ledger" of the assignee of $251.17; that the assignee did not collect the balance of $251.17 alleged to be due from defendant, or any part of it; that in March, 1911, he reassigned the accounts uncollected to plaintiff and that in August, 1911, the original books of plaintiff were destroyed by fire.

There is evidence on the part of plaintiff and his assignee tending to prove that a statement, or copy of his account, as it appeared on the books of plaintiff, was mailed about October 1, 1910, by the assignee to each person against whom an account was found in the books and evidence of the plaintiff tending to show that prior to his assignment he gave to defendant, whenever he purchased goods on credit, a statement showing the previous balance and the items of the goods so purchased. The defendant denies the receipt of the statement alleged to have been sent him by the assignee, although he admits receiving a notice from him and substantially denies the receipt of the statements alleged by plaintiff to have been given him at the time of the purchases.

In view of the evidence of the plaintiff and his assignee that statements of account were mailed to all the debtors of plaintiff about the first of October and the fact that a few days later defendant, through his wife, delivered to the assignee goods of considerable value, which were included in the account, we think the court justified in finding, as a matter of fact, that the statement was mailed by the assignee to defendant and was received by him. *Ross* v. *Reynolds,* 112 Maine, 223, 225. See also *Dana* v. *Kemble,* 19 Pick., 112, 114; *Grunberg* v. *U. S.,* 145 Fed., (C. C. A. 1st circ.) 81, 97, 98; *Overlock* v. *Hall,* 81 Maine, 348, 350; *Turner's Ex'r* v. *Turner,* 98 Md., 22, 33;

The balance due from defendant was also satisfactorily proved, the original books being destroyed, by the production of the "ledger" of the assignee who testified that it contained a true copy of all the balances shown by the books of the plaintiff at the time

of the assignment. *Freeman* v. *Thayer,* 33 Maine, 76, 78; *Holmes* v. *Marden,* 12 Pick., 168; *Insurance Co.* v. *Weide,* 9 Wall, 677, 681. *Anchor Milling Co.* v. *Walsh,* 108 Mo., 277; 32 Am. St. Rep., 600; *Turner's Ex'r* v. *Turner,* 98 Md., 22, 33.

The defendant made no reply to the statement sent him by the assignee and denies that he ever discussed the amount of balance due either with the plaintiff or his assignee. His silence is not satisfactorily explained and under the circumstances of this case may be regarded as an admission that the statement of the amount of the balance was true. *Ross* v. *Reynolds,* 112 Maine, 223, 226; *Dennis* v. *Packing Co.,* 113 Maine, 159, 162.

Judgment may be entered for plaintiff for the sum of two hundred fifty-one dollars and seventeen cents and interest thereon from October 1, 1910, to the day of entry of judgment, to be calculated by the clerk on the entry of judgment.

So Ordered.

THOMAS M. STEVENS, Collector,

vs.

DIXFIELD AND MEXICO BRIDGE COMPANY.

Oxford. Opinion November 18, 1916.

Double taxation. Method of taxing real estate belonging to toll bridge companies. Rule as to taxing stock of toll bridge companies.

In an action of debt brought by the collector of the town of Mexico against a toll bridge corporation to recover the tax upon that portion of the bridge property situated in said town and assessed as real estate, it is

Held;

1. That under R. S. chap. 9, sec. 14, the stock of toll bridge corporations must be taxed as personal property to the owners thereof.
2. That the enactment upon which this section is based is sec. 2 of chap. 187 of the Public Laws of 1846, which provided that no part of the general

tax act of 1845 "shall be deemed to authorize or require the taxing of toll bridges as real estate in the towns where the same are situated, but the stock in such bridges shall be taxed as personal property to the several owners in the towns where such owners reside."

3. That to tax the capital stock to the owners and the property itself to the corporation would be in effect double taxation which is contrary to legislative policy.
4. That the tax in question was unauthorized, and cannot be collected. Kittery v. Portsmouth Bridge, 78 Maine 93, is overruled.

Action of debt by the collector of taxes of the town of Mexico, brought under section 28, chapter 10 of the Revised Statutes of Maine. Defendant pleaded general issue, and case was reported to Law Court upon an agreed statement of facts. Judgment for defendant.

Case stated in opinion.

Lucian W. Blanchard, for plaintiff.

Drummond & Drummond for defendant.

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

CORNISH, J. This is an action of debt brought by the collector of the town of Mexico against the defendant toll bridge company to recover the tax assessed against the corporation for the year, 1915. The assessment was upon the real estate of the defendant, consisting of a toll house and lot, and the east half of the toll bridge across the Androscoggin river connecting the towns of Mexico and Peru. The defendant was chartered under Pr. and Sp. L., 1887, chap. 111, as amended by Pr. and Sp. L., 1893, ch. 402, and was organized on December 27, 1894, with a capital stock of $25,000. The bridge was built in 1895 and has been maintained and operated as a public toll bridge since that time.

It is admitted that all statutory requirements as to the assessment, commitment and proceedings for the collection of the tax have been complied with. The only question involved is the legal right of the assessors of the town of Mexico to assess a tax upon this property or on any part thereof.

The plaintiff relies upon R. S. ch. 9, sec. 3, which provides that "real estate for the purposes of taxation includes all lands in the

State and all buildings erected on or affixed to the same," and upon Rules of Construction, R. S., ch. 1, sec. 6, par. X, viz: "The word 'land or lands' and the words 'real estate' include lands and all tenements and hereditaments connected therewith and all rights thereto and interests therein." The application of this definition to a toll bridge, toll house and land connected therewith seems to be proper, *Kittery* v. *Portsmouth Bridge,* 78 Maine 93, but the weakness in the plaintiff's cause of action is that, under our statutes and the interpretation that has been placed upon them in analogous cases where the question has been raised, the real estate of a toll bridge corporation is not taxable to the corporation. To so hold would create double taxation, which is obnoxious to the spirit of our tax laws.

Under R. S., ch. 9 sec. 14, "The stock of toll bridges shall be taxed as personal property to the owners thereof, in the towns where they reside, except stock owned by persons residing out of the State, which shall be taxed in the town where the bridge is located, and where such bridge is in two towns one-half of the stock so owned by persons residing out of the State shall be assessed and taxed in each town." This section makes ample provision for the taxation of all toll bridge property, namely by taxing the shares of stock to the owners thereof, because the shares of stock represent the corporate property. Taxing the stock is in reality taxing the property, and to tax both is double taxation. There is some conflict of authority on this proposition theoretically, but this court has recently passed upon the question in the case of *East Livermore* v. *Banking Co.,* 103 Maine, 418, where both upon reason and what is deemed the better precedents this principle is adopted without hesitation. That case also holds that the legislative policy of this State is against double taxation. "There seems to be not only no intention to impose it but an anxiety to avoid it." Many illustrations are given to prove the soundness of that conclusion. Further, that case by analogy settles the principle involved in the case at bar, and is conclusive against the plaintiff's right of action. In that case the plaintiff town levied a tax upon certain shares of stock owned by the defendant in other banks. It claimed the right to do this under R. S., ch. 9, sec. 2, which enacts that "All personal property of the inhabitants of the State" is subject to taxation,

under R. S., ch. 9, sec. 5, which enacts that "personal estate for the purposes of taxation includes . . . all shares in moneyed and other corporations within and without the State," and under sec. 12 which provides that "all personal property within or without the State shall be assessed to the owner in the town where he is an inhabitant on the first day of such April," with certain immaterial exceptions. Section 29 of the same chapter provides that the stock of banks and banking associations shall be taxed to the owners thereof where they reside.

The court held that while the language of section 5 is explicit that all shares in money corporations shall be taxed, it does not necessarily follow that they are to be taxed twice or so taxed that the result shall be a double taxation of them, and that section 5 should not be read by itself but in connection with the other statutes prior and contemporaneous. "Taking all these into consideration," say the court, "the tax statutes as a whole do not force us to the conclusion that a tax is to be assessed at the same time upon all the personal property of a corporation to the corporation and also upon all its shares to the shareholders." Judgment was accordingly rendered for the defendant.

In the case at bar the situation is the same, mutatis mutandis. R. S., ch. 9, sec. 2, makes all the real estate within the State subject to taxation. Under section 3, real estate for the purposes of taxation includes all lands in the State and all buildings erected on or affixed to the same. Under section 8 "taxes on real estate shall be assessed in the town where the estate lies to the owner or person in possession thereof on the first day of each April." Section 14 requires the stock in toll bridges to be taxed as personal property to the owners thereof in the towns where they reside. It will thus be seen that like provisions apply to the taxation of real estate and the taxation of personal property, and we have here the same situation in taxing both the real estate to the toll bridge corporation and the capital stock to its owners, as in taxing the personal property to the bank and the capital stock to its owners. If the latter was double taxation and unauthorized the former also is. There is no escape from this conclusion. The reasoning in the bank case is decisive of this.

The anxiety to avoid double taxation in the case of the property of toll bridges is rendered even more obvious when we consider the origin and history of section 14, compelling the taxation of the stock. The legislative intent is thereby rendered clear and explicit, and resort to the original source is always desirable. *Taylor* v. *Caribou,* 102 Maine, 401.

Prior to 1845 this State passed no general tax act, that is, no public law prescribing the various classes and nature of the property to be assessed. These are to be found in the annual tax acts which were private and special laws, and were entitled in substance "an act to assess and apportion on the inhabitants of the State a tax," the amount of which varies with the different years. The general statutes at that time directed assessors to assess the town and county as well as the State taxes each year according to the rules laid down in the then last private act for raising a State tax. R. S., 1841, chap. 14, secs. 22 and 23. In these various annual tax acts, from 1820 to 1844 inclusive, personal estate was made to include among other kinds of property, "shares (or property) in any incorporated company for a bridge or turnpike road."

The general tax act of 1845, "An Act concerning the assessment of taxes," defined the term personal estate to include, after specifying certain classes, "all other property, included in the last preceding State valuation for the purposes of taxation." Pub. L., 1845, ch. 159, sec. 4. This act did not specifically mention stock in toll bridges, but it was included by reference in the last clause because such stock had been in terms designated in the tax act of 1844. However, the next Legislature made certain not only the taxing of the stock but the non-taxation of the property. Chap. 189 of the P. L. of 1846, amended the general tax act of 1845, ch. 159, sec. 4, and sec. 2 of the amendatory act is as follows:

"No part of the act to which this is additional, shall be deemed to authorize or require the taxing of toll bridges as real estate in the towns where the same are situated, but the stock in such bridges shall be taxed as personal property to the several owners in the towns where such owners reside." No part of this section has ever been repealed. In the following revision, it was condensed to read "the stock of all toll bridges shall be taxed as personal property to the owners thereof in the towns where they

reside." R. S., 1857, ch. 6, sec. 13. Subsequent revisions retain substantially the same form. The provision as to the non-taxation of the real estate to the corporation was not expressly stated, the revisers and the Legislature evidently not thinking it necessary, as the provision for the taxation of the stock impliedly negatived the power to tax the property. However, mere condensation and change of phraseology in revision are not deemed a change in the law unless so intended. *Hughes* v. *Farrar,* 45 Maine, 72; *John* v. *Sabattis,* 69 Maine, 473. Such a change does not necessarily nor even presumptively indicate a change in legislative will. *St. George* v. *Rockland,* 89 Maine, 43.

In the case at bar, therefore, we have not only the general legislative intent under which the case of *East Livermore* v. *Bank,* supra, was decided, but we have the express legislative intent as embodied in the amendatory act, P. L., 1846, ch. 189, sec. 2.

Our conclusion therefore is that the tax in question was unauthorized and cannot be collected. The tax must be imposed upon the stock of toll bridge corporations in the hands of its owners, and not upon the real estate in the hands of the corporation.

We have not overlooked the case confidently relied upon by the plaintiff, *Kittery* v. *Proprietors of Portsmouth Bridge,* 78 Maine, 93, in which it was held that so much of the bridge over the Piscataqua river between Portsmouth and Kittery as was within the limits of Kittery was properly taxable as real estate to the defendant corporation. In that case the statute providing for the taxation of the stock was called to the attention of the court and the question of double taxation was distinctly raised by the learned counsel for the defendant, but neither point was referred to in the opinion. The amendatory act of 1846, however, seems not to have been cited to the court. The only point considered in the opinion was whether, under the statutory definitions that portion of the structure within the town of Kittery should be regarded as real estate. The court so held and ordered judgment for the plaintiff. So far as the construction of the terms "lands" and "real estate" adopted in that opinion is concerned we concur. But in so far as it was held that the real estate was taxable to the corporation, that decision for the reasons hereinbefore stated, must be overruled.

Judgment for the defendant.

FRANK B. WILDER, et als., in Equity,

vs.

WALTER MORSE WILDER, et als.

Waldo. Opinion November 18, 1916.

Duty of Court in regard to rendering opinion upon past assignments or transfers. Revised Statutes, Chapter 79, Section 6, Paragraph VIII., interpreted.

A testator died in Boston, Mass., on May 2, 1889, and his will was duly probated in Suffolk County, Mass., on May 27, 1889. Several trusts were created. The executors and trustees named therein were duly appointed, and on January 23, 1892, conveyed by deed to Frank B. Wilder as trustee for the purposes named therein certain real estate situated in Searsmont, Waldo County, Maine. William L. Wilder, the beneficiary for life in this trust deed, died on May 4, 1915, leaving a second wife and an adopted son. In September, 1915, one of the contingent beneficiaries in the trust deed deeded to another contingent beneficiary his interest in the real estate. On October 12, 1915, ancillary administration was taken out on the original will in Waldo County. Charles W. Wilder, Jr., and Frank B. Wilder were appointed executors. Six days later Charles W. Wilder, Jr., died. Upon a bill in equity brought by the surviving executor and the widow and children of Charles W. Wilder, the contingent beneficiary under the trust deed, against the widow and adopted son of the life beneficiary thereunder, asking the court to "construe and interpret the provisions of said will and said trust deed together and ascertain and determine the effect of said deed from said executors and trustees—and the respective rights of the complainants and the defendants and each of them in the premises" it is

Held;

1. That R. S. chap. 79, sec. 6, par. VIII., under which this proceeding is brought, relates solely to the construction of wills where a valid doubt is entertained as to their meaning, and does not empower the court to construe a trust deed.
2. That the rights of the parties here have become fixed under the conveyances already given and this court must decline in this form of proceeding to express any opinion as to the validity of past assignments and

transfers. If a legal cause of action between the interested parties has already arisen through transactions subsequent to the will, they must litigate their claims through the proper legal channel. The remedy sought here is not appropriate.

Bill in equity praying that the court will construe and interpret the provisions of a certain will and trust deed together and ascertain and determine the effect of said deed. In addition to this prayer in the bill, there were certain other requests, all purporting, in substance, to ask the court to pass upon the legality of certain deeds and certain other transactions. Answers were filed to said bill, and by agreement of parties questions of law having arisen, the case was reported to the Law Court upon bill and answer. Bill dismissed without costs. Decree in accordance with opinion.

Case stated in opinion.

Dunton & Morse, for plaintiff.

A. S. Littlefield, for Walter Morse Wilder and Estella L. Butler.

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

CORNISH, J. Charles W. Wilder of Boston, Massachusetts, died testate on May 2, 1889. His will dated May 26, 1879, and a codicil thereto dated October 15, 1881, were duly proved and allowed in the Probate Court for Suffolk County, Massachusetts, on May 27, 1889. Calvin A. Richards, Charles W. Wilder, a son, Edgar A. Anthony, a son-in-law, and Frank B. Wilder, a son, were duly appointed executors and trustees. Various trusts were created, one in favor of a son William L. Wilder, the trust fund being ten thousand dollars.

At the time of his decease, the testator owned certain real estate situated in Searsmont in this State. Under the will the executors and trustees were empowered to sell and convey the whole or any part of any real estate left by him. Acting apparently under this general power but without previously taking out ancillary administration in Waldo county where the land lies, the executors and trustees conveyed the real estate in Searsmont by deed dated November 2, 1891, and delivered January 23, 1892, to one Andreas Blume of Boston, who on the same January 23, 1892, and as a

part of one and the same transaction, conveyed the same by deed to Frank B. Wilder as trustee for the purposes set forth therein. Under this trust deed William L. Wilder was to have the use and occupation of the real estate during his life time on certain conditions therein stated; also his wife, Minnie, at his decease, and at the death of the survivor or the remarriage of the widow said trustee was to convey the property to the child or children of William L., if any, if not then to Charles W. Wilder, Jr., and himself, Frank B. Wilder, and to the issue of either if he shall have previously deceased. These deeds were duly recorded in Waldo county registry on January 29, 1892.

William L. Wilder, the beneficiary for life in this trust deed, died May 4, 1915, leaving a second wife, he having been divorced in 1903 from his first wife, Minnie, and an adopted son, Walter Morse Wilder, the decree of adoption being dated August 14, 1906. In September, 1915, Charles W. Wilder, Jr., one of the contingent beneficiaries in the trust deed conveyed all his interest in this real estate to Frank B. Wilder, the other contingent beneficiary.

After all these conveyances had been made, twenty-six years after the original will had been probated in Massachusetts, and three of the four original executors and trustees had died or been otherwise incapacitated, on October 12, 1915, ancillary administration was taken out on the will of Charles W. Wilder, senior, in the Probate Court of Waldo county in this State, and Charles W. Wilder, Jr., and Frank B. Wilder were appointed executors. Six days later, on October 18, 1915, Charles W. Wilder, Jr., died and Frank B. is now the sole surviving executor in this State.

Subsequent to the death of Charles W. Wilder, this bill in equity was brought by Frank B. Wilder and by the widow and children of the beneficiary, Charles W. Wilder, against Walter Morse Wilder, the adopted son, the widow and the divorced first wife of William L. Wilder. The latter by answer disclaimed all interest in the property and the bill has been dismissed as to her.

The general prayer of the bill is that "the court will construe and interpret the provisions of said will and said trust deed together and ascertain and determine the effect of said deed from said executors and trustees to Andreas Blume and said deed from Andreas Blume to said Frank B. Wilder and the respective

rights of the complainants and the defendants and each of them in the premises." Then follow several special requests for the determination of the rights of the several parties under said trust deed.

This statement of the situation makes it apparent that the court cannot entertain this bill. R. S., ch. 79, sec. 6, par. VIII, authorizes a bill in equity to be brought "to determine the construction of wills and whether an executor not expressly appointed a trustee, becomes such from the provisions of the will; and in cases of doubt the method of executing a trust and the expediency of making changes and investments of property held in trust."

The scope of this statute and the power of the court under it have been often considered. *Heseltine* v. *Shepherd,* 99 Maine, 495, collated the cases decided previous to that time (1905) where the court had either discussed its jurisdiction or had assumed or declined to assume jurisdiction in analogous cases. See also *Huston* v. *Dodge,* 111 Maine, 246; *Tapley* v. *Douglass,* 113 Maine, 392. Certain principles may be regarded as settled and the application of those principles precludes the assumption of jurisdiction here.

The language of the will must be such that the parties may reasonably have doubts concerning its true construction. Evidently the parties interested in this will and in the settlement of the property rights under it entertained no such doubt. Had they done so they could and doubtless would have asked the court in Massachusetts, where the original will was probated, to solve the doubts. This they did not do. Instead they apparently felt no hesitation as to its meaning and in 1892 executed the deeds which have been referred to. It is not then the construction of a will, or the interests of legatees or devisees thereunder, which the parties are asking for and which the court under certain circumstances is obliged to give, but the construction of a certain deed given by the executors and trustees under the will and the trust deed given by that grantee, which construction the court under no circumstances in this form of proceeding is empowered to give. The prayer states the fact correctly and at the same time is its own denial, when it asks the court to construe the "provisions of said will and the trust deed together." This the court must decline

to do. It has always declined to express any opinion as to the validity of past assignments or transfers. *Jackson* v. *Thompson,* 84 Maine, 44; *Hersey* v. *Purington,* 96 Maine, 166. Here the provisions of the trust under the will and under the deed are very unlike. Different property is included, different beneficiaries are named and different conditions are specified. What the parties really desire is to ascertain the validity of these conveyances made twenty-four years ago by parties living in a foreign jurisdiction, and the rights of the various conflicting interests arising thereunder. This they cannot ascertain under the guise of construing a will. This is another well settled principle, because the design of this equitable proceeding is to prevent litigation, not to make it a substitute for litigation. If a legal cause of action between the interested parties has already arisen through transactions subsequent to the will they must litigate their claims through the proper legal channel. The remedy sought here is not appropriate.

As the defendants did not resist the proceedings, but join in the prayer for construction, the bill is to be dismissed without costs.

Decree in accordance with the opinion.

INHABITANTS OF THE TOWN OF RANGELEY *vs.* ELMER SNOWMAN.

Franklin. Opinion November 19, 1910.

Adverse possession. Necessary proof in action of trespass quare clausum. Occupation of property by licensee. Rights acquired in property by licensee, or person occupying, under oral permission. Rights of parties to remove personal property placed on land of another with oral permission, or license.

1. Occupation of a licensee cannot be adverse to the true owner while he is claiming to occupy it by virtue of the license, and as long as the licensee continues to occupy the premises, or exercises the license by claiming it to be a license or oral permission, said occupation gives no interest in the land and it cannot be considered adverse to the true owner, because it is

with the consent of the true owner, and the license is a complete answer and defense made to a claim of adverse possession set up by the licensee, unless the licensee has occupied or used the premises as his own openly, exclusively, and adversely for the period of twenty years, claiming to be the true owner thereof.

2. A possession which gives title must be adverse for all the requisite time and so notorious that the owner may be presumed to have knowledge that it is adverse.

3. This being an action of quare clausum for entering the close of the plaintiff and entering a building thereon and the carrying away of a small amount of personal property, the gist of the action is the breaking and entering. The other allegations are simply laid as aggravations of the trespass. It is, therefore, incumbent upon the plaintiff to prove such unlawful entry, but the defendant is not liable for breaking and entering because he had the right to revoke the license which gave him the right to enter, and in this form of action, if the breaking and entering is not made out, the action fails.

Action of trespass quare clausum. Defendant filed plea of general issue and also brief statement alleging that, at the time of the trespass complained of, the plaintiffs were not in possession of said close, and further alleging that he was the owner in fee simple of said close and the buildings standing thereon. Case reported to Law Court upon agreed statement of facts, the Law Court to determine the questions of law and fact involved and to render such judgment as the rights of the parties require. Judgment for defendant.

Case stated in opinion.

Frank W. Butler, for plaintiffs.

Richard & Rollins, and C. C. Holman, for defendant.

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

HALEY, J. An action of trespass quare clausum, for breaking and entering a close alleged to be the property of the plaintiff, situated in the town of Rangeley, and entering a building thereon formerly used as a school house, and is reported to this court upon an agreed statement of facts, from which it appears that the lot of land in dispute was located in what was formerly school district No. 3 in said Rangeley. In 1857 a school building was erected by individuals living in said district, on a lot other than the lot in

question. In 1860 certain of the individuals comprising said district wanted the school house in a more central location, and the school house was then moved on the lot in question by said individuals, under oral permission from James D. Badger, who was the owner of the land, to be occupied as long as the same was used for school purposes. August 8, 1878, said Badger made, executed and delivered to James Snowman a warranty deed of the lot in question, which was duly recorded October 20, 1881, and it is admitted that the school house was moved on to a part of the land described in said deed. In 1893 the school districts in all towns in the State were abolished by law. In April, 1894, acting under said law, the assessors for the town of Rangeley made an appraisal of the school property in said town, including whatever rights they had in said school house and lot as provided by law, and the value of the school house property in district No. 3 was appraised at the sum of $124.96, which sum was rebated to the taxpayers in said district.

After proper vote by the town the plaintiffs took possession of the school house and lot above described, succeeding to all rights of the school district therein. In 1897 the town sold the above named school house, which was removed by the purchaser thereof, and erected the present building upon the same lot, occupying the same ground occupied by the old school house, and in addition thereto certain contiguous land which was necessary for the enlarged building. The school board in 1897 contracted with one Herbert Ross and others to put in the foundation for the new building. When they commenced work on the same, James Snowman objected to the erection of the new building to said Herbert Ross and his father, who reported the same to the school board, which was the duly authorized building committee for said town, which thereupon directed said Ross to continue with the work, which he did. James Snowman died on January 5, 1906, leaving a will devising all his property to the defendant, which will was duly probated. The defendant and his predecessors in title have cut the hay of town upon said lot since the incorporation of said town from said lot. The inhabitants of said town never had a deed of said lot or any part thereof, or paid or tendered said Badger or either of said Snowmans anything for the same, or the right to maintain the

school house thereon. The school house was moved on the lot in 1860. The district, up to 1894 and the town since that date, have claimed the right to occupy said lot for school purposes by virtue of the said oral permission of James D. Badger given in 1860. Neither said Snowman nor said Badger, or the defendant, ever requested the school district or the town to remove said building, except at the time complaint was made to the workmen as aforesaid in 1897. In 1912 the average number of scholars attending school in said district having fallen below eight, the school board summarily suspended school for the year, and no school has since been held therein, but the school books, maps, charts and other school property of said town, including chairs and benches, were left in said school house. In May, 1914, the defendant broke open the school house door, entered the building and removed therefrom certain of the above named school books. The plaintiffs claim that they can maintain this action because they have been in open exclusive, adverse possession under a claim of right for more than twenty years, and thereby the title to the lot vested in the inhabitants, and also because the school property in the district was taken over by the town in 1894 and appraised for $124.96, which sum was rebated to the taxpayers in district No. 3 to pay for the school property situated therein which was turned over to the town, and that the defendant, being the owner of other real estate in the town, received his proportion of the rebate of $124.96.

James D. Badger in 1860, when he gave the oral permission to move the building upon the lot, did not attempt to make to the parties who moved the building, or to the district or the town, a grant of the land.

From the agreed statement it appears, "that since the school house was moved on the lot in 1860 that the district up to 1894, and the town since that date, have claimed the right to occupy said lot for school purposes by virtue of the oral permission from James D. Badger in 1860." Occupation of a licensee can not be adverse to the true owner while he is claiming to occupy it by virtue of the license, and as long as the licensee continues to occupy the premises, or exercise the license by claiming it to be a license or an oral permission, said occupation gives no interest in the land, and it cannot be considered adverse to the true owner, because

it is with the consent of the true owner, and a license is a complete answer and defense to a claim of adverse possession set up by the licensee, unless the licensee has occupied or used the premises as his own, openly, exclusively and adversely for the period of twenty years, claiming to be the true owner thereof. *Coalter* v. *Hunter,* 4 Rand., (Va.) 58; 15 Am. Dec., 726 and note; *Luce* v. *Carley,* 24 Wend, 451; 35 Am. Dec., 637 and note. "A possession which gives title must be adverse for all the requisite time and so notorious that the owner may be presumed to have knowledge that it is adverse." *Morse* v. *Williams,* 62 Maine, 445.

In this case the agreed statement shows that the district or the town has never claimed to be the true owner. They have not claimed to occupy it adversely to the defendant, because "they have claimed the right to occupy said lot for school purposes by virtue of the oral permission of James D. Badger in 1860." From the agreed statement it would seem that, at the time of the alleged trespass, the town was only claiming to occupy the premises as the licensee, not as owners and not adversely to the title of the defendant, and, as the agreed statement shows that the district or the town never have occupied the premises under a claim of right as owners, openly, exclusively and adversely, but only as the licensee of the owner, or owners, it follows that the district had no title to the land in question and since the town took it over the town has had no title to the land. Title by adverse possession set up by the plaintiffs fail, and they are not entitled to maintain this action upon the ground that they were the owners of the premises described in the writ.

This being an action of quare clausum for entering the close of the plaintiff and entering a building thereon and the carrying away of a small amount of personal property, the gist of the action is the breaking and entering. The other allegations are simply laid as aggravations of the trespass. It is, therefore, incumbent upon the plaintiff to prove such unlawful entry, but the defendant is not liable for breaking and entering because he had the right to revoke the license which gave him the right to enter, and in this form of action, if the breaking and entering is not made out, the action fails. *Dingley* v. *Buffum,* 57 Maine, 379.

When the town, in 1894, made an appraisal of the school property in said town they appraised the school district's interest in the school house then on the lot in the sum of $124.96. This sum was rebated to the taxpayers of the district, and of course the defendant, being a land owner in the district, received a small part of that sum as a rebate on his taxes. How much he received does not appear, but the sum of $124.96 was rebated to the taxpayers of the district. But the defendant is not estopped by that act from recovering possession of land owned by him in the district. The district was the owner of the building on the lot, and "a structure placed upon the land of another, to be used by the builder during the pleasure of the owner of the land; ownership of the structure by the builder and his right to remove it if the land owner revokes his license, is recognized and implied." *Salley* v. *Robinson,* 96 Maine, 474. By the appraisal the town became the owner of the building upon this lot, with the right to remove it whenever the owner of the land revoked his license to allow the building to remain there. In the appraisal no interest in the land of the plaintiff, upon which the building was situated, passed to the town, for the town could only take the interest of the district, which was to a license to maintain the building upon the lot as a school house during the will of the owner of the land.

Judgment for defendant.

CHARLES I. ALBEE *vs.* ATHERTON LORING, et als.

Lincoln. Opinion November 19, 1916.

Duty of Court under a bill in equity asking for construction of a will, to pass upon validity, or legality, of certain past and completed transactions carried through by parties interested in the estate. Object and scope of Chapter 79, Section 5, Paragraph VIII. of Revised Statutes of Maine.

1. This court declines to pass upon the validity of past sales and completed transactions of parties interested in an estate when called upon to construe wills under the provisions of R. S. chap. 79, sec. 6, par. VIII.
2. From a careful study of the case it seems quite apparent that, under the guise of a request to construe a will, the real object sought is to have the court determine the validity of past transactions in the nature of mortgages.

Bill in equity brought by executor of, and legatee under, the will of Sarah E. Albee in which he asks the court to construe the will and also to set aside and declare void, not only his own mortgage deeds, but also another mortgage made to one of the defendants by the remainderman under said will. Two of the defendants filed demurrer and the other defendant, son of the plaintiff, did not file any plea, answer or demurrer. The court sustained the demurrers of the defendants, and plaintiff filed exceptions. Exceptions overruled.

Case stated in opinion.

A. S. Littlefield for plaintiff.

Payson & Virgin, E. W. Freeman, and Whipple, Sears & Ogden, for defendants.

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

PHILBROOK, J. This is a bill in equity praying the court to construe the provisions of the will of Sarah E. Albee, mother of the plaintiff, and also to determine and decree that certain mortgages

given by the plaintiff and by Charles H. Albee, one of the defendants, are null, void and of no effect. Loring and Gorman, two of the defendants, demurred to the bill. The remaining defendant, Charles H. Albee, filed no plea, answer or demurrer. The court below sustained the demurrers filed by Loring and Gorman and the case is before us upon exceptions to that ruling.

From an examination of the record it appears that Sarah E. Albee died testate on the nineteenth day of October, 1909, that the will was duly proved and allowed, and that the plaintiff was appointed executor of the estate. The bill does not aver, nor does the record disclose the date when the will was probated and the executor appointed, but in argument it is asserted by the defendants who demur that the Probate Court for Lincoln county, the county in which the will was probated, sits on the first Tuesday of each month except August, that the will was not filed in said Probate Court until the December term, December 7, 1909, and was not proved and allowed until the January term, January 4, 1910.

After disposing of her personal property, the testatrix by the second item in her will gives "all the rest and residue of my property, of every name, nature and description, to my said son, Charles I. Albee, (the plaintiff in this case) for the term of his natural life, with power to receive the income only therefrom, and to use said income in such manner as he may deem necessary or advisable." By further provisions of the will the said son, as executor, was authorized to sell any part or all of the property so devised to him, or to mortgage the same in fee simple, or for a less estate, or to lease the same for a term of years even though a term of lease may extend beyond his life. No license or decree of court, so the will provides, was to be required to authorize any such sale, mortgage or lease, and no purchaser was to be liable for the application of the purchase money, but the son was to hold the proceeds of any such sale, mortgage or lease, with a life interest only in the same, and only with power to use the income thereof. The will also provided that if the son deemed it necessary to use any part or all of the property devised to him, or the proceeds of sale of such property, for his own comfortable support and maintenance, he was authorized to do so, and the exercise of that right was to be his personal privilege, but such property or proceeds of

sale was to be used only by him and for his support and maintenance. Charles H. Albee, grandson of the testatrix and one of the defendants, as above stated, was made remainderman under certain conditions not necessary to discuss at this point.

On the thirtieth day of November, 1909, about six weeks after the death of Sarah E. Albee, the plaintiff, and the Eastern Coal Company, of which plaintiff was then treasurer, entered into an agreement in writing with Loring whereby the latter was to loan ten thousand dollars to said company, which was to give its note, payable in two years with interest at six per cent, endorsed by the plaintiff, and as additional security for the loan the plaintiff agreed to give Loring a first mortgage on certain real estate, which, in the agreement, he referred to as property "recently inherited from his mother, Sarah E. Albee." The agreement was carried out, the loan made, and on the first day of December, 1909, plaintiff gave a mortgage to Loring of lands which were referred to in that instrument as lands which "came to me by inheritance from my mother, Sarah E. Albee."

On the sixth day of May, 1912, the plaintiff gave to the defendant Gorman, a mortgage for five thousand dollars on a portion of the land described in the mortgage to Loring. It is alleged in the bill, and necessarily admitted by the demurrer, that this second mortgage was given to secure a debt due to the Gorman-Leonard Company from the Eastern Coal Company. In this second mortgage the plaintiff referred to the land as "being the same property left to me under the will of Sarah E. Albee, who died on the nineteenth of October, 1909."

On the twentieth day of July, 1912, at the special request of Loring, as the bill alleges and the demurrer admits, the plaintiff gave another mortgage for ten thousand dollars on the property to Loring, but in this mortgage the plaintiff described himself as "executor of the last will of Sarah E. Albee," and further declares that it is given to secure the payment of "a certain note for ten thousand dollars ($10,000) dated December 1, 1909, signed by the Eastern Coal Company and endorsed by me as executor."

On the same twentieth day of July the remainderman, Charles H. Albee, who is also one of the defendants, as we have seen, gave a mortgage to Loring of all his "right, title and interest under

said will," not mentioning what will, but substantially describing the tracts mentioned in the mortgages given by Charles I. Albee, to secure the payment of "a certain note for ten thousand dollars ($10,000) dated December 1st, 1909, signed by the Eastern Coal Company and as security for the payment of which two certain mortgages have been given, one by Charles I. Albee individually, and one by Charles I. Albee, executor." These four mortgages, the plaintiff asks us to declare null, void and of no effect.

From this statement of the case it seems quite apparent that, under the guise of a request to construe the provisions of the will, the real object sought is to have the validity of these mortgages passed upon, in other words to pass upon the validity of completed transactions carried through by parties interested in the estate. Whether this court should assume or decline to assume jurisdiction in such a controversy was very fully and learnedly discussed in *Haseltine* v. *Shepherd,* 99 Maine 495. It was there held as a general proposition that in a bill in equity praying for the construction of a will the court would decline to express any opinion as to the validity of past sales. This position is still adhered to. As the construction of the will in question could not appropriately deal with any other controversy raised by the plaintiff we hold that the ruling of the court below was correct.

Exceptions overruled.

ELIZABETH GARMONG *vs.* JOHN B. HENDERSON.

Penobscot. Opinion November 27, 1916.

Breach of contract to marry. Burden of proof when defendant's pleading raises the issue of chastity of the plaintiff. Burden of proof when case is reported to Law Court. Jury powers of Law Court in determining liability when case is sent on report.

This is an action for breach of promise of marriage. A former verdict for the plaintiff has been set aside as against the evidence. The case now comes before this court on report, for the determination of the liability of the defendant, the jury having passed upon the question of damages under a stipulation of the parties.

Held;

1. The burden now rests more heavily upon the plaintiff than when the case came to this court before, with a verdict of the jury in her favor.
2. Then the burden was upon the defendant to convince the court that the verdict was manifestly wrong. Now the court is acting with jury powers, the question of the preponderance of evidence is open and the burden is upon the plaintiff to substantiate her claim.
3. If upon the former evidence, plus a verdict, the plaintiff was not allowed to recover, she cannot now prevail, minus a verdict, unless her case has been strengthened by additional and effective testimony to such an extent that she can now sustain the burden of proof.
4. The new evidence offered by the plaintiff is meagre and unimportant, while that presented by the defendant materially strengthens the defense.
5. The existence of a mutual engagement of marriage can be proved either by direct evidence of an express promise or by evidence of such facts, conduct and circumstances as will lead to a reasonable inference of such engagement and contract.
6. The evidence here is insufficient to prove either. The proof of an express promise comes wholly from the plaintiff and in view of the fact that she swore falsely either in the courts of Iowa where she instituted proceedings against one Smith, or in the courts of Maine where she makes similar charges against the defendant, little weight can be attached to her statements.
7. Nor can any promise or agreement be reasonably inferred from the conduct of the parties viewed in the light of all the circumstances. The contrary inference is the more probable and reasonable.

8. It is a settled principle of law that if the plaintiff was unchaste with other men or with another man prior to or during an engagement with the defendant, it is a bar to this suit, unless at the time he made or renewed his promise he knew or had been informed of her unchastity.
9. Even assuming that an engagement was entered into in August, 1909, or in 1910, or at any time prior to November, 1910, when the plaintiff gave birth to a child, she has failed to convince the court upon these two essential points.
10. A promise of marriage made by the defendant in November, 1910, in view of all the facts and circumstances is unbelievable. Her own conduct in first instituting bastardy proceedings against him negatives the idea of such a promise and reveals her own belief as to the true relations existing between the parties.
11. The question now before this court is not the paternity of the child, but the existence of a valid promise of marriage, and upon that question it is the opinion of the court that the plaintiff has failed to substantiate her claim.

Action of assumpsit to recover damages for an alleged breach of contract to marry the plaintiff. Defendant filed a plea of general issue and also brief statement. The jury were allowed to assess the damages, and case was reported to Law Court upon certain stipulations which are set forth in the opinion. Judgment for defendant.

Case stated in opinion.

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

Fellows & Fellows, and Deasy & Lynam, for defendant.

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

CORNISH, J. The plaintiff in this action seeks to recover damages for an alleged breach of promise of marriage. The ad damnum is $250,000. The writ alleges that a contract was entered into between the parties about March 10, 1910, in the city of Washington, D. C., the marriage to take place sometime during that year; that on November 6, 1910, the promise was renewed by the defendant but the date was deferred to about March 1, 1911, and that the defendant subsequently refused to be bound by his promise and repudiated the agreement.

The defendant in his pleadings denies the existence of any contract and by way of brief statement sets up 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, the latter being shown by proceedings instituted by her in Iowa against one Roscoe D. Smith for seduction under promise of marriage. He further pleads his ignorance of these facts until after the date of the second alleged promise.

Upon the issues joined, the cause was tried at the January term, 1915, for Penobscot county, and a verdict was rendered in favor of the plaintiff in the sum of one hundred and sixteen thousand dollars. This verdict was set aside by the Law Court. The concluding language of the opinion is this: "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 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 claims, 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." *Garmong* v. *Henderson,* 114 Maine, 75, 90.

A second trial was had at the April term, 1916, when the jury assessed the damages in the sum of seventy-five thousand dollars, and the case was reported to the Law Court upon so much of the evidence as is legally admissible, the Law Court to determine the liability of the defendant and if liability is established to enter judgment upon the amount of the verdict, unless the defendant should file a motion for a new trial because of excessive damages. In that event the Law Court is to reduce the damages, if found excessive, to a sum which would be the greatest amount that it would approve if found by the jury. That motion has been filed.

Under this stipulation this court acts with jury powers in determining in the first instance the liability or non liability of the defendant. The burden therefore rests more heavily upon the plaintiff now than when the case came to this court before with a verdict of a jury in her favor. That verdict threw upon the defendant the burden of proving to the satisfaction of the court that it was manifestly wrong, and the well settled rule is that 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." *Garmong* v. *Henderson,* supra. Notwithstanding this rule, which gives so much weight to the findings of a jury, and which was not only recognized but expressly stated in the opinion, this court had no hesitation in determining upon all the evidence and circumstances that the jury had clearly erred in finding a verdict in the plaintiff's favor; in other words that the plaintiff had so obviously failed to make out a legal and enforceable cause of action that even with the aid of a verdict she could not be allowed to prevail.

The present situation is different. As the case is now before us on report, the burden is on the plaintiff to prove her case, and the question of the preponderance of evidence is open. If upon the former evidence plus a verdict she was not allowed to recover, upon substantially the same evidence minus a verdict she certainly cannot prevail. By agreement the evidence at the former trial, as well as at this, is before us, and the crucial test therefore is, whether the plaintiff has strengthened her case by additional and effective testimony to such an extent that she can now sustain the burden of proof and maintain her action.

A patient study of the entire evidence compels us to answer this question in the negative.

In the former opinion the facts and circumstances were exhaustively discussed. Every phase of the case as raised by the pleadings or developed by the voluminous evidence was carefully considered. The evidence now before us is doubly voluminous

because the testimony at the first trial was for the most part repeated at the second, and we now have a record consisting of two volumes of about five hundred pages each instead of one. In view of the previous thorough analysis it would be a needless task to again dissect the same evidence. It is sufficient for our purpose to fashion the barest outline of the salient events and then consider the bearing and effect of the new evidence upon the vital issues in the case.

The plaintiff was born in Iowa in 1880. While at school there she became engaged to one Roscoe D. Smith. In November, 1907, she came to Baltimore to pursue her medical studies and was a special student at the Woman's Medical College from November, 1907, to May, 1908, when she was requested by the faculty to withdraw because of her unsatisfactory work. She may have attended some other medical lectures in Baltimore for a short time, and then she engaged in nursing. She first met the defendant casually in June or July, 1909, at a residence in Washington where she was visiting. He took her on a short automobile drive at that first meeting and they were together for an hour or two. Soon after, the defendant went to his summer home in Bar Harbor. The plaintiff followed, at some time in July without informing him that she was coming. She was a stranger in the place, and stopped at a boarding house. She remained in Bar Harbor about four weeks and during that time they walked and rode and sailed together on several occasions. At her departure she borrowed seventy-five dollars of him to pay her expenses west. She went first to her uncle's in Scranton, Pennsylvania, and then to Philadelphia where she resumed her occupation as a nurse. She remained in Philadelphia until February, 1910. The defendant visited her once while she was there, they taking dinner together at a hotel, and she went to Washington to meet him five or six times, their meetings there also taking place at a local hotel. On these trips the defendant paid her traveling expenses. In February, 1910, she left Philadelphia and went to Washington, boarding for a time with her aunt. The parties met as before, taking automobile rides together and dining together at one or more hotels. He never visited her at her aunt's house, but on one or more occasions took

her from there before or brought her back there after their rides. Nor did he take her to his own home nor introduce her to his family. About the first of April, 1910, the plaintiff left Washington and went to her home in Des Moines, Iowa. Visits from her lover, Roscoe D. Smith, were soon resumed. On July 6, 1910, she instituted a criminal proceeding against Smith, alleging under oath that on or about June 15, 1910, and July 4, 1910, he had seduced her under promise of marriage. Smith was arrested and incarcerated, but the case was not prosecuted and he was released. She then began a civil suit against Smith for breach of promise of marriage, with an allegation of seduction. Smith attempted to adjust this suit and a settlement was agreed upon, but the plaintiff refused to sign a receipt and discharge. In September, 1910, the plaintiff secured an indictment for seduction against Smith, she testifying under oath before the Grand Jury that she had been engaged to him, that because of their engagement she had submitted to his embraces and had had sexual intercourse with him soon after April first, 1910, and was then pregnant by him; that he had repudiated his agreement and refused to marry her. This indictment was never brought to trial. Her allegation as to her condition was true. Late in October, 1910, she returned to Washington and on November 6, she had an interview with the defendant, at which time she charged him with the paternity of her child which was about to be born. Two days later the child was born at the Emergency Hospital in Washington, to which she had gone under an assumed name. On November 9, she was taken to the George Washington Hospital where she remained a little over three weeks. The defendant visited her there one or more times and, as she claims, sent her fruit and flowers. Subsequently they met at various times, their interviews being, according to her version friendly and even affectionate, but, as he claims, stormy. He paid her various sums of money aggregating about $900, prior to March, 1911, as he says, to buy his peace. In the early spring of 1911 he came to Bar Harbor. She followed him. They had an interview there, and soon after, he refused to pay her any more money or have anything further to do with her. She then instituted bastardy proceedings against him in Hancock county. The

case was tried at the April term, 1912. The fair inference from certain testimony in this case is that the defendant prevailed. She instituted this suit for breach of promise on October 16, 1913.

This is a mere skeleton of events taken chronologically. It is not intended as a statement of all the material facts on either side. But it is sufficient to enable us to resume the consideration of the vital issues before us in the light of the new evidence and that is its purpose.

The controlling issue is the existence of a mutual engagement of marriage. This admittedly can be proved either by direct evidence of an express promise or by evidence of such facts, conduct and circumstances as will lead to a reasonable inference of such engagement and contract. So far as the proof of an express promise on the defendant's part is concerned, the evidence comes wholly from the plaintiff herself, and its force rests therefore upon her credibility. It rests upon a weak foundation. In view of the fact that she is an admitted perjurer either in the courts of Iowa, where she instituted proceedings against Smith, or in the courts of Maine, where she makes the same charges against the defendant, little weight can be attached to her statements. She now states in her proceeding against Henderson that all her allegations in Iowa against Smith were false. Her testimony was perjured either there or here. "It must therefore 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" said the court in the former opinion. The same criticism holds good now. The senseless excuse for her conduct that she offered at the former trial she repeats at this, and it neither palliates the offense nor lessens the enormity of her course of action.

The plaintiff's evidence on the point of an express contract remains uncorroborated. The only new witness introduced by her throughout the whole trial was her brother, John P. Garmong, and his testimony is meagre and unimportant. It relates to a brief interview that he had with the defendant at Bar Harbor in October, 1909, in relation to a boa which had been lost by the

plaintiff. During their conversation the brother says that the defendant spoke very highly of the plaintiff, told him that he had the highest respect for her and admired the ambitious spirit that had brought her east to pursue her studies. This was a colorless interview. No statement was made by the defendant even suggesting an engagement between the parties or in any way acknowledging the existence of such a relation. There was no hint of it. It bears no resemblance to the expected conversation between prospective brothers in law, and has no probative force in establishing the contract on which the plaintiff now relies. Apparently at the time it produced no effect on the brother. If it had, he would doubtless have communicated so important a fact to other members of his family. But they continued to remain in entire ignorance of any engagement between these parties until the denouement.

When we pass to the conduct of the parties, the circumstances and the probabilities of the case, no new light has been thrown upon the situation to warrant the inference of a subsisting agreement to marry. No engagement was publicly announced and there is no evidence that any friend or relative understood it to exist. Even as late as August 28, 1910, we find the plaintiff's sister writing to the mother of Dr. Smith and imploring her to persuade the doctor to keep his promise of marriage and save the plaintiff from being the mother of an illegitimate child. There was no engagement ring. There were no presents such as one would expect a person of the wealth of the defendant to shower upon his affianced wife. There was no public conduct from which an engagement could be inferred. There is no evidence that the alleged engagement was ever referred to by the defendant or by any third person in his presence. He returned to his luxurious club life in Washington, and she continued to earn her living by employment as a nurse.

The letters or notes that the defendant wrote to the plaintiff were not those of an affianced husband. They were infrequent in quantity and meaningless in quality, quite unlike the loving and even passionate letters that passed between the plaintiff and Dr. Smith to whom she evidently was engaged at the time she met the plaintiff and whose engagement continued for a considerable time

thereafter, if not until the legal proceedings were instituted by her in Iowa after she discovered that she was with child.

Upon this branch of the case, without discussing the evidence further it need only be said that the existence of a contract of marriage expressly made in Bar Harbor in August, 1909, or at Washington or elsewhere in February or March, 1910, or to be inferred from conduct and circumstances, is unsupported by such proof as commends itself to our judgment.

Thus far we have not referred to the evidence of the defendant. He strenuously denies any promise of marriage at any time. It is fair, however, to say that in his denial of the paternity of the child we think his testimony is not to be relied upon. The facts speak otherwise, and in that respect his credibility is certainly shaken. But in other respects and especially during the course of a long, searching and at times trying cross examination we find his testimony for the most part to be frank, truthful and consistent. The plaintiff on the other hand, perhaps because of the strain of a second trial, we find even less trustworthy than before. Her answers are evasive, at times reckless and again insolent to both counsel and court. We are constrained therefore by even stronger reasons than before to reject the plaintiff's claim of a promise of marriage either in August, 1909, or February or March, 1910, or at any time prior to November, 1910.

This brings us to the other main subject of controversy, the making or renewal of the defendant's promise of marriage in November, 1910, after the plaintiff's return from Iowa and on the eve of the birth of her child. Here we are forced to the same conclusion.

The law is well settled that if the plaintiff was unchaste with other men or 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 his promise, he knew or had been informed of her unchasity. *Garmong* v. *Henderson,* supra, p. 85.

Even assuming therefore that there had been a subsisting engagement, made either in August, 1909, or in February or March, 1910, her unchastity with Dr. Smith, either in previous years or during the spring and summer of 1910, would bar recovery

in this action unless the defendant was fully informed of all the material facts and, despite such knowledge, renewed his promise.

Her improper relations with Smith are abundantly proved. Smith testifies to those relations as beginning in May, 1907, and continuing until she left for the east. The correspondence that passed between them after she came east confirms his statement. Her letter to him dated June 20, 1908, was quoted and commented upon in the prior opinion. Its somewhat obscure or veiled language was interpreted to signify that sexual intimacy had existed between them. In it she seemed to claim the privilege of intimacy with other men if he had been untrue to her. Other letters introduced for the first time at this trial confirm the accuracy of that interpretation. Two days later, on June 22, 1908, she wrote: "Am really ashamed of asking what I did when I wrote Sunday, but if you have, I will too. Now be honest." Again in her letter of July 8, 1908, evidently referring a second time to her request of June 20, she says: "Well when I do use the limit of my nerve energy there will be no more letters from me. . . . Your refusal of my horrible request only deepened my love for you." Dr. Smith's letter to her in response to the "horrible request" was not produced. Words like these need no interpretation. They are self explanatory.

As to what took place between the plaintiff and Dr. Smith in the spring and summer of 1910, after her return from the east, the plaintiff has admitted by her sworn allegations in the Iowa proceedings. Smith's acts in endeavoring to settle the civil suit which incorporated seduction corroborate hers. It is not unlikely that because their illicit relations were resumed early in April, 1910, Smith considered himself responsible for her condition when she made her charges against him in July and September. The date of the birth of the child placed its conception in February rather than April and tended to shift its paternity from Smith to the defendant; but the fact of the sexual relations between Smith and the plaintiff during the spring and summer of 1910 remains unchanged.

The evidence upon the two essential points, first, whether the plaintiff gave Henderson full information as to her relations with

Smith and her accusation in Iowa, and, second, whether he promised to marry her despite this information, is no stronger for the plaintiff than it was at the first trial. All that this court said in the previous opinion upon both these points applies with equal force now. Repetition of the reasons is useless. Such a promise under all circumstances as disclosed is simply unbelievable. Her own conduct in at once instituting bastardy proceedings instead of a suit for breach of promise, negatives such a promise and reveals her own belief at the time.

Upon the question of the plaintiff's illicit relations with men other than Dr. Smith the new evidence introduced by the defendant bears strongly. If the testimony of apparently disinterested and reputable witnesses is to be believed, she began her improper conduct many years before she ever met the defendant, and according to her statements to those witnesses, her paramours had been many.

This brings us to what, after a long and careful study of the case, we believe to be the true situation and the real relations between the parties. The plaintiff claims that they were affianced husband and wife, the defendant that they were merely friends. The facts bear out neither hypothesis. The true solution seems to be what was suggested in the former opinion, the evidence of no bethrothal but of illicit relations between them from nearly the beginning of their acquaintance. With this theory the circumstances and probabilities harmonize. The defendant was a man thirty-nine years old, a widower, of present and prospective wealth, high social standing, culture and travel, a man of the world so called. The plaintiff was a woman of twenty-nine, of a different social sphere, away from her own home, with a somewhat varied experience, self supporting and worldly wise. The lively interest which they manifested in each other at the first casual introduction, the rapidity with which their acquaintance ripened, her following him to Bar Harbor without his knowledge when they had met but once before, the nature, times and places of their semi-clandestine meetings in Bar Harbor and subsequently in Philadelphia and Washington, the absence of those accompaniments which we would expect in the case of a true engagement, and which we have before

referred to, and the presence of other conditions which we should not expect, all point in one direction. They led in the end not to a legitimate marriage but to the birth of an illegitimate child, and the consequent proceedings under a bastardy complaint.

The result is deplorable, but this court cannot do otherwise than decide the precise issue now before it, which is the existence of a valid contract of marriage. That issue the plaintiff has failed to maintain and the entry must therefore be,

Judgment for the defendant.

ANDROSCOGGIN COUNTY SAVINGS BANK *vs.* JAMES TRACY, et als.

PEOPLES SAVINGS BANK *vs.* SAME.

Androscoggin. Opinion November 27, 1916.

Bill of Interpleader. Burden of proof on appeal to reverse finding of fact of single Justice sitting in Equity. Duty of guardian to ascertain and inquire into the estate of his ward. General power of Court of Equity. Right of Guardians to sell real estate of ward when there was sufficient personal estate. Rule of law as to findings of fact of Single Justice sitting in Equity. Rule of law as to funds received from the sale of lands which were impressed with trust. Warranty deeds impressed with trust.

1. The findings of a single Justice in equity procedure, upon questions of fact necessarily involved, are not to be reversed on appeal unless clearly wrong.
2. The evidence does not show that the findings of the single Justice are erroneous, but, on the other hand, that they are well supported by the proof.
3. Where real estate is conveyed upon the faith of the promise of the grantee to make a will devising it to the grantor, or his children, in the event of his death, and it would be a fraud on the part of the grantee to refuse to perform her promise, equity declares that promise is a trust binding on her conscience, and, therefore, that she took and held the property impressed with that trust.

4. The will which the grantee executed after the death of the grantor, devising the real estate to his children, but with the proviso that both the property itself and the income therefrom should be held by a trustee until the devisees should attain their legal majority, was not a compliance with the condition which the grantee agreed to perform when the property was conveyed to her.
5. Moreover, the sale of the property in the lifetime of the grantee rendered inoperative her devise of it to the children of the grantor.
6. Where real estate, which is impressed with a trust in favor of a third party, is sold in disregard of the trust, the proceeds of the sale become likewise impressed with the same trust.
7. Where the proceeds of the sale of real estate that was impressed with a trust, are not in the hands of any bona fide holder thereof, equity can and should reach those proceeds and turn them over to the party to whom they equitably and rightfully belong.
8. The single Justice did not err in his conclusion that the two deposits in controversy, namely, No. 29,688 in the People's Savings Bank, and No. 33,050 in the Androscoggin County Savings Bank, are the property of Bridget Ellen Tracy and Catherine Tracy, and that Catherine V. Tracy, their guardian, is entitled to have and receive said deposits in her capacity as such guardian.
9. It seems to the court equitable that the $50 fee and the costs allowed to each plaintiff bank under the decree of interpleader in each case, should be paid pro rata from the two deposits in that bank; and, further, that no costs should be allowed in favor of either claimant. In other respects the decrees of the sitting Justice are affirmed.

Bill of interpleader filed by plaintiffs to determine title to certain deposits in plaintiffs' banks. The two cases were tried together before a single Justice upon bills, answers and proofs. The Justice presiding, after hearing, made certain findings upon which a decree was made, and from this decree an appeal was entered. Decree of sitting Justice, excepting as to allowance of fees and certain costs, affirmed.

Case stated in opinion.

White & Carter, for plaintiff.

Newell & Woodside, for James Tracy.

McGillicuddy & Morey, for Catharine V. Tracy, guardian.

Belleau & Belleau, for plaintiff.

Newell & Woodside, for defendant.

SITTING: CORNISH, KING, BIRD, HALEY, PHILBROOK, MADIGAN, JJ.

KING, J. These two cases are bills of interpleader, in each of which the plaintiff bank prays that the defendants be decreed to interplead touching their respective claims to certain deposit accounts in its bank. The causes were heard together by the sitting Justice upon bills, answers, and proof, the answers being taken as the pleadings of the respective claimants; and decrees were made upon the merits. From those decrees the defendant James Tracy appealed.

In the bill of complaint wherein the Androscoggin County Savings Bank is plaintiff it is alleged in substance: that at the time of the death of one Mary A. Tracy, February 1, 1911, she had on deposit in said bank in her name $392.87 represented by deposit book No. 13207; that there was also on deposit in said bank at the time of her death $2,385.34 for which said bank had issued a deposit book No. 33050 in the name of James Tracy, guardian of Mary A. Tracy; that Mary A. Tracy died testate and said James Tracy was duly appointed and qualified as the executor of her will; that subsequent to the death of the testatrix there was withdrawn from said deposit book 33050 by James Tracy or upon his order the sum of $389.40; that said deposit books are in the possession of the defendant Catherine V. Tracy who claims title to the whole of the deposits represented thereby as guardian of her daughters, Bridget Ellen Tracy and Catharine Tracy; that said James Tracy also claims the whole of said deposits as executor of the will of Mary A. Tracy; that the total amount of the two deposits with accrued dividends to the date of the bill is $2,699.55.

The allegations of the bill in the other case are the same, except as to name of the plaintiff and the amounts of the deposits and the numbers of the books. There was at the death of Mary A. Tracy a deposit in that bank of $483.90 represented by book No. 21284 issued in her name, and also another deposit of $821.83 represented by book No. 29668 in the name of James Tracy, guardian of Mary A. Tracy. Subsequent to her death the amount of $32.84 was withdrawn from deposit account No. 29668. Catharine V. Tracy has possession of those deposit books and she claims the

whole of the deposits as guardian of her said daughters. James Tracy likewise claims the whole of the deposits as the executor of the will of Mary A. Tracy. The total amount standing to the credit of both of the books in the People's Savings Bank, with accrued dividends to date of bill, is $1,492.33.

The sitting Justice filed with his decrees an extended statement of facts as found by him, from which we summarize as follows:

Title to only two of the deposits is really in question, namely, No. 29668 in the Peoples Savings Bank, and No. 33050 in the Androscoggin County Savings Bank.

Prior to August, 1894, John Tracy was the owner of a block on Main street in Lewiston, upon which there was a mortgage of $2,500. He had a sister, Mary A. Tracy, who was becoming old and infirm and for whose comfort and support he wished to make some substantial and permanent provision. Accordingly, August 23, 1894, he executed, without consideration, and delivered to Mary a warranty deed of the block. At that time John was married to the defendant, Catherine V. Tracy, but they then had no children. Mary had the use and income of the block from the time it was so conveyed to her until it was sold by her guardian as hereinafter mentioned. It is claimed by the defendant, Catherine V. Tracy, that the conveyance of the block by her husband John to his sister Mary was made upon the express condition, agreed to by Mary, that she would make a will devising the block to him, if living at her death, otherwise to his children, if he left any. And soon after the conveyance to Mary she did execute a will in John's favor. John died in 1904, leaving his widow Catherine V., and their two minor children, for whom the mother, Catherine V., was appointed guardian. Very soon after John's death his sister Mary destroyed her will in his favor, and made another in which she devised the block to John's two daughters, with the proviso that, if the devisees were not of lawful age at the time of the death of the testatrix, "I hereby appoint my brother James Tracy trustee of said real estate to collect the rents and income and hold the same until the said children shall have reached their legal majority." James Tracy was the sole residuary legatee under that will, and was named as the executor thereof.

In August, 1907, James Tracy was appointed guardian of Mary A. Tracy. Soon after his appointment he presented to the probate court a petition for license to sell the block, alleging therein that such sale was necessary to raise funds for the proper support of Mary. The license was obtained and the property was sold thereunder in January, 1908, by the guardian, James, for $6,000. The proceeds of the sale less the mortgage debt were deposited in the two plaintiff banks in the name of James Tracy, guardian of Mary A. Tracy, and the two deposits here in controversy, namely, No. 29668 in the Peoples Savings Bank, and No. 33050 in the Androscoggin County Savings Bank, represent what is left of the proceeds of the sale of said block and nothing more.

Mary A. Tracy died in 1911 and her second will, above mentioned, has been probated and James Tracy has been appointed and qualified as the executor thereof. As such executor he claims to be entitled to the deposits in question. On the other hand Catherine V. Tracy as the guardian of the two minor children of John Tracy claims these deposits which represent the balance of the proceeds of the sale of the block.

In his statement of facts the sitting Justice says:

"The only claim which the guardian can assert is one based upon the theory that the title of the books is vested in her wards. Upon the law and the evidence I think this claim must be sustained upon two grounds: First, that the petition to the probate court asking authority to sell was fraudulent, and, as between James Tracy and the guardian and her wards, touching the proceeds of the sale, gave the probate court no jurisdiction. Second, because under the facts and circumstances attending the giving of the deed to Mary A. Tracy by John Tracy, Mary A. Tracy took the property impressed with a trust in favor of John, or his heirs, as to whatever of the property was left by her after having received her support from it, using either the principal or income."

As to the first ground, that the petition to sell the block was fraudulent, the sitting Justice states the facts to be, that at the time the petition was presented Mary A. Tracy was in a hospital at a regular expense of but $12 per month, and that she then had in her possession, in her trunk, two bank books representing deposits

in her name in the Lewiston Savings banks aggregating $725.48, and that James Tracy, her guardian, according to his own testimony, filed the petition for license to sell the block without making any investigation to ascertain if his ward had any money or other available means for her support. And the Justice states it as his conclusion, without passing upon the question of actual fraud, "that the petition to sell this real estate was based upon constructive fraud, which vitiates the sale, so far as the rights of James Tracy are concerned, and substitutes the proceeds of this sale for the real estate and conveys these proceeds to the devisees of this block instead of the block itself."

As to the other ground, that under the conveyance from John to Mary of the block she took the title thereto impressed with a trust, the sitting Justice says:

"Upon this point the evidence seems quite conclusive. Catherine V. Tracy, widow of John Tracy, testifies, that at the time her husband conveyed this block to his sister, Mary, she had been married but a short time and then had no children; that John, his sister, Mary, and she met and discussed the conveyance John was intending to make; that he was then quite a large real estate owner, and wished to make some permanent provision for his sister; that he proposed to Mary to convey to her the block on Main Street upon the condition that she would make a will devising it back to John, if living, or his children, if he left any, when she had gotten through with the use of it; and that she agreed to this and accepted the deed upon this condition. . . .

"I therefore find that Mary A. Tracy held this block of real estate on Main street under her deed from her brother John impressed with a trust to devise it, or in some other way provided for its transfer, to him or his children, as the case might be, and that this trust attached to this real estate and follows the proceeds of the sale thereof represented by the two bank books in question and vests the title of the sums represented in these books" in the two daughters of John Tracy.

It is a well settled doctrine, often and recently stated by this court, that the findings of a single Justice in equity procedure, 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, otherwise the decree appealed from must be affirmed. *Haggett* v. *Jones,* 111 Maine, 348.

In the case at bar the sitting Justice found as a fact, that the conveyance of the block from John Tracy to Mary A. Tracy was made on the condition that Mary would make a will devising it to John if living, if not, to his children, if he left any, and that Mary agreed to the condition and accepted the conveyance upon that condition. A study of the evidence does not satisfy the court that that finding of fact is clearly wrong. On the other hand, it seems to be reasonably well supported by the proof.

What is the effect of that condition that Mary A. Tracy assented to and agreed to perform? We think it is this. Inasmuch as the grantor conveyed the title to the property to her upon the faith of her promise to perform the condition, and it would be a fraud on her part to refuse to perform it, equity declares that her promise is a trust binding on her conscience, and, therefore, that she took and held the property so conveyed to her impressed with that trust. See *Gilpatrick* v. *Glidden,* 81 Maine, 137 and cases cited.

The will which Mary A. Tracy executed after the death of her brother John devised the block in question to his two daughters with the proviso that both the property itself and the income therefrom should be held by a trustee until the devisees should attain their legal majority. We think that was not a compliance with the condition that she had agreed to. Moreover, the property was sold in the lifetime of Mary, and thereby her devise of it to the daughters of John became inoperative. But as the property sold was impressed with the trust in favor of the daughters of John, so likewise did the proceeds of the sale of it become impressed with the same trust. Those remaining proceeds, however, will not pass to the daughters of John under the will of Mary. The will does not so provide. Nor did she, after the sale of the property, by will or otherwise, provide that the daughters of John should receive the remaining proceeds of the property in compliance with the trust. Inasmuch, therefore, as Mary has deceased, not having complied with the trust, and the proceeds of the trust property now exist,

and are not in the hands of any bona fide holder thereof, equity can and should reach those proceeds and turn them over to those to whom they equitably and rightfully belong.

It is therefore the decision of the court that the sitting Justice did not err in his conclusion that the two deposits in controversy, namely, No. 29668 in the Peoples Savings Bank, and No. 33050 in the Androscoggin County Savings Bank, are the property of Bridget Ellen Tracy and Catherine Tracy, and that Catherine V. Tracy, their guardian, is entitled to have and receive said deposits in her capacity as such guardian.

It is conceded that the other two deposits in the plaintiff banks, namely, No. 21284 in the Peoples Savings Bank, and No. 13207 in the Androscoggin County Savings Bank, are the property of the estate of Mary A. Tracy, and that James Tracy as the executor of that estate is entitled to the custody and control thereof.

Upon consideration of all the facts and circumstances disclosed in the cases, we think the decree filed by the sitting Justice in each case should be modified in respect to the deposit from which the plaintiff's fee of $50 and costs should be paid in each case, and also in respect to costs allowed Catherine V. Tracy. And it seems to the court equitable that the $50 fee together with costs, allowed under the decree of interpleader to the plaintiff bank in each case, should be paid pro rata from the two deposits in that bank; and, further, that no costs should be allowed in favor of either claimant. In other respects the decrees of the sitting Justice are affirmed.

Accordingly let a new decree be made in each case in accordance with this opinion.

So ordered.

MELVILLE H. REED *vs.* J. BURTON REED.

Lincoln. Opinion December 4, 1916.

Writ of forcible entry and detainer. Rule of law as to burden of proof when the defendant, in an action of forcible entry and detainer, pleads title in himself. The right to open and close under such pleading. The granting or denial of the right to open and close not discretionary with the presiding Justice.

1. The right to open and close in a trial is a legal right, to the denial of which exceptions lie.
2. The right to open and close in a trial is to be determined by the state of the pleadings at the beginning of the trial, and depends upon which party has the initial or primary burden of proof.
3. In a case of forcible entry and detainer, in which the defendant in the municipal court pleaded title in himself, and thereupon as required by statute the case was removed to the Supreme Judicial Court, in the latter court the defendant's title is the only issue, and upon that issue the burden is on the defendant, at the outset, and he has the right to open and close.

Action of forcible entry and detainer begun in Wiscasset municipal court, county of Lincoln. Defendant pleaded general issue, with brief statement claiming title in himself and others as tenants in common of the land claimed. The case was then removed to the Supreme Judicial Court as required by statute. Defendant, at the trial, claimed the right to open and close the case. The court denied his claim and exceptions were filed by defendant. After hearing, a verdict was rendered for the plaintiff. Defendant filed his bill of exceptions and also a motion for a new trial. Exceptions sustained.

Case stated in opinion.

Carl M. P. Larrabee, and C. R. Tupper, for plaintiff.

A. S. Littlefield, for defendant.

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

SAVAGE, C. J. This action of forcible entry and detainer was before this court in *Reed* v. *Reed,* 113 Maine, 522. In the municipal court the defendant had pleaded the general issue, with a brief statement of title in himself and two others as tenants in common, and thereupon the case was removed to the Supreme Judicial Court, as required by statute, R. S., chap. 96, sec. 6. We held that the municipal court had exclusive jurisdiction, subject to appeal, of all issues, except the defendant's title. In that court the plaintiff was bound to prove his title or right to maintain the action; but that the defendant by pleading title and securing a removal of the case had waived all other defenses, and that the only issue triable in the Supreme Judicial Court was that of the defendant's title.

Upon a second trial, the defendant claimed the right to open and close. His claim was denied, and he excepted. The correctness of this ruling is the question now to be decided.

The right to open and close is a legal right. The grant or denial of it does not lie in the discretion of the court. Therefore an erroneous denial of it is exceptionable. *Johnson* v. *Joseph,* 75 Maine, 547.

As a general rule, when the defendant pleads the general issue, the burden is on the plaintiff, and he has the accompanying right to open and close. And it is claimed that this rule holds, even if the defendant by way of brief statement pleads matter in bar, or by way of confession and avoidance. *Ayer* v. *Austin,* 6 Pick., 225; *Lunt* v. *Wormell,* 19 Maine, 100. Notwithstanding the plea, the plaintiff must prove his case, before the defendant is required to show his defence. The defendant contends that the rule does not hold in the peculiar situation of this case.

Of course, the right to open and close cannot be made to depend upon exigencies in the situation of the case which may arise as the trial proceeds. The rule as generally stated is that the right is to be determined by the state of the pleadings at the beginning of the trial. *Merriam* v. *Cunningham,* 11 Cush., 40; *Seavey* v. *Dearborn,* 19 N. H., 351; *Ayer* v. *Austin,* 6 Pick., 225; *Heilbronn* v. *Herzog,* 165 N. Y., 101; *Lowe* v. *Lowe,* 40 Iowa, 220. See also *Washington Ice Co.,* v. *Webster,* 68 Maine, 449; and note to *Brunswick W. R. Co.* v. *Wiggins,* 61 L. R. A. at p. 529. In other words the right

depends upon who has the initial or primary burden of proof, under the pleadings. *Judge of Probate* v. *Stone,* 44 N. H., 595. The right belongs to the party against whom judgment would be rendered, if no evidence were introduced on either side. *Davis* v. *Mason,* 4 Pick, 156; *Boardman* v. *Woodman,* 47 N. H., 120; *Elwell* v. *Chamberlin,* 31 N. Y., 611; *Chicago etc. R. Co.* v. *Bryan,* 90 Ill., 126; *Kent* v. *White,* 27 Ind., 390; *Brunswick W. R. Co.* v. *Wiggins,* 61 L. R. A., note at p. 514.

How does this case stand, in the light of these principles? Under the pleadings, the defendant's title, and not the plaintiff's, was the sole issue. The defendant's plea had eliminated all issues except that of his title. It had eliminated the office of the general issue. The case is not like the ordinary one where the defendant pleads the general issue with a brief statement. The plaintiff could safely rest upon the pleadings until the defendant had shown title. He was not bound to go forward, and offer proof, until the defendant had moved. The defendant must move first; otherwise, judgment would go against him. The defendant had the initial or primary burden. He must move, or fail.

And such in fact was the necessary procedure in this case. In the matter of proof the defendant proceeded first, and showed a title by inheritance from his father. The plaintiff then met this proof by showing a deed from the father. The defendant rebutted by attempting to show that the deed was never delivered with intent that it should pass the title.

The real dispute submitted to the jury was whether the deed had been so delivered as to pass title. But that was not the initial issue raised by the pleadings. That issue was whether the defendant had title. Until he had shown a title, the question of the plaintiff's title was immaterial. We think the defendant had the burden at the outset, and that, in accordance with the principles which we have stated, he had the right to open and close.

Exceptions sustained.

ANNIE F. ALDRICH *vs.* FRANK L. BOOTHBAY, et al.

Cumberland. Opinion December 5, 1916.

Master and Servant. Duty of master to provide safe and suitable machinery for employee, or servant. Contributory negligence on part of servant or employee. Burden of proving that machinery or appliances are defective and dangerous.

1. To entitle the plaintiff to a verdict it was encumbent upon her to establish by a fair preponderance of the evidence that the machine was defective and out of repair as alleged, or at least that it was defective in some one of the particulars alleged, and that such defective condition was the sole cause of her injury.
2. From a careful examination and consideration of all the evidence in the case the court is of the opinion that there is not sufficient evidence to justify the jury in finding that the machine was defective as alleged in the plaintiff's writ.
3. The court is also of the opinion that the evidence does not affirmatively establish that the plaintiff was in the exercise of reasonable care on her part at the time she was injured.

Action on the case to recover damages for injuries sustained by the plaintiff through the alleged negligence of defendant. The negligence complained of and relied upon was an alleged defective condition in the machine at or by which plaintiff was injured. Defendant filed plea of general issue. Verdict for plaintiff in the sum of two thousand dollars. Motion for new trial filed by defendant. Motion sustained. New trial granted.

Case stated in opinion.

Hinckley & Hinckley, for plaintiff.

William Lyons, for defendants.

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

KING, J. Action of tort to recover damages for personal injuries alleged to have been received by the plaintiff while in the defendants' employ operating a corn cutting machine. The case is before this court on defendants' motion to set aside the verdict in the plaintiff's favor for $2,000, on the ground that it is contrary to the weight of the evidence and excessive in amount.

The machine which the plaintiff was operating at the time of her injuries was a model M, 1900, Sprague corn cutter. The work of the machine is the cutting of the kernels of corn from the cob. There is an opening in the center of the head of the machine through which the ears of corn can pass and thence be carried into and through the machine. Around the opening are the ends of four arms in each of which there is a spur wheel revolving inward. The ears of corn are carried along endwise on an endless chain running in the feed trough until they are caught by the spur wheel and drawn into the machine. The arms and knives are so attached to the head of the machine with springs or other appliances that the opening is to some extent self adjusting, thereby accommodating itself to the larger and smaller ears. It is a usual occurrence for the ears to clog in the opening or as they pass into the machine between the knives, and such clogging does not necessarily indicate that the machine is defective or out of repair. Around the edge of the head of the machine is a circular rod, with an upright handle at its top, and the rod is so connected to the head of the machine that the opening through which the ears of corn enter and pass through the machine can be considerably enlarged by using some force on the handle, thereby moving the circular rod a little one way or the other. And the purpose of the rod with the handle thereon is to enable the operator to enlarge the opening so that the clogging ears may clear themselves, as they often do. If they do not clear themselves by the moving of the rod, then the operator stops the machine by pushing back a lever, within easy reach, which moves the belt shipper by which the belt is slipped from the fixed to the loose pulley and the machine stops. Then the clogged ears are cleared with a stick or piece of iron, and the machine is again started by pulling the lever forward thereby shifting the belt onto the fixed pulley. There is a removable hood on the front of the

head above the opening, but not extending down over it. By removing that hood the opening between the spur wheels and between the knives just back of the spur wheels is more easily reached.

The plaintiff was injured by getting her right hand into the opening and in contact with the knives whereby the back of her hand was cut. Her contention is, that, the ears of corn having clogged, she stopped the machine, removed the hood, and while digging out the clogged ears with a stick the machine "started of its own free accord" and the stick and her hand were drawn into the machine.

The plaintiff alleges in her declaration that the defendants had suffered the machine on which she was working to become defective and out of repair in several specified particulars, of all of which they had knowledge, and that such defective condition of the machine was the sole cause of her injuries. The declaration is unprecedently voluminous, covering 25 closely printed pages of the record. It alleges at least five separate and distinct defects in the machine, in as many counts, and then, in as many more counts, sets out the same defects, alleging that the plaintiff, prior to her injuries, had complained to the defendants in respect to each of said defects and that they had assured her that if she would continue to operate the machine the defects would be remedied at once. We shall not attempt here to state in any detail the allegations in the writ in reference to those alleged defects. In a word they are, that the lever used in stopping and starting the machine had become worn to such an extent that it was loose and unstable, and when it was pushed down, thereby stopping the machine, it would not remain so but would work back allowing the belt to slip onto the fixed pulley and start the machine; that the "fork" which forms a part of the belt shipper and guides the belt had become so worn that it allowed the belt a greater play than was proper and permitted the belt to work over from the loose to the fixed pulley thereby starting the machine; that the belt itself was improperly adjusted in that it was looser than was necessary, which excess looseness caused it to strike against the fork thereby moving it and its attachments so that the belt worked from the loose pulley onto the

fixed pulley thereby starting the machine; that the belt was old and cut and fastened together in an uneven and irregular manner which caused it to strike the fork and thereby it was moved over so that the belt came onto the fixed pulley and started the machine; that the pulley on the overhead shafting was not properly adjusted with the pulleys on the machine, and that such want of adjustment caused the belt to work from the loose to the fixed pulley whereby the machine was started.

To entitle the plaintiff to a verdict it was incumbent upon her to establish by a fair preponderance of the evidence that the machine was defective and out of repair as alleged, or at least that it was defective in some one of those particulars, and that such defective condition was the sole cause of her injury.

We have examined the evidence with painstaking care and we are clearly of the opinion that there is not sufficient evidence in the case to justify the jury in finding that the machine was defective in any of its parts as alleged in the plaintiff's writ. The witnesses in behalf of the plaintiff were her husband, herself, Dr. Knight, and Harry P. Boyle. The last two gave no testimony of their own knowledge concerning the condition of the machine. And a careful examination of the testimony of both the plaintiff and her husband does not show that either of them gave any substantial testimony tending to show that the machine was defective in any of the particulars as alleged. Mr. Aldrich began work for the defendants on Monday, and his wife, the plaintiff, began to work for them on the following day, Tuesday, and on the machine in question. She was injured on Saturday of the same week. His work was on the retort or cooker, at the boiler room, some distance from the machine on which the plaintiff was working. Both testified that the machine clogged frequently; but, as above stated, that is not unusual, and not sufficient evidence we think of a defective condition of the machine. Neither the plaintiff nor her husband testified to any personal knowledge of the particular defective conditions alleged. It is true that they both testified that the belt came off frequently and that the foreman, Mr. Swett spent a long time on Thursday fixing the machine, and the belt so it would stay on; and they both testified that on Friday, Mrs. Aldrich

told her husband that the machine had started while she was cleaning it, and that he then so informed the foreman, who said if she would put the lever back and be careful he thought she could run the machine until he had time to look it over.

On the other hand, Mr. Swett, in answer to the question whether the plaintiff or her husband ever made any complaint to him about the machine before she got hurt, answered, "not one thing;" and he further testified, that they never had any trouble with the machine either before or after the plaintiff was hurt. Mrs. Lydia M. Hoyt, called by the defense, who operated another corn cutter, during all the same time that the plaintiff was operating the machine in question, both machines being belted to the same shaft, and about 10 feet apart, testified: "Q. During the time that Mrs. Aldrich was there, did you ever see the belt of her machine come off? A. Never. Q. Did you see anybody repairing the machine she was on? A. No, only to sharpen the knives and replace them." The man who tended the machine on which the plaintiff worked, who put the corn in the hopper, also testified that while she was operating the machine he never saw anyone making repairs on the machine, and did not see the belt come off. The machinist, who overhauled and started up the corn cutters in the defendants' factory at the beginning of the packing season of 1913, only a short time before the accident, was called to examine the machine immediately after the plaintiff was hurt, and he found it in proper condition and not defective as alleged.

We are therefore constrained to the conclusion that the machine was not defective as alleged, and that no negligence on the part of the defendants was proved.

The court is also of the opinion that the evidence does not affirmatively establish that the plaintiff was in the exercise of reasonable care. She was familiar with the machine, having operated a similar one before. She understood the danger of getting her hand in contact with the spur wheels. She was told both by her husband and by the foreman to keep her hands away from the opening of the machine, if not she would get hurt. We think it is quite incredible that the machine, if stopped, started of its own accord. And the man who was tending the machine and who stood

facing the plaintiff testified that she did not stop the machine, but undertook to clear it while it was going. The evidence and all the circumstances support we think no other reasonable conclusion than that the plaintiff undertook to clear the machine with the stick without stopping it, and in doing so got her hand in contact with the spur wheels which drew it into the machine. For that unfortunate accident the defendants should not be held liable. It was not the result of any negligence on their part, but was due, we think, to a want of reasonable care on the plaintiff's part.

Motion sustained.
New trial granted.

CONTINENTAL PAPER BAG COMPANY

vs.

MAINE CENTRAL RAILROAD COMPANY.

Cumberland. Opinion December 8, 1916.

Duties and liabilities of common carriers. Effect of Carmack Amendment. Rule of law as to proximate and remote cause where act of God intervenes. Rules as to practice in actions brought in State Courts under Federal Statutes.

An action for damages upon a bill of lading issued by defendant to plaintiff under the provisions of the "Carmack Amendment."

The exclusiveness and paramount character of a Federal Law in relation to any subject within constitutional powers of Congress cannot be questioned.

In actions under such statutes brought in the State courts, while questions of procedure and evidence are to be determined according to the laws of the forum, questions inseparably connected with the right of action, such as those of liability of defendant and the measure of damages must be settled according to the general principles of law as administered in the Federal courts.

Hence, in actions upon a bill of lading, where the shipment is interstate, the rights and liabilities of the parties depend upon the acts of Congress, the bill of lading and common law as accepted and applied in the Federal tribunals.

Where in an action upon a bill of lading, the shipment being interstate, the arrival of the goods at the place of destination is delayed by the negligence of one or more connecting carriers and after such arrival they are injured by an unprecedented flood amounting to an act of God, the flood, and not the delay, is the proximate cause of the injury.

The prime object of the Carmack Amendment was to bring about a uniform rule of responsibility as to interstate commerce and interstate bills of lading and the principal subject of responsibility embraced by the act of Congress carries with it necessarily the incidents.

Action on the case to recover damages for the alleged negligence in failing to deliver certain property delivered by plaintiff to defendant carrier to be taken over its roads and connecting roads to point of destination. Defendant filed plea of general issue and alleged further, by way of brief statement, that the loss, damage or injury, if any, to the property mentioned in the declaration of the plaintiff was caused by an act of God. Case reported to Law Court upon certain stipulations and agreed statement of facts. Judgment for defendant.

Case stated in opinion.

Verrill, Hale, Booth & Ives, and Benjamin B. Sanderson, for plaintiff.

Charles H. Blatchford, for defendant.

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

BIRD, J. This is an action for damages upon a bill of lading issued by defendant to plaintiff. The case comes before us upon report on an agreed statement of facts which is summarized in the brief of plaintiff as follows:

"The plaintiff delivered a carload of paper bags and wrapping paper to the defendant at Rumford, Maine, on March 6, 1913, consigned to Dayton, Ohio. The shipment was delayed in transit several days owing to the admitted negligence of one or more of the connecting carriers, arriving at Dayton for delivery on Sunday, March twenty-second. The next day an extremely severe rain

storm occurred throughout the day, making it practically impossible for the consignees to unload the shipment. On Tuesday, the twenty-fourth day of March, there was an unprecedented flood in Dayton, amounting to an act of God, which partially submerged the car containing the plaintiff's goods, at that time stationed on the railroad siding, and damaged them. It is admitted that, but for the negligent delay, the damage in all probability would not have occurred. The goods, in damaged condition were subsequently tendered to the consignee, who refused the same, and after failure to receive instructions from the plaintiff as to their disposition, were sold at auction.

"The bill of lading, which is made a part of the agreed statement of facts, provides in Section I, that the carrier shall not be liable for any loss or damage or delay caused by the act of God. Also in Section III, that the carrier's liability for damage shall be based on the value of the property at the time of shipment unless a lower valuation is determined by the classification or tariff upon which the rate is based whether or not such damage occurs from negligence.

"The agreed statement provides that it shall be immaterial, for the purposes of this suit, which carrier negligently delayed the shipment."

It may be added to this summary that by paragraph five of the statement it is agreed that the tariffs governing the movement of the shipment in question were filed and published as provided by law; that there were two rates in effect, one the rate used by plaintiff, upon executing the uniform bill of lading, "Exhibit A," and the other a rate 10 per cent higher to be applied in case the property was shipped under full common carrier's liability.

Under this statement of facts, a single issue only is presented, whether a common carrier, engaged in interstate commerce is liable for damage to goods which are subjected while in his custody to injury by an act of God because of the carrier's negligent delay in transportation and but for whose negligence the goods would not have been injured.

The solution of the question depends upon the interpretation of the Carmack Amendment, so called, in conformity to the provisions

of which the bill of lading was drawn and issued. The portion of the amendment involved in the present inquiry is:

"That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed, *provided,* That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing laws," 34 U. S. Stats. at Large, Ch. 3591, pp. 593, 595.

The exclusiveness and paramount character of a Federal law in relation to any subject within the constitutional powers of congress cannot be questioned. The enactment of such a statute removes its subject matter from the sphere of state action; *Nor. Pac. Ry. Co.* v. *Washington,* 222 U. S., 370, 375, 378. In actions brought in the State courts under such statutes, while questions of procedure and evidence are to be determined according to the laws of the forum, questions inseparably connected with the right of action, such as those of the liability of defendant and the proper measure of damages, must be settled according to general principles of law as administered in the Federal courts; *C. &c. Ry. Co.* v. *Kelly,* 241 U. S., 485, 491; *Minneapolis & St. Louis R. R. Co.* v. *Bombolis,* 241 U. S., 211; *Second Employers' Liability Cases,* 223 U. S., 1, 58.

Coming to the specific question to be determined, it cannot be questioned that the shipment being interstate the rights and liabilities of the parties depend upon the acts of Congress, the bill of lading and common law as accepted and applied in the Federal tribunals. *Cleveland & St. L. Ry.* v. *Dettlebach,* 239 U. S., 588; *Southern Express Co.* v. *Byers,* 240 U. S., 612, 614; *Southern Ry. Co.* v. *Prescott,* 245 U. S., 632, 639, 641; *Cincinnati etc. Ry. Co.* v. *Rankin,* 241, U. S., 319, 327. See also *Southern Ry. Co.* v. *Gray,*

Admx., 241 U. S., 333, 339; *Georgia etc. Ry.* v. *Blish Co.*, 241 U. S., 190, 195. And so our own court in *R. S. Royster Guano Co.* v. *Cole*, 115 Maine, 387.

Upon the issue before us in this case, the courts of the great majority of the states of the Union have held the carrier liable. The courts of Massachusetts, Ohio and Pennsylvania, have concluded otherwise. In *Morrison* v. *Davis*, 20 Pa. St. (1852) 171, goods under transportation on a canal were injured by the wrecking of the boat, caused by an extraordinary flood. It was shown that a lame horse used by defendant delayed the boat, which would otherwise have passed the place where the accident occurred in time to avoid the injury. The court held the flood to be the proximate cause of the disaster, and the delay, the remote cause, and that the maxim, causa proxima, non remota spectatur, applied as well to contracts of common carriers as to others. This was followed by *Denny* v. *N. Y. C. R. R. Co.*, 13 Gray (1859) 481, in which *Morrison* v. *Davis*, supra, was approved and followed. The question was before the Supreme Court of the United States in 1869 and that court after quoting the two cases last cited said "of the soundness of this principle we are entirely convinced." *Railroad Co.* v. *Reeves*, 10 Wall (1869), 176, 191. The same principle is recognized in *Scheffer* v. *Railroad Co.*, 105, U. S., 249 and by *St. Louis &c. Ry. Co.* v. *Commercial Ins. Co.*, 139 U. S., 233, 237. And there are many decisions of the other Federal Courts to the same effect, and among them may be cited *Empire State Cattle Co.* v. *Ry. Co.*, 145 Fed., 457 affirming 135 Fed., 135; *Thomas* v. *Lancaster Mills*, 71 Fed., 481.

It should not be overlooked that the prime object of the Carmack amendment was to bring about a uniform rule of responsibility as to interstate commerce and interstate bills of lading and that the principal subject of responsibility embraced by the act of Congress carried with it necessarily the incidents; *A. T. S. F. Ry. Co.* v. *Harold*, 241 U. S., 371, 378.

In view of these decisions the court is of opinion that had this case been submitted to a jury, the trial court would have been justified upon the evidence in directing a verdict for defendant.

In accordance with the agreed statement of facts,

Judgment may be entered for defendant.

LUCIUS C. MORSE *vs.* INHABITANTS OF MONTVILLE.

Waldo. Opinion December 15, 1916.

Municipal corporations. Right to ratify unauthorized acts of agents or servants. Rule of ratification where the acts done and contracts entered into by the agents and servants are in violation of Statute. Duty of vendor in selling goods to agents or servants of municipal corporations. Powers, duties and limitations of School Committee, under Public Laws of 1909, Chapter 88, Section 2.

Action of assumpsit to recover the value of certain clapboards sold to the defendant town to be used in the construction of a school building in the defendant town. During the progress of the building many questions arose as to the legality of the acts of the school committee in locating the school house; also questions arose as to acts of the Selectmen in regard to the town meetings held to ratify the acts of the Selectmen and school committee.

Held;

1. As no plans or specifications were furnished by the State to be used in the construction of said school house, the superintending school committee had no authority to erect or construct a school house until they had made plans and specifications for such proposed school building and had submitted them to and had them approved by the State Superintendent of Public Schools, and the State Board of Health, under section 2, of chapter 88 of Public Laws of 1909.

2. A municipal corporation may ratify the unauthorized acts and contracts of its agents or officers, which acts or contracts are within the scope of the corporate powers, but cannot ratify so as to make legal the acts of their agents or officers, which acts were prohibited by statute.

3. The act of the superintending school committee and superintendent of schools in building the school house before the plans and specifications had been approved, as required by law, being unauthorized, all parties who did business with them in furnishing material or labor for the erection of the school house dealt with them at their peril. It was their duty, before they furnished labor or materials on the credit of the town, to examine and see if the parties with whom they were contracting were authorized by law to make the contracts entered into.

Action of assumpsit on account annexed to recover the value of certain clapboards sold to defendant town. Defendant filed plea of general issue. Case was reported to Law Court upon agreed statement, the Law Court to determine all questions of law and fact and render judgment accordingly. Judgment for defendant.

Case stated in opinion.

Dunton & Morse, for plaintiff.

Ellery Bowden, and Walter A. Cowan, for defendant.

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

HALEY, J. An action of assumpsit on account annexed, in which the plaintiff seeks to recover for clapboards, alleged to have been sold the defendant town in 1912 and used in the construction of a new school house in the Halldale district, so called, and is reported to this court on an agreed statement of facts, from which it appears that at the annual town meeting, held March 7, 1910, the town voted to build a school house at Halldale and appropriated $425 for that purpose. At the March meeting, 1911, on the following article in the warrant, "To see where the town will vote to locate the Halldale school house," the town voted, "To leave the location of said school house with the Halldale district." The superintending school committee of said town did not agree as to the location upon which to build the new school house, and on March 11, 1911, they voted, "To recommend the change of the location of the Halldale school house." A special town meeting was called and held on April 3, 1911. Article 2 of the warrant of said meeting was: "To see if the town will vote to change the location of the school house in the Halldale district, so called, from its present location to the old location near the church." And the town thereupon voted, "To change the present location to old location near the church." The superintending school committee disregarded the vote of the town, and thereafterwards agreed to build the new school house by the side of the old Halldale school house, the spot selected for said building being within the limits of the location

then in use, and being the legal location for the Halldale school house. No building committee was appointed to build the school house, and the school committee, on or about October 28th, 1912, proceeded to erect a new school house on the lot on which the old school house was situated. The superintendent of schools of said town was the duly authorized agent of the school committee in procuring materials and building said school house, and the materials named in the plaintiff's account annexed were ordered on the credit of the town of Montville by said superintendent for said school house, and were used in its construction, the price charged is reasonable, as agreed upon between the superintendent and the plaintiff. On the 10th day of December, 1912, before said school house was completed, a protest in writing against the erection of the new school house on the location then in use by the town, and other than voted by the town as aforesaid, signed by thirty-five taxable inhabitants of said town, was given to the chairman of the board of selectmen of said town. On the 11th day of December the selectmen of said Montville informed the superintendent of schools of said town that said protest had been given to the chairman of their board as aforesaid, and no bills for the construction of said school house had been approved or paid since the 11th day of December, 1912. But the superintendent, as agent of said school committee, continued the erection of said school house until the same was completed with the exception of benches, seats and chimney.

The superintending school committee, in the construction of said building, did not use plans and specifications prepared by the state superintendent of public schools, and the plans and specifications that were used for said building were not submitted by said superintending school committee to the State Superintendent of Public Schools, or the State board of health, prior to the commencement of the building of said school house, nor were the same ever approved by them. At the annual town meeting, held March 3, 1913, there was an article in the warrant, "To see what action the town will take in regard to the Halldale school house," and the town, by vote, instructed the selectmen to pay for the Halldale school house. April 4, 1913, a bill in equity praying for an injunc-

tion by citizens of Montville was brought against the inhabitants of said town, the selectmen, treasurer and school committee, and on the 19th day of May, 1913, a final decree was made, enjoining the officers of the town, and their successors, from further proceedings in the erection of the school house, and the paying out, or causing to be paid out, any money of said town for the erection of said school house or under any contract therefor. The plaintiff in this suit was not a party to the bill in equity and had no notice of said hearing.

It is necessary to consider but one branch of the defense. Section 2, chapter 88, Public Laws of 1909, reads: "Where the plans and specifications, prepared by the state superintendent, are not used, all superintending school committees of towns in which new school houses are to be erected, shall make suitable provision for the heating, lighting, ventilating and hygienic conditions of such building, and all plans and specifications for any such proposed school building shall be submitted to and approved by the Superintendent of Public Schools, and the State board of health, before the same shall be accepted by the superintending school committee, or school building committee of the town in which it is proposed to erect such building."

"Sec. 3. In case no special building committee has been chosen by the town, the superintending school committee shall have charge of the erection or construction of any school building, provided that said superintending school committee may, if they see fit, delegate such power and duty to the superintendent of schools."

As no plans or specifications were furnished by the State to be used in the construction of said school house, the superintending school committee had no authority to erect or construct a school house until they had made plans and specifications for such proposed school building, and had submitted them to and had them approved by the State Superintendent of Public Schools, and the State Board of Health. *Lunn in Equity* v. *City of Auburn,* 110 Maine, 241. The superintending school committee and superintendent of schools had no authority from the town to build a school house, except as they proceeded according to law, and as the erection of the school house by them was not according to law, but

in violation of the statute, they had no authority to bind the town for building material used by them in their illegal act; for all persons furnishing materials to town or city officers must take notice at their peril of the extent of the authority of such officers. *Goodrich* v. *Waterville,* 88 Maine, 39. The plaintiff contends that, the vote of the town meeting of March 3, 1913, at which it was voted to instruct the selectmen to pay for the Halldale school house, is a ratification of the acts of the superintending school committee and superintendent of schools, made by the town with the full knowledge of all the facts and therefore binding upon the town, citing sec. 797, Dillon's Municipal Corporations 3d ed.: "A municipal corporation may ratify the unauthorized acts and contracts of it's agents or officers which are within the scope of the corporate powers, but not otherwise." This rule does not aid the plaintiff, for, although the town might ratify the unauthorized acts and contracts of its agents or officers which were within the scope of the corporate powers, they could not ratify so as to make legal the acts of their agents or officers in doing acts prohibited by the statute. The statute of 1909, above referred to, prohibits the building or erection of a school building until the plans and specifications have been approved by the State Superintendent and by the State Board of Health, unless plans and specifications prepared by the State Superintendent are used. If the town could ratify, by a vote of a town meeting, the acts of their agent in violation of the statute, after such acts had been performed, then it would lay in the power of any town to nullify the provisions of the statute requiring plans to be approved as specified by section 2, chapter 38, Laws of 1909. Many of the acts of agents of a municipality may be ratified, but not acts that are done in violation of a statute, as the building of the school house in question was. The act of the superintending school committee and superintendent of schools in building the school house before the plans and specifications had been approved, as required by law, being unauthorized, all parties who did business with them in furnishing material or labor for the erection of the school house, dealt with them at their peril. It was their duty, before they furnished labor or materials on the credit of the town, to examine and see if the parties with whom they were contracting,

were authorized by law to make the contracts. If they had done so in this case the plaintiffs would have discovered that the superintendent of schools had no right to order the goods upon the credit of the town.

Judgment for defendant.

JOHN W. BINGHAM *vs.* MARCOTTE, COTE & COMPANY.

Androscoggin. Opinion December 15, 1916.

Exceptions. Requested instructions. Rights of trespasser as compared with rights of invitee or licensee.

1. If the owner or occupier of land, either directly or by implication, induces persons to go upon his premises, he thereby assumes an obligation to see that such premises are in a reasonably safe condition so that the persons there by his invitation may not be injured by them or in their use for the purpose for which the invitation was extended.
2. Under all conditions and circumstances men must use reasonable care, and if they fail to use reasonable care and are hurt on account of their failure, then they must bear their injuries themselves, regardless of who else might have been responsible.
3. It is not error to refuse to give requested instructions, the granting of which would, in substance, amount to an expression of opinion upon the facts in the case.

Action on the case to recover damages for injuries received by plaintiff through the alleged negligence of defendant. Defendant filed a plea of general issue. Verdict for plaintiff in the sum of one hundred sixty-two dollars and fifty cents. Defendant filed exceptions to refusal of court to give certain requested instructions and rulings, and also a motion for a new trial. Exceptions overruled. Motion overruled.

Case stated in opinion.

George C. Wing, and George C. Wing, Jr., for plaintiff.

J. G. Chabot, for defendants.

SITTING: CORNISH, KING, BIRD, HALEY, PHILBROOK, MADIGAN, JJ.

HALEY, J. An action to recover damages for personal injuries alleged to have been sustained by the plaintiff by falling off the landing of a stairway into the basement of the defendant's storeroom. The plaintiff alleges that on August 14th, 1915, he was directed by one of the defendants to go to the storeroom and get an empty barrel in exchange for one containing some apples which the plaintiff had sold to the defendant that morning, and while doing so fell down the stairway and sustained the injuries complained of. The defendant contended that the plaintiff did not meet with any accident when he went after the barrel, as alleged by him, but that having sold two boxes of apples subsequent to the first transaction when he sold the defendant a barrel of apples, he went, of his own accord, without being directed or told to, back into the same storeroom for two empty boxes to take the place of those containing the apples sold the defendant, and that in so doing he fell down the stairway into the basement and sustained the injuries sued for. The verdict was for the plaintiff for the sum of $162.50, and the case is before this court upon exceptions and a motion to set aside the verdict.

EXCEPTION.

1. The defendant excepted to the following in the charge of the presiding Justice: "The defendant has raised no objection so far as the form of the writ goes, but says that as a matter of fact, if he was hurt at all, that he was not hurt when he was getting the barrels, but when he was getting some boxes. If the plaintiff was invited on either occasion, if there were two, to go into the room, the rule of law would not be different whether it was a barrel or boxes. The defendant does not make any point, however, about that, the phraseology of the writ, but he says the circumstances connected with the getting of the boxes were different from what the plaintiff says they were with regard to getting the barrels. The difference between the two is one which might be cured by amendment, and no point has been made, so I shall submit the case to you on what the liability of the defendant might be in either case."

The plaintiff's cause of action, as set forth in his writ, is that he was directed by the defendant to go into the storeroom of the defendant connected with their store and obtain a barrel in place of the barrel containing apples which he had sold them, that the storeroom was dark and had an open trap door in it, of which the plaintiff had no notice, and by the exercise of due care would not have had notice, and that, by reason of the negligence of the defendant in sending him into that room with the open trap door, he fell through the trap door and sustained the injuries complained of. The cause of action was sending him into the storeroom having a trap door open that the plaintiff knew not of. It was immaterial whether he went in to get a box or barrel. That was no part of the cause of action. It was merely the reason for his going. If the room had been safe, and he exercised due care, whether it was a barrel or boxes that he was after, he would not have received his injuries. The purpose of the plaintiff's visit to the storeroom was not the cause of his injuries; it might be proved to show that he had a lawful right to enter, and it was the duty of the presiding Justice, no question having been raised in regard to the testimony when it was offered, to instruct the jury fully upon the liability of the defendant in either case as the evidence showed, and it appears by the Judge's charge, which is made a part of the bill of exceptions, that they were so instructed. *Cyr* v. *Landry,* 114 Maine, and cases cited, page 196.

As stated by the defendant's counsel, "It is a well recognized rule of law, requiring no citation, that the plaintiff is bound to prove the material facts as alleged; but, as stated above, it was immaterial whether he entered the storeroom for a barrel or a box." The exception must be overruled.

2. The defendant also excepted to the refusal of the presiding Justice to instruct the jury as follows: "The defendant's counsel ask me to instruct you that if the place was dark, that it was the plaintiff's duty to get a light, if he was not familiar with it." The court said: "I do not give you that instruction. I instruct you that it was his duty to use reasonable care. If the situation of the room, and the light and darkness were such that reasonable care required a light, then of course he should have obtained one,

otherwise not." It was a disputed question of fact whether the room was light or dark. Witnesses testified that there were two windows from which the light shone in a direct line with the stairway, and necessarily must have shown the open trap door. Other witnesses testify that it was dark. The requested instruction called for an expression of opinion on the facts.

This case differs from the case of *Parker* v. *Portland Publishing Company,* 69 Maine, 173. In that case the plaintiff was a stranger upon the premises, and in the dark hours of the night was seeking to find his way through an unlighted corridor and fell into the elevator shaft. In this case there was evidence tending to prove that the plaintiff was familiar with the room, that there was light in the room from two windows, and the fact that the trap door was open was apparent to any one who used their eyes, and the jury were properly instructed that it was the duty of the plaintiff to exercise due care under all the circumstances of the case. The charge of the presiding Justice defined to the jury what due care was, and the defendant had no right to have the court assume that his contention upon the disputed facts was right and instruct the jury upon that assumption.

MOTION.

There is no doubt that the plaintiff was injured while upon the defendant's premises. The only questions upon liability were the negligence of the defendant and the contributory negligence of the plaintiff. The jury found for the plaintiff, and the evidence is not so strong to the contrary as to show that they were influenced by prejudice, bias or mistake, and the mandate must be,

Exceptions overruled.
Motion overruled.

NELSON A. EUGLEY *vs.* FRED W. SPROUL.

Lincoln. Opinion December 18, 1916.

Mortgages for support. Equitable nature of right to redeem. Writ of entry. Bonds given with mortgages for support. Scope of powers of Court in matters of redemption of mortgages.

Writ of entry brought for foreclosure of a mortgage to be void in the case of full performance of the conditions of a bond of even date. The bond, in the penal sum of $500., was one with a condition of defeasance,—to be void, if the obligor well and sufficiently supported and maintained the obligee, the plaintiff, and his wife, during their natural lives. The jury found a breach of the condition of the mortgage and the case is before this court upon the agreed statement of the parties; this court to determine whether the sum to be paid by defendant to redeem is the penal sum of the bond or a larger sum which the parties have fixed at $1,000.

1. When a note or bond is given, the mortgage which secures it is to be construed with it, while a mortgage may describe the debt as well as the note or bond and thus qualify their terms.
2. Upon a writ of entry for foreclosure of a mortgage for support, the sum to be paid by defendant to redeem should be a present equivalent for full performance.
3. In cases of the character of the present, the relief in equity must be adapted to the nature of each case and must be as various as the differing character of the contracts in question.

Writ of entry to foreclose a mortgage given for support of plaintiff and his wife. Under proper instructions, in answer to a question framed by the presiding Justice, the jury found that the defendant had broken the condition of his mortgage. The plaintiff thereupon filed a motion for conditional judgment. In addition to the clause in the mortgage deed, the defendant gave a personal bond in the sum of five hundred dollars for the fulfillment of the conditions of the support and maintenance, and the defendant contended that his liability should be fixed by the penal sum of the bond so given. Upon certain agreements and stipulations, case was reported to Law Court. Pursuant to the stipulation of the parties, the amount to be paid by defendant in order to redeem is one thousand dollars and costs.

Case stated in opinion.

L. M. Staples, and A. S. Littlefield, for plaintiff.

Weston H. Hilton, for defendant.

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

BIRD, J. This action is a writ of entry brought for the foreclosure of a mortgage. The condition of the mortgage is "Provided, nevertheless that if the said Fred W. Sproul, his heirs, executors or administrators shall well and truly perform all the conditions of a certain maintenance bond given by the said Sproul to the said Eugley, said bond bearing even date with these presents, then this deed shall be void, otherwise shall remain in full force." The condition of the bond, which is without sureties, is "that if the said Fred W. Sproul, his executors and administrators shall at all times during the natural life of the said Nelson A. Eugley and his wife, Olive Eugley, well and sufficiently support and maintain the said Nelson A. and Olive Eugley, in the house of the said Sproul and them provide with meat, drink, clothes, nursing, medicine, and all other things necessary for their comfortable support. Now, therefore, if the above bounden parties, or either of them, or his or their heirs, executors or administrators shall well and truly perform the above conditions then this obligation shall be void; otherwise it shall remain in full force." The consideration named in the mortgage and the penal sum of the bond are the same—$500.

The issue being submitted to a jury, it found that the condition of the mortgage had been broken and the plaintiff moved for a conditional judgment. The defendant contends that the penal sum of the bond is the limit of such judgment and that, except in the matter of interest and costs, such judgment cannot exceed such sum. It is agreed by the parties that, if the amount to be paid in or order to redeem is not limited to the penal sum stated in the bond, the amount shall be one thousand dollars and costs.

"The case is reported to the Law Court for its determination of that question, judgment to be rendered as of mortgage in accord-

ance with that determination, the plaintiff to have possession of the premises pending redemption if the defendant notifies him that he may so take possession, otherwise and if the defendant shall retain possession he shall pay the plaintiff for the use of the premises until he surrenders possession in case he does not redeem from said mortgage."

No collateral personal security for the debt need be taken and a deed still be a mortgage, provided a debt or the fulfillment of some contract, is secured by the latter. This is familiar law. *Smith* v. *People's Bank,* 24 Maine, 185, 195; *Brookings* v. *White,* 49 Maine, 479, 483. See *Mitchell* v. *Burnham,* 44 Maine, 286, the case of a mortgage for the support of the mortgagee. See also *Reed* v. *Reed,* 75 Maine, 264, 271, 272. And when a note or bond is given, the mortgage which secures it is to be construed with it. A mortgage may describe the debt as well as the note and thus may qualify the terms of the note. I Jones Mort. (3d Ed) 71.

But in neither bond nor mortgage is found any covenant or undertaking to pay any specific sum of money nor is there any stipulation in either bond or mortgage that the penalty of the bond was intended to be liquidated damages; see *Bresnahan* v. *Bresnahan,* 46 Wisc., 385, 388.

Yet, whether we consult the bond or the mortgage, the debt is, in effect, an undertaking to support, maintain, etc., the mortgagee and wife during their lives. Under the former the personal liability of the mortgagor, or obligor, is limited by the penal sum. Not so, however, with the mortgage, wherein the extent of the lien upon the land is unlimited, except as fixed by the amount of the indebtedness. In a court of equity the debt is the principal, and the mortgage is the accessory; *Parsons* v. *Welles,* 17 Mass., 419-245; *Smith* v. *People's Bank,* 24 Maine, 185, 190, 191, 195. The condition of a bond of the character of that given by defendant is the essential portion. *South Berwick* v. *Huntress,* 53 Maine, 89, 98. Upon a writ of entry for foreclosure of a mortgage for support, the sum for which conditional judgment should be rendered is a present equivalent for full performance. *Sibley* v. *Rider,* 54 Maine, 463, 466; *Fales* v. *Hemmenway,* 64 Maine, 373, 387.

The redemption of mortgages is part of the broad field of equity jurisdiction for relief from forfeitures. *Henry* v. *Tupper,* 29 Vt., 358, 372. For forfeiture it substitutes compensation. It is exercised by the courts of common law in writs of entry for the foreclosure of mortgages under R. S., c. 92, § 10. The concluding paragraph of that section is as follows: "When the condition is for doing some other act other than the payment of money, the court may vary the conditional judgment as the circumstances require." Under a similar statute in Massachusetts, practically identical with our own, and another provision of a more general nature, it was held that these special provisions as to the judgment give to the special writ of entry nearly all the attributes of a suit in equity. In *Holbrook* v. *Bliss,* in which the history of the law is given, although the provision of more general nature was no longer a part of the Revised Laws, the court gave the same interpretation and force to the enactment in question. 9 Allen 69, 76. See *Philbrook* v. *Burgess,* 52 Maine, 271, 277.

Since redemption is an equitable right, it can be claimed by a mortgagor, only on terms of his paying all that is just and equitably due under the mortgage, even though the debt should not be recoverable at law, being barred by the statute of limitations. *Johnson* v. *Candage,* 31 Maine, 28, 31, 32; *Palmer* v. *Bray,* 136 Mich., 85, 89; *Oakman* v. *Walker,* 69 Vt., 344, 351. The sum required for the redemption of the mortgaged premises is the same in a suit by the mortgagor to redeem as it would be in like circumstances in a suit by the mortgagee to foreclosure. *DuVigier* v. *Lee,* 2 Hare, 326.

At the time the mortgage and bond were given the plaintiff and his wife were seventy-six and seventy-eight years of age respectively. Was it his intention to dispose of his property upon condition of their support during life and yet to limit the amount to be paid them in the event of breach of condition to the sum of five hundred dollars? The mortgage was given to secure the performance of this condition and is without limitation. The relief in equity, must be adapted to the nature of each case and must be as various as the differing character of the contracts in question. *Bryant* v. *Erskine,* 55 Maine, 153, 158; *French* v. *Case,* 77 Mich., 64, 74; *Austin* v. *Austin,* 9 Vt., 420; *Bresnahan* v. *Bresnahan,* 46

Wis., 385, 388; *Henry* v. *Tupper,* 29 Vt., 358, 371, 372. *Bethlehem* v. *Annis,* 40 N. H., 34, 40, 41; *Mower* v. *Kip,* 11 Paige, Ch., 88, 95; *Cluger* v. *Daniel,* McNeil Eq., 161; *Long* v. *Long,* 16 N. J. Eq., 59. See also *Mason* v. *Mason,* 67 Maine, 546.

Pursuant to the stipulation of the parties the amount to be paid by defendant in order to redeem is one thousand dollars and costs.

GEORGE KAPERNAROS, Admr., *vs.* BOSTON & MAINE RAILROAD.

York. Opinion December 18, 1916.

Negligence on part of parents of children. Trespassers on railroad tracks. Revised Statutes, Chapter 52, Section 26, known as the Railroad Fence Statute, interpreted.

This is an action of the case brought by the plaintiff, as administrator of James Kapernaros, for the recovery of damages arising from the instantaneous death of his intestate, occasioned by a locomotive of the defendant, under the provisions of R. S. chapter 89, sections 9 and 10. Exceptions to order of nonsuit.

1. Section 26 of chapter 52 of the Revised Statutes does not require railroads to fence their locations against the intrusion of human beings, whether adults or infants.
2. The evidence in support of the propositions that the engineer failed to seasonably see the child upon the track, or, seeing him, negligently failed to avoid him, is insufficient to support a verdict for plaintiff.

Action on the case brought by plaintiff, under the provisions of Revised Statutes, chapter 89, sections 9-10, to recover for the death of the plaintiff's intestate. Defendant pleaded general issue and also filed a brief statement setting forth, as matter of defense, that the plaintiff's intestate was a trespasser at the time he received the injuries, and was not in the exercise of due care, and that the parents of the child were also negligent and that said negligence and lack of due care upon the part of the parents of the plaintiff's intestate contributed directly to the injury which caused the plain-

tiff's intestate's death. At the conclusion of the plaintiff's case, counsel for defendant moved that nonsuit be granted. Nonsuit ordered, to which ruling plaintiff filed exceptions. Exceptions overruled.

Case stated in opinion.

John G. Smith, for plaintiff.

George C. Yeaton, and Emery & Waterhouse, for defendant.

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

BIRD, J. This is an action of the case brought by the plaintiff, as administrator of James G. Kapernaros, for the recovery of damages arising from the instantaneous death of his intestate under the provisions of R. S., c. 89 §§ 9 and 10. At the close of plaintiff's evidence, a nonsuit was ordered and the plaintiff excepted to the order.

The evidence discloses that intestate, an infant slightly less than two years old, was upon the defendant's location engaged in playing between the rails of its track. While thus occupied, the regular passenger train of defendant was approaching from the east and, although efforts were made by the locomotive engineer to stop the train, he was unsuccessful and the child received the injuries from which he died. The place where the child was injured was not a public crossing nor was it in the near neighborhood of one. The plaintiff urges that the child went upon the location by pursuing a well defined path leading from the lot occupied by his parents across land contiguous to the latter.

The first count of the declaration alleges that, on the twenty-fifth day of December, 1913, defendant, being possessed and in operation of a railroad running through improved land in Saco between Wharf street and Front street, contrary to law, failed to maintain a fence on the northerly side of its land, between these streets and that, by reason of such failure, the plaintiff's intestate without the fault or negligence of his parents wandered on to the track of defendant and, while in the exercise of due care, was struck by a locomotive of defendant and killed.

The statute invoked by the pleader is now R. S., c. 52, § 26. "Where a railroad passes through enclosed or improved land, or wood-lots belonging to a farm, legal and sufficient fences shall be made on each side of the land taken therefor . . . and such fences shall be maintained and kept in good repair by the corporation."

Violation of the requirement to maintain and repair is punishable upon indictment by fine. This provision of statute was originally enacted in 1842. (Pub. Laws, 1842, c. 9, § 6.) Since the day it became law, it has been construed as an act for the protection of trains from collision with domestic animals and of their owners from the loss or injury of such animals. *Norris* v. *Androscoggin R. R. Co.*, 39 Maine, (1855) 273, 277-278; *Estes* v. *A. & St. L. R. R. Co.*, 63 Maine, (1873) 308, 310; *Gould* v. *B. & P. R. R. Co.*, 82 Maine, (1889) 122, 126; where it is said "that the primary and perhaps the only purpose of the statute is to prevent the escape of domestic animals, both for their own protection and that of the public." *Allen* v. *Railroad,* 87 Maine, (1895) 326; *Cotton* v. *R. R. Co.*, 98 Maine, (1904) 511, 516. See also *Wilder* v. *M. C. R. R. Co.*, 65 Maine, (1876) 332, 340. No reported case, in this State, is found which holds otherwise nor is the court aware of any case in which the statute has been invoked for the protection of men or children. Provisions of similar character have received like construction in New Hampshire, *Hughes* v. *Railroad,* 71 N. H., 279, 284 and in Massachusetts, *Menut* v. *B. & M. R. R.*, 207 Mass., 12, 19, 20.

In 1873 by c. 126, Pub. Laws "any person who shall take down or intentionally injure any railroad fence, which has been erected to protect the line of any railroad in this State, or shall turn any horse, cattle or other animals, upon or within the enclosures of said railroad is rendered subject to criminal prosecution. Without material change it has now become § 28, c. 52, R. S.

We are forced to conclude that upon the first count the nonsuit was properly ordered.

The varying decisions upon the various provisions of the different states, upon the duty of railroads to fence are collected and arranged in the note following *Bishof* v. *Illinois Southern Ry. Co.*, 13 Ann. Cases, 185.

The two remaining counts of the declaration allege the presence of plaintiff's intestate upon the track of defendant without fault of his parents, that he was in the exercise of the care due from one of his immature years and was killed by the locomotive of defendant. The second count declares that the place, near a switch, where the child was struck was such that the engineer had reason to anticipate the presence of children upon the track, and alleges, as the cause of the accident, the neglect of the engineer to see the child when he should and could have seen him. The negligence set out in the third count is the negligent operation of the train by the engineer after he saw the child.

It is manifest that the child was a trespasser upon the track of defendant corporation. This from our conclusion upon the exceptions under the first count and in view of these provisions of statute: "No railroad corporation shall be liable for the death of any person walking or being upon its road contrary to law. . . . R. S., c. 52, § 76. "Whoever without right, stands or walks on a railroad track—forfeits not less than five nor more than twenty dollars to be recovered by complaint." Id., § 77.

Being a trespasser, the defendant owed the plaintiff no duty save to refrain from wantonly or wilfully injuring him. *Russell v. M. C. R. R. Co.*, 100 Maine, 406, 408; *Elie* v. *Street Ry. Co.*, 112 Maine, 178, 180. The burden of showing the breach of such duty is upon the plaintiff.

The evidence tending to show that the engineer had reason to anticipate that children might be on the track at or near the spot where the child was, we must hold to be insufficient to sustain the proposition.

The gravamen of the second count is the failure of the engineer to see the child when he could and should have done so and of the third count that, seeing the child, he so carelessly and negligently managed the train as to kill the child.

The evidence upon both these matters is very meagre. The only eye witness of the casualty who testified is defendant's gate keeper at the Main street crossing, which must be at least three hundred feet westerly of the place where he first saw the child. The Saco

station, where the train was scheduled to stop, is some distance west of Main street. He states that the bell at his gate house rang indicating the approach of the train; that in his judgment the automatic appliance which causes the bell to ring is less than a quarter of a mile from the gate house; that he lowered his gate and then looked down the track easterly towards the approaching train; that he saw near the switch an object which he thought was a piece of paper; that later the object moved and he recognized it as a child; that the train approached the switch upon a curve and until it had proceeded westerly upon the curve for some distance, he could not see it; that before he could see it, he heard the alarm whistle which continued to sound after the train came into view; and that, as the train came into sight, the emergency brake was applied. There is also testimony that the view of the track is unobstructed for a distance of over five hundred feet easterly of the switch and that the train was two hundred feet westerly of the switch before it stopped. But all this testimony, taken as true, falls far short of evidence upon which a jury could find wanton or reckless conduct, either in failing to seasonably see the child or, when seen, in failing to use all efforts to stop the train. The presumption is that the engineer did his duty and it is inconceivable that any man would not do all within his power to avoid the commission of such an injury as befell plaintiff's child. To say otherwise upon the evidence would be to substitute for proof, guess or conjecture. *Russell* v. *M. C. R. R.*, 100 Maine, 406, 409; *Titcomb* v. *Powers*, 108 Maine, 347, 349. See also *Leighton* v. *Wheeler*, 106 Maine, 450, 453, 455, 456.

The exceptions must be overruled.
So ordered.

LAPOINTE MACHINE TOOL COMPANY, In Equity,

vs.

J. N. LAPOINTE COMPANY.

Cumberland. Opinion December 18, 1916.

Fair and unfair competition defined. Use of Trade Name. Use of Family Name. Trade device. Right to use family name if same has been previously transferred. Transfer of good will. Dealing in articles easily subject of mistake by imitation or mis-branding as compared with dealing in valuable machinery, or piece of machinery purchased by mechanical experts.

In a bill in equity brought to enjoin the defendant from using the name "Lapointe" in any way in connection with its corporate name or its products, and also to recover damages for loss of profits on the ground of unfair competition;

Held;

1. This case does not involve in any degree the question of trade marks nor the rights which pertain to patented articles. The sole issue is that of unfair competition.
2. As the injunction sought in this class of cases operates as restraint in the mercantile field it is a principle of equity based upon caution that to justify an injunction the case must be unmistakably clear and the proof full and convincing.
3. Competition in trade is of two kinds, fair and unfair; and unfair competition may be subdivided into the ethically unfair and the legally unfair. Courts have to do only with the latter. Many acts between keen business rivals which might offend the golden rule do not violate the legal rule.
4. Unfair competition consists in beguiling or attempting to beguile the purchasing public into purchasing the wares of the offender under the belief that they are buying the wares of a rival. The essence of the action is fraud and the prohibition is confined to cases where the wrongdoer has resorted to some form of deception. The plaintiff must prove a fraudulent intent to deceive or show facts or circumstances from which such an intent can be reasonably inferred.

5. If the defendant, although a sharp and vigorous competitor, so conducts its business as not to palm off its own products as those of the plaintiff, the action fails. It has kept within its legal rights.
6. The question of unfair competition is one of fact, to be determined by the evidence and circumstances in each particular case, considered in the light of certain well defined rules of law.
7. Some of the complaints, such as the motive of Lapointe in leaving the old company, the hiring of many of its employees, and the change in cable address, are of minor importance and, if proved, fall within the domain of the unethical rather than the unfair. But the evidence fails to substantiate the significance claimed for them.
8. In the absence of contract, estoppel or fraud, any person can use his own name in all legitimate ways and either as a part or the whole of a corporate name.
9. No contract right to the exclusive use of the name "Lapointe" existed in the plaintiff, and the record does not show such conduct on the part of either Lapointe or the defendant as will warrant with the application of the doctrine of equitable estoppel.
10. While family names sometimes acquire a secondary meaning and come to denote not merely origin but quality, the acquisition of such a secondary meaning is a matter of proof and the proof here is lacking. Lapointe had come to stand for a certain type of machine, but was not a brand or trade name.
11. As the originator of this particular process, Lapointe had the right to avail himself of his reputation and to use his name in the new corporation provided he exercised care to prevent the public from believing that his product, or the product of the new company, was the product of the old, or that the new company was the successor of the old.
12. The machines themselves, although somewhat similar in outline and appearance, especially to the inexperienced layman, possess points of marked difference to the expert mechanic. They are marked with no special device, but with the name and residence of the maker. The partial dissimilarity in name and the entire dissimilarity in residence should tend to prevent confusion in the minds of purchasers.
13. The defendant by its letters, circulars, advertisements and oral representations made all reasonable effort to acquaint the trade with the situation, and to differentiate between the two companies and their products. It obviously desired to avoid and not to create confusion, and it claimed superiority for its own machine over those of the plaintiff.
14. The test on the question of similarity is the likelihood of deceiving an ordinary purchaser who is exercising ordinary care. In applying the test regard must be had to the nature and physical requirements of the article itself, its cost, the class of persons who purchase it and the circumstances under which it is purchased.

15. These machines are not sold like articles of merchandise in common use which are sold through middlemen to the general and undiscriminating public, but either directly or through sales agents to a limited and specialized trade composed of mechanical experts who are not apt to purchase without careful investigation and examination.
16. The evidence fails to prove that the defendant either succeeded in palming off its product as the product of the plaintiff, or attempted to do so. The defendant belongs in the class of legitimate and not unfair competitors.

Bill in equity brought by plaintiff company against the defendant, both organized under the laws of the State of Maine, alleging, among other things, unfair competition on the part of the defendant and asking the court to enjoin the defendant company from using the name "Lapointe" in any way connected with its business, and also asking for damages on account of loss of trade and profits therefrom. Temporary injunction granted by single Justice. Questions of law having arisen of sufficient importance and doubt to justify the same, and the parties agreeing thereto, case was reported to the Law Court for decision upon bill, answer, replication and evidence, including original exhibits produced in court. Upon so much of the evidence as legally admissible, the Law Court is to render such judgment as the rights of the parties, legal and equitable, shall require. If the Law Court shall find for the complainant, this case is to come back for determination by a master of the damages and profits. Temporary injunction dissolved and bill dismissed with costs. Decree in accordance with opinion.

Case stated in opinion.

James A. Tirrell, of Boston, Mass., and Woodman & Whitehouse, for plaintiff.

Philip Z. Hankey, of New London, Conn., and Williamson, Burleigh & McLean, for defendant.

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

CORNISH, J. This bill in equity is brought by the Lapointe Machine Tool Company of Hudson, Massachusetts, against the J. N. Lapointe Company of New London, Connecticut, both corporations having been organized under the laws of this State, to enjoin

the defendant from using the name "Lapointe" in any way in connection with its corporate name or its products, and also asking for damages for loss of profits. The cause is before this court on report, a temporary injunction having been issued by the sitting Justice. The essential facts may be outlined as follows:

Both the plaintiff and defendant companies are manufacturers of what is known in the mechanic arts as broaching tools and broaching machines. A broaching tool, or a broach, as it is sometimes called, is made from a solid bar of steel in which teeth are cut, each succeeding tooth being a little longer than the preceding. A broaching machine is operated by either pushing or pulling a broach through an internal section of metal changing its contour or outline. The cutting of a key way is a simple illustration. Broaching tools and machines of various designs have been known to the trade for many years.

In 1896 Joseph N. Lapointe, then an employe of the Pratt and Whitney Company of Hartford, Connecticut, after many experiments originated a system of broaching which was a marked improvement on the methods then in use. This improvement in the broaching tool consisted in making the cutter teeth an integral part of the bar instead of having separate teeth attached to the bar. He also designed and built a broaching machine of a new model adapted to do the work by this new system. Some of the older machines then in use were upright. The Crompton and Knowles type which he had been using in the Pratt and Whitney shop was of the horizontal type but with a rack and pinion drive. The machine originated by Lapointe was also of the horizontal type but with a nut and screw drive. This increased the power, and the new system combining both the machine and the improved tools enhanced the production and enlarged the scope of the work.

On March 3, 1902, J. N. Lapointe caused the plaintiff company to be incorporated for the purpose of manufacturing among other products these new broaching machines and broaches. He gave to it the name of the Lapointe Machine Tool Company. On March 15, 1902, he conveyed to the corporation all his patent rights, whether issued or pending, and all his right, title and interest in his patterns, drawings and designs in return for stock in the company. He himself became a director and the president and general

manager. He was the head of both the manufacturing and the business departments and was the ruling spirit in the company.

This corporation began business in a small way on Hereford street, Boston, Mass., with only three or four employes. As it had meagre capital, it, at first, did a general jobbing business and, later, manufactured portable reamers and taps. At the end of eighteen months larger quarters were secured on Atlantic avenue. In 1903 it manufactured and sold its first broaching machine. In 1906 the company moved to Hudson, Mass., where it erected a plant and has ever since remained. Its trade increased after the removal to Hudson and with the advent and development of the automobile business, beginning about 1900, the use of these machines was multiplied. Frank J. Lapointe, the plaintiff's son, early entered into the service of the company. He was made a foreman and later had practically one-half of the manufacturing at the Hudson plant under his charge. He was a skilled machinist.

In the summer of 1911, one Hall, who had been a stockholder and the treasurer for several years, but who was himself actively engaged in the insurance business in Boston, acquired the stock control of the corporation. Friction ensued and both J. N. and Frank J. Lapointe were, as they claimed, practically forced out of the company.

On July 17, 1911, immediately after severing his connection, J. N. Lapointe organized the defendant corporation, gave it his full name and began the manufacture of broaching machines and tools at Marlboro, Mass. The company remained there about eighteen months and in the early part of 1913 moved to New London, Connecticut, where a new plant had been constructed and where it has ever since been carrying on a growing business. Frank J. Lapointe entered the new concern with his father. Another son, Ralph R. Lapointe, was engaged by the plaintiff as a mechanical engineer after the withdrawal of his father and brother and is still in its employ.

This brief statement of facts makes an adequate outline for the discussion of the issues in this case. The plaintiff and defendant have been engaged in lively competition since 1912 when the new company started in active business. The plaintiff contends that this competition has been unfair on the part of the defendant, and

on December 11, 1915, brought this bill in equity to protect its rights by enjoining the defendant from the use of the name "Lapointe," and to recover damages for loss of profits. The decision of this case does not involve in any degree the question of trade marks nor the rights which pertain to patented articles. The sole issue, around which all the subsidiary and collateral issues cluster, is that of unfair competition. This is a question of fact to be determined in accordance with certain well recognized and clearly defined rules of law.

It should be stated at the outset that the nature of this form of action is such that the courts require clear and convincing proof of the plaintiff's claim. In a sense the remedy that is sought invades the realm of private enterprise and private rights, and it is only when the necessity and the justice of such invasion are made clear that the court in equity will interfere. As was said by the Federal Court, in denying an injunction in a very recent case:

"When a plaintiff provisionally stands upon grounds independent of the scope of his patent and goes to the proposition of unfair competition in trade, he prevails; if he prevails at all, under the general doctrines of equity; and when an injunction is sought, which operates as restraint in the mercantile field, it is a principle of equity based upon considerations of caution, that to justify an injunction the case must be unmistakably clear and beyond question." *Marshall Field & Co. v. Kelley Co.*, 233 Fed., 265 (1916).

Stated broadly, monopoly in trade is frowned upon, while free competition is favored by the law. There is, of course, one exception to this rule, namely patent and copyright legislation which is designed to promote invention and literary achievement. But unless a commodity is governed by these exceptional rights competition is to be desired and encouraged.

Competition, however, is of two kinds, fair and unfair, and unfair competition may be subdivided into the ethically unfair and the legally unfair. Courts have to do only with the last named. Many acts among keen business rivals which might offend the golden rule do not violate the legal rule.

Hence it is that unfair competition, as a legal term, has acquired a well defined meaning. Its definition is found in varied forms

throughout the decisions, several of which are collated in Nims on Unfair Business Competition, sec. 14, but the underlying element in all is that no person shall be permitted to palm off his own goods or products as the goods or products of another. The essence of the wrong consists in beguiling or attempting to beguile the purchasing public into buying the wares of the offender under the belief that they are purchasing the wares of a rival. The ground of the action is fraud. The prohibition is confined to cases where the wrongdoer has resorted to some form of deception. The complaining party must prove such circumstances "as will show wrongful intent in fact, or justify that inference from the inevitable consequences of the act complained of." *W. R. Lynn Shoe Co.* v. *The Auburn-Lynn Shoe Co.,* 100 Maine, 461, 476, quoting the rule adopted by the Supreme Court of the United States in *Elgin Nat. Watch Co.* v. *Illinois Watch Co.,* 179 U. S., 674.

The methods adopted to practice this deception are as varied as human ingenuity can devise. It may be by closely simulating a particular device, mark or symbol, by assuming the same or practically the same name, by the use of crafty and misleading advertisements or by false oral representations. Such conduct, calculated to steal away the custom, good will and business established and maintained by another, works both a fraud upon the purchasing public and actionable injury upon the defenceless rival. The rights of both are to be protected. Nims, sec. 16-20; *C. A. Briggs Co.* v. *National Wafer Co.,* 215 Mass., 100; *W. R. Lynn Shoe Co.* v. *The Auburn-Lynn Shoe Co.,* supra.

The converse is also true. If the defendant, although a sharp and vigorous competitor, so conducts his business as not to palm off his products as those of the plaintiff, the action fails. He has kept within his legal rights. *Howe Scale Co.* v. *Wyckoff, Seamans & Benedict,* 198 U. S., 118; *Motor Mfg. Co.* v. *Marshalltown Mfg. Co.,* 167 Iowa, 202, 149 N. W., 184; *Kaufman* v. *Kaufman,* 223 Mass., 104.

On which side of the line stands the defendant here? Is it a fair or an unfair competitor? This is a question of fact, and the answer must be found in the record. Its determination brings us to a consideration of the evidence and to the facts and circumstances relied upon by the plaintiff as proving unfair competition.

Some of these complaints are of a minor nature and even if substantiated they fall within the domain of the unethical rather than of the legally unfair. They are urged by the plaintiff as revealing an actual willful intent to defraud on the part of the defendant.

The plaintiff in the first place contends that J. N. Lapointe and his son Frank were not forced from the old company, but voluntarily withdrew because they were incited by its large and growing business to establish a rival concern of their own. The facts do not bear out this contention. It is proven to the satisfaction of the court, that after Hall had acquired the stock control and friction had developed, in an interview between J. N. Lapointe and Hall, the former offered to purchase Hall's stock at par, amounting to $11,000, although its cost was much less, and continue the business, or to sell his own stock at seventy-five cents on the dollar and agree not to engage in the same kind of business again. Hall declined both offers. He would neither sell nor buy, and Lapointe then added: "Well, then it is a question of competition." We can see in this situation neither ground of complaint on Hall's part nor evidence of bad faith on the part of Lapointe. Whether the ill feeling that had been engendered between the business head and the controlling owner was adequate cause for Lapointe's withdrawal is immaterial. It seemed adequate to Lapointe, and his statement as to competition was frank and plain. Deception does not show its hand so openly.

The plaintiff further claims that in order to injure the plaintiff's business by causing it to make errors in filling duplicate orders, Frank J. Lapointe, just before leaving the employ of the old company, fraudulently altered the company's shop sketches. This is a serious charge. It involves rank turpitude on the part of the offender and needs convincing proof. Frank J. Lapointe indignantly refutes the charge. Without discussing the evidence on this point in detail it is sufficient to say that the imputation is without substantial basis. The claim outstrips the facts.

Another complaint made by the plaintiff is that the defendant took away many of its skilled workmen in order to handicap the plaintiff's business and enable the defendant by plausible adver-

tisements to create the impression that it and not the plaintiff was the concern of long standing. It is true that several of the employes of the old company followed Mr. Lapointe into the new, but the change was voluntarily made. In most cases they sought the new employment because they wished to work under their old manager, a most natural and reasonable course on their part. The defendant advertised for help in the Hudson newspapers as it had a legal right to do. Some of the old employes answered the advertisement as they had a legal right to do. Competition in the employment of labor is full and free.

The fourth minor complaint is that Lapointe after conferences with the representatives of the telegraph company took for the new company the cable address "Lapointe-Marlboro," leaving for the old company, "Lapointe-Hudson." This does not smack of fraud. Lapointe naturally wished to incorporate his own name in the new cable address. The difference in the residence obviated any confusion, especially as the foreign business was done through sales agents who were not likely to be misled.

It is unnecessary to devote more space to minor and rather insignificant contentions. We come now to the more serious elements of the plaintiff's cause, those growing out of the name taken by the new company and the alleged fraudulent methods adopted by it, by way of advertisements and otherwise, to deceive the public and injure the plaintiff.

The name of the original corporation is the "Lapointe Machine Tool Co.," the name of the new is the "J. N. Lapointe Co." Has the adoption of that name by the defendant subjected it to the charge of unfair competition? The decisive test is whether by the use of the word "Lapointe" in its corporate name the defendant is sailing under false colors and is succeeding in palming off its machines as the machines of the plaintiff. The use of the name itself is not controlling. The manner in which it is used and the actual or probable effect are the vital questions. The gist of the action is not the employment of similar words, but the appropriation of the plaintiff's business. Thus it has been very recently decided by the Massachusetts court that the mere use of a trade name which one person has found effective in bringing his

goods to the attention of the public in one business territory, by another person in another business territory constitutes no actionable wrong. *Kaufman* v. *Kaufman,* 223 Mass., 104.

A distinction should here be noted between the use of a family name as a trade name and certain trade marks, designs or devices. The latter are arbitrary symbols adopted to designate particular goods. They are associated with those goods and no others, and rivals are not permitted to imitate them. The device in *W. R. Lynn Shoe Co.* v. *Auburn-Lynn Shoe Co.,* 100 Maine, 461, is a fair illustration. But the use of a family name is quite different, and to prohibit its use throws upon the complaining party the burden of showing the deceitful practices which are the gist of unfair competition. Nims, sec. 81.

Moreover a trade name, if it be not fanciful, gives more information than a trade device. It often gives not merely the name, individual or corporate, of the manufacturer, but the place of manufacture as well; while a trade device or a fanciful name is silent on these points and can give this information only by association.

These observations are pertinent here. It is conceded that J. N. Lapointe was the originator of this particular process and was a widely known and acknowledged expert in the art of broaching. Hence he naturally wished to avail himself of the general reputation in the trade which attached to that business, and he had a perfect right to do this provided he exercised care to prevent the public from believing that his product, or the product of the new company employing his name, was that of the old company, or that the second company was the successor of the first. *Int. Silver Co.* v. *Rogers,* 66 N. J. Eq., 119; *Stix Baer & Fuller Co.* v. *American Piano Co.,* 211 Fed., 274; *Knabe Bros.* v. *American Piano Co.,* 229 Fed., 23; *Hotel Claredge Co.* v. *Rector,* 169 App. Div., 185, 149 N. Y. Supp., 748; *Wm. Rogers Mfg. Co.* v. *Simpson, et als.,* 54 Conn., 527.

"Every person has a right to the honest use of his own name in his own business, but he will not be permitted by imitation and unfair devices to mislead the public in regard to the identity of the firm or corporation or the goods manufactured by it." *W. R. Lynn Shoe Co.* v. *Auburn-Lynn Shoe Co.,* 100 Maine, 461-473.

If the use of the name be reasonable, honest and a fair exercise of his right, the user is not rendered liable for the incidental damage caused a rival thereby. The inconvenience or loss is damnum absque injuria. The injury which results from similarity in name alone is not actionable. But the offender cannot resort to any artifice or adopt any methods calculated to deceive the purchasing public. This is settled law. *Brown Chemical Co.* v. *Meyer,* 139 U. S., 540; *Singer Mfg. Co. v. June Mfg. Co.,* 163 U. S., 169; *Elgin Nat'l Watch Co.* v. *Illinois Watch Co.,* 179 U. S., 665; *Howe Scale Co.* v. *Wyckoff, Seamans & Benedict,* 198 U. S., 118. In the case last cited, the court laid down the rule that in the absence of contract, fraud or estoppel, any person could use his own name in all legitimate ways and as a part or the whole of a corporate name. This rule can be applied here. No contract right to the use of the name "Lapointe" exists in the plaintiff. True, J. N. Lapointe allowed his surname to be used as a part of its corporate name when it was organized, and that privilege he has not attempted to and cannot take away although he has severed his connection with the company. But it is not an exclusive right. He conveyed to the company his patents, drawings and designs. He did not relinquish the exclusive right to use his name nor did he transfer his good will. Had his name been sold he could not use it in the second corporation. *Russia Cement Co.* v. *Le Page,* 147 Mass., 206; *Frazier* v. *Lubricator Co.,* 121 Ill., 147, 13 N. E., 637; *Symonds* v. *Jones,* 82 Maine, 302; *Kidd* v. *Johnson,* 100 U. S., 617. But as neither the use of his name as a trade name nor his good will was transferred, no contract right therein belongs to the plaintiff. *Hezelton Boiler Co.* v. *Hezelton Tripod Boiler Co.,* 142 Ill., 494, 30 N. E., 339.

Nor is there proof of conduct on the part of Lapointe such as to create an equitable estoppel. This claim is urged by the learned counsel for the plaintiff, but the record fails to disclose acts which will warrant the application of that doctrine. The cases cited to support the contention are based upon facts vitally dissimilar from those that confront us here. They are readily to be distinguished.

This eliminates all but the third restriction upon the use of one's name as held in *Howe Scale Co.* v. *Wyckoff etc.,* supra, and that

is the presence of fraud. We are back again then upon the original proposition that fraud is the essence of this proceeding and that it is the deceiving use of the name and not the use itself which compels relief.

What then is the character of the use which the defendant has made of the word "Lapointe"? Was it chosen as a cover for unfair competition? Has it been used craftily, with the purpose of misleading the purchasing public, and has the wrongful design been accomplished? In the judgment of the court these questions must all be answered in the negative and for the following reasons:

In the first place the name selected, while it contained the surname of the originator of the process, did not copy it closely. There is a marked difference between the "Lapointe Machine Tool Co." and the "J. N. Lapointe Co." The new name did not so much imitate the old as it emphasized the personal association of its owner with the new.

In the second place the broaching machines themselves are marked with no special device, simply the maker's name and the residence. On the machines of the plaintiff are the words "The Lapointe Machine Tool Co., Hudson, Mass., U. S. A.," on the machines of the defendant, "The J. N. Lapointe Co., Marlboro, Mass., U. S. A.," and after the removal "The J. N. Lapointe Co., New London, Conn., U. S. A." The partial dissimilarity in name and the entire dissimilarity in residence should tend to prevent confusion in the minds of the trade. The place of business of rival concerns, whether in the same or different towns, is always a point to be considered. *Holmes, Booth & Hayden* v. *Holmes, Booth & Atwood,* 37 Conn., 278; *Viano* v. *Baccigalupo,* 183 Mass., 160; *W. R. Lynn Shoe Co.* v. *Auburn-Lynn Shoe Co.,* 100 Maine, 461.

Moreover the machines themselves though somewhat similar in outlines and appearance, especially to the ordinary and inexperienced layman, possess points of marked difference to the expert mechanic, and these differences became more conspicuous as the defendant added one improvement after another. It must not be overlooked that in the manufacture of a machine the maker is limited as to general form and design by the very nature of the article itself. It must be adapted to a particular kind of work,

and hence must necessarily assume the form calculated to perform that work best. No intention to imitate should be inferred therefrom. It is quite different from the wide option left open to the manufacturer of commodities which are designated by labels, or wrappers, or form of package. Here there is no excuse for imitation, as in packages of chocolate, *Baker* v. *Slack,* 130 Fed., 514, or velvet candy, *Hildreth* v. *McDonald Co.,* 164 Mass., 16, or shoes, *W. R. Lynn Shoe Co.* v. *Auburn-Lynn Shoe Co.,* supra.

The plaintiff urges however that "Lapointe," although primarily a family name, has acquired a secondary meaning and has become identified with the products of the plaintiff company. That it denotes not merely origin but quality, and it cannot be used by the defendant as a corporate or trade name since that would necessarily create the impression that the defendant's products are those of the plaintiff. It is true that family names do sometimes acquire such a secondary meaning, as "Rogers Silver," *International Silver Co.* v. *Rogers Co.,* 110 Fed., 955, or "Baker's Chocolate," *Walter Baker & Co.* v. *Slack,* 130 Fed., 514. But the acquisition of such a secondary meaning is in every case a matter of proof, and the evidence here does not sustain the claim. There is no evidence that the broaches were marked at all, and the machines were not marked as "Lapointe" products, but like all heavy machines of like character with simply the name and business location of the maker. The plaintiff's advertising by catalogue or through the trade journals followed for the most part the same course. The machines came to be known in the trade simply as the type of broaches, propelled by nut and screw in a horizontal plane, made by the Lapointe Machine Tool Co., of Hudson, Mass. As one of the plaintiff's witnesses put it, the machine was known as a Lapointe broaching machine and "Lapointe" was used, not as a descriptive trade name like "Perfection Cigarettes," because, to quote his own language: "I take it that 'Perfection' is a brand or trade name, while 'Lapointe' is descriptive of a type, as between a hoist bridge and a swing bridge."

We come now to the circulars and advertisements issued by the defendant. They are of great value in ascertaining the good or bad faith and the honest or fraudulent purpose of the new com-

pany and of J. N. Lapointe as its head. *Goodyear Mfg. Co.* v. *Goodyear Rubber Co.*, 128 U. S., 598; *Howe Scale Co.* v. *Wyckoff, Seamans & Benedict*, 198 U. S., 118, 139. After the Lapointes had left the old company and formed the new, the new corporation made thorough and persistent efforts to state the exact facts and acquaint the trade with the true situation. It obviously desired to avoid confusion, not to create it; to sail under its own colors not under the colors of another, and to sell its products as its own and not as those of the rival. Immediately after the organization of the new company it sent out postal cards to all the trade and all prospective customers, including the customers of the old company, announcing the formation of the new corporation and the establishment of its business at Marlboro, Mass., asking for patronage and adding: "Mr. J. N. Lapointe and son Frank J. Lapointe have had nine years' experience in this line of work in their former connection with the Lapointe Machine Tool Company and are justified in considering themselves not only the pioneers but the systematizers of the broaching system as they have put it into practical use." This was signed "The J. N. Lapointe Company, Marlboro, Mass." This was followed by a circular letter of the same import to all manufacturers of automobiles, of automobile parts, and to many other metal working concerns and machine shops. Agencies were established throughout the United States and J. N. Lapointe personally visited many of them as well as many automobile manufacturers throughout the central west, about three months after the business started. He explained to all that he had severed his connection with the old company, had established the new, and proposed to make broaching machines possessing valuable improvements, and he instructed his agents to always make the same distinction. The evidence shows that these instructions were followed.

In addition to these precautions the defendant advertised in the trade paper, "American Machinist," for six months, emphasizing in different forms the fact that J. N. and Frank J. Lapointe had left the old company and formed the new, and after the removal to New London, Conn., the trade was informed of that removal. We can hardly conceive what additional steps could have been taken by the defendant to explain to the purchasing public the

existence of two corporations and to disabuse their minds of any connection between the two. The defendant continued to advertise in the trade journals as did the plaintiff. The defendant in many advertisements stated that the Lapointes were the originators of the system. Such was the fact and the new company had the legal right to advertise it. *Fish Bros. Wagon Co.* v. *Fish,* 82 Wis., 546. A few advertisements crept in which might be somewhat objectionable if taken literally, but we think this was due not to design but rather to the inattention of the defendant in trusting too much to the publisher, and in not critically examining the phraseology before it appeared in print. As a whole the advertisements made a clear distinction between the two corporations and their respective products. In many instances the advertisements of both appear upon the same or opposite pages and this at the request of the defendant. They were the product not of a designing and deceiving imitator but of an open and confident competitor. The man of ordinary caution and discernment had no excuse for being misled thereby.

In this connection another important fact should be kept in mind. We are not dealing here with merchandise or articles in common use, which are advertised and sold to the general and indiscriminating public, like shoes, breakfast food, chocolate, soap, candy, &c., &c., articles which may easily be the subject of mistake, but we are dealing with a valuable machine, involving a substantial expenditure of money, designed for a particular work and purchased only by men who are mechanical experts and know precisely what they want and what they are buying. It is a limited and specialized trade. The customers are men with trained mechanical eye and brain who do not purchase a machine of this character and value without careful examination and consideration. These machines are not sold to middlemen, like ordinary articles of trade, but by the manufacturer to the user, either directly by the company or indirectly by its sales agents. The likelihood of palming off the defendant's machines for the plaintiff's, even if the defendant desired to do so, is very remote.

The test applied by the courts on the question of similarity is the likelihood of deceiving an ordinary purchaser who is using ordinary care, and in applying that test regard must be had to the nature

and physical requirements of the article itself, its cost, the class of persons who purchase it, and the circumstances under which it is purchased. *Fairbanks Co.* v. *Bell Mfg. Co.*, 77 Fed., 869; *Barnes Co.* v. *Vandyck Chemical Co.*, 207 Fed., 855, affirmed in Circuit Court of Appeals, 213 Fed., 637 (1914); *Wirtz* v. *Eagle Bottling Co.*, 50 N. J. Eq., 164; Nims, sec. 39, 40.

Perhaps the best test of whether certain acts are likely to deceive is whether after being continued for a series of years they have in fact deceived. The evidence here is lacking to prove that the public have been misled or that substantial confusion has been created. Through carelessness or mistake a few letters or orders or telegrams are shown to have been sent to the one concern when they were intended for the other, but the witnesses themselves admitted the error and that very fact admits also their knowledge of the existence of the two concerns. *Motor Mfg. Co.* v. *Marshalltown Mfg. Co.*, 167 Iowa, 102. Considering the volume of business transacted the confusion would seem to be negligible. One of the leading sales agents for the plaintiff, and its own witness, intelligently sums up the situation on the question of confusion. He states that competition began early in 1912, and this competition increased the difficulty of selling his own make. Customers then wished to know which was the original Lapointe broaching machine, and he explained that his was the original. But he says that "today the purchaser of this type of machine is familiar with both companies and in conversation a customer merely asks which Lapointe broaching machine I am handling."

This is undoubtedly a correct statement of the present situation. Any slight misapprehension that may have at first existed on the part of the public has ceased. It is five years since the competition started. It has been persistent and vigorous. But its very intensity on both sides has served to dispel all possible misunderstanding. The defendant apparently is proud of its product and has endeavored to impress upon the trade its superiority over the product of the rival plaintiff. It wishes to be known and is known not as the old company, nor as its successor, but as a distinct and pushing competitor.

The case of *W. R. Lynn Shoe Co.* v. *The Auburn-Lynn Shoe Co.*, 100 Maine, 451, so often referred to before, is confidently relied upon by the plaintiff in support of its various contentions. The principles of law laid down in that case so far as applicable are reaffirmed in this. But that decision depended, as in every case it must depend, upon the particular facts involved, and the court, after discussing the evidence, reached this conclusion: "The entire history of the conduct of the shoe business by the defendant corporation after the retirement of W. R. Lynn from the plaintiff company, discloses a manifest intention and persistent effort on the part of the management to beguile the old customers of the plaintiff company into purchasing the defendant's shoes under the impression that they are the Auburn-Lynn product manufactured by the plaintiff and thereby to appropriate the value of the reputation which the latter had acquired. It shows a determination to continue such efforts until compelled by the courts to forbear."

With equal truth it can be said in the case now before us that the entire history of the conduct of the machine business by the defendant corporation after the retirement of the Lapointes from the plaintiff company discloses no such fraudulent intention and no such inequitable effort as was there discovered and decried. We find in the appallingly voluminous record an entire lack of proof that the trade has been imposed upon and beguiled, or that the conduct of the defendant has been calculated to produce that result. Legitimate competition relies on the intrinsic merits of its own goods and offers to purchasers a choice of selection between the articles exposed for sale. Unfair competition seeks to appropriate the reputation of another and to dispose of its product as the product of that other. The former acts openly, though it may be with energy. The latter acts cunningly and in disguise.

It is the opinion of the court that the defendant belongs in the class of the legitimate and not the unfair competitors. The temporary injunction is therefore to be dissolved, and the bill dismissed with costs.

Decree in accordance with the opinion.

ROBERT P. COOMBS *vs.* WILLIAM L. WEST.

Waldo. Opinion December 21, 1916.

General rules of construction. Rule where land is described as bounded by other land. Where land is bounded by a non-navigable fresh water stream or party wall. Where a tree or rock is given as one of the boundaries. General rule where reference is made in a deed to a tree as a boundary or monument

1. The general rule of construction of a deed may be thus stated; whenever land is described as bounded by other land, or by a building or structure, the name of which, according to its legal and ordinary meaning, includes the title to the land of which it has been made a part, as a house, a mill, a wharf, or the like, the side of the land or structure referred to as a boundary is the limit of the grant; but when the boundary line is simply by an object, whether natural or artificial, the name of which is used in ordinary speech as defining a boundary, and not as describing a title in fee, and which does not in its description or nature include the earth as far down as the grantor owns, and yet which has width, as in case of a way, a river, a ditch, a wall, a fence a tree, or a stake and stone, then the center of the thing so running over or standing on the land is the boundary of the lot granted.
2. Where a grant is bounded upon a non-navigable fresh water stream, a highway, a ditch or a party wall, or the like, such stream, way, ditch or wall are to be deemed monuments located equally upon the land granted and the adjoining land, and in all such cases, the grant extends to the center of such monument. It is, however, competent for the grantor to limit his grant as he may choose. He may exclude or include the entire monument, and run his line either side, or to the center thereof, at his pleasure, by the use of apt words to indicate his intention so to do.
3. When walls, fences and the like are referred to as monuments, if they are of considerable thickness or width, the boundary line is always in the center of the monument, as has been seen in the case with streams and highways.
4. A monument is a fixed place on the earth, a reference in a deed to a tree as a boundary or monument carries to the center of the tree, and, as the years go by, the tree increases in size the monument remains the same.

Writ of entry. Plea of general issue. Case was reported to Law Court upon agreed statement, the Law Court to render such

judgment as the law and facts require. In the defendant's deed the following words were used: "Beginning at a point in the northerly line of Franklin street, so called, four rods easterly of the tree standing on the southwesterly corner of the land conveyed to Charles E. White by Isaac M. Boardman." Under one of the stipulations it was agreed that if, under the construction placed upon the deeds by the court this measurement commenced at the center of the tree, judgment to be rendered for the defendant; otherwise, for plaintiff. Judgment for defendant.

Case stated in opinion.

Dunton & Morse, for plaintiff.

Arthur Ritchie, for defendant.

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

HALEY, J. This is a writ of entry to recover a strip of land about two feet in width on the northerly side of Franklin street in Belfast, and two feet and eight inches in width at the northerly line of the adjoining lots of plaintiff and defendant, and is reported to this court on an agreed statement of facts.

On the 13th day of September, 1898, one Isaac M. Boardman conveyed to Charles E. White, by deed, duly recorded, the land comprising the adjoining lots of the plaintiff and defendant. The land was conveyed as one lot. On the 26th day of October, 1898, Charles E. White conveyed, by warranty deed, to M. L. Mitchell so much of that lot as lies easterly of the following described line, to wit: "Beginning at a point in the northerly line of Franklin street, so called, four rods easterly of the tree standing in the southwesterly corner of the premises conveyed to said White by said deed from Boardman, and extending thence parallel with the line of Congress street, so called, to the northerly line of said premises."

April 28, 1908, Mitchell conveyed the premises to defendant West. February 9th, 1909, Charles E. White conveyed to Robert B. Coombs, the plaintiff, land now owned by him described in the deed as follows: "A certain lot or parcel of land with the buildings

thereon situated at the junction of Franklin and Congress streets in said Belfast, and bounded and described as follows, to wit: 'Bounded northerly by land of Mrs. Lefia Cottrell, easterly by land of W. L. West, southerly by Franklin street and westerly by Congress street, being the same premises conveyed to me by Isaac M. Boardman by his warranty deed dated September 13, 1898, and recorded in Waldo County Registry of Deeds in Book 204, Page 170, except so much thereof as was conveyed by me to Martin L. Mitchell by deed recorded in said registry.' "

It is agreed that if, under the construction placed upon the deeds by the court, the measurements commenced at the center of the elm tree judgment is to be rendered for the defendant, otherwise for plaintiff.

In City of Boston v. *Richardson,* 13 Allen, 154, the court states: "The general rule of construction may be thus stated; whenever land is described as bounded by other land, or by a building or structure, the name of which, according to its legal and ordinary meaning, includes the title to the land of which it has been made a part, as a house, a mill, a wharf, or the like, the side of the land or structure referred to as a boundary is the limit of the grant; but when the boundary line is simply by an object, whether natural or artificial, the name of which is used in ordinary speech as defining a boundary, and not as describing a title in fee, and which does not in its description or nature include the earth as far down as the grantor owns, and yet which has width, as in case of a way, a river, a ditch, a wall, a fence, a tree, or a stake and stone, then the center of the thing so running over or standing on the land is the boundary of the lot granted." In *Bradford* v. *Cressey,* 45 Maine, 13, the court states: "And it is undoubtedly true, that where a grant is bounded upon a non-navigable fresh water stream, a highway, a ditch or a party wall, or the like, such stream, way, ditch or wall are to be deemed monuments located equally upon the land granted and the adjoining land, and in all such cases, the grant extends to the center of such monument. It is, however, competent for the grantor to limit his grant as he may choose. He may exclude or include the entire monument, and run his line either side, or to the center thereof, at his pleasure, by the use of apt words to

indicate his intention so to do." In *Schneider* v. *Jacobs,* 86 Kentucky, 101, in speaking of a street as a monument, the court said: "The street, in such a case, is regarded as a single line; and as a single line it becomes a boundary of the lot. It is as a tree or rock which is called for as a boundary. The terminus of the line is ordinarily the center of the tree or rock unless the vendor's title to the property conveyed extends only to the edge of the tree or rock; and in the same manner the street is a monumental boundary." In *Jacobs* v. *Woolfolk,* L. R. A., 9, page 551, the court quotes from the Schneider case, and further says: "As seen, the street or alley is to be regarded as a single line, and the conveyance is to be treated as being the center thereof, the same as if a tree or rock had been called for. In other words, the center of the street or alley is one of the lines called for in the deed; and as long as the deed stands unattacked for fraud or mistake, it is to be conclusively presumed that it speaks the intention of the parties. Of course the parties may agree in the deed that the edge of the street is to be the dividing line. So also may they agree as to the tree or rock." In *Warner* v. *Southworth,* 6 Conn., 470, the plaintiff owned the lot described in his declaration, and the land adjoining thereto on the south that was owned by the defendant at the time of the acts complained of. The plaintiff threw up a bank and sank a ditch across the land for his own accommodation, and for a division between the north and south lots. This ditch he made about six feet wide, throwing the earth out on the north side of it. Afterwards he sold the south lot to Edward A. Leet, bounded it north on the ditch, and the same land the defendant owned at the time complained of. The evidence showed that the defendant, at the time of the trespass complained of, dug out the earth more than four feet from the center of the ditch and filled up the same on the south side of it to a height not exceeding the height of the defendant's land adjoining. The judge charged the jury that, "by the conveyance, the defendant owned the land to the center of the ditch, that where no division had been made, as in the case, the ditch was the common fence of both proprietors, and each had a right to repair it when it decayed for the common benefit of both lots, in a reasonable manner, according to the rules of good husbandry, but not to dig

more than four feet from the center line throwing and laying the bank on his own land."

The first objection to the charge was that by the conveyance the north line of the defendant was not the center of the ditch. The court said, "To this it is answered that where a conveyance is made bounded on a river not navigable the grantee holds to the center of the river, (citing cases). There is no doubt that had this been a river such is the law, and if it be considered as a common fence, as I supposed it to be, the law is the same. Doubtless had the boundary line been a stone wall six feet in width at the bottom, the grant would have extended to the center of it. This grant, by analogy, should be so construed. The charge upon this point is correct."

"When walls, fences, and the like are referred to as monuments, if they are of considerable thickness or width, the boundary line is always in the center of the monument, as has been seen in the case with streams and highways." Tiedman on Real Property, paragraph 838.

At the time of giving the deed to Martin L. Mitchell of the premises now owned by the defendant West, the tree mentioned was at the southwesterly corner of land conveyed to Charles E. White by Isaac Boardman, a part of which Charles E. White conveyed to Mitchell, it was on the boundary line, a monument at the southwest corner of the land conveyed by Boardman, and in selecting it as a monument from which to run the line of the land conveyed to the defendant, West, the grantor, used the same language that he would have used if he had been conveying the lot, or part of the lot, that adjoined the tree at the southwest corner. It was referred to as four rods easterly of the tree standing at the southwest corner. That language in a deed would have conveyed to the center of the tree, if the tree was standing at the southwest corner, and the parties used the description of it the same as they would if they had been making a deed of the other half of the lot, not from the outer edge of the tree, but from the center of the tree. "A monument is a fixed place on the earth, a reference in a deed to a tree as a boundary or monument carries to the center of the tree, and, as the years go by, the tree increases in size the monu-

ment remains the same." Otherwise, the monument would change with time. As the tree grew, if the monument was then outside of the tree, the lot would narrow up, and if lots were sold upon both sides of the tree, in the course of time there would be a strip of land upon which the tree stood that, although not owned by the grantor after the giving of his deeds, would appear to be his by the lapse of time and the action of nature.

There being no ambiguity in the deed of White to Mitchell, under whom the defendant claims, it is the duty of the court to construe it, and it is the opinion of the court that it was the intention of the parties and the legal construction of the language used, that the parties to the deed referred to the tree standing at the southwest corner of the White property as a monument, the same as they would have referred to it as a monument if they had been deeding the land at the southwest corner of the lot, and that the monument referred to by the deed, viz., the tree, was of considerable thickness or width, the point of the monument from which the measurement should begin is the center of the tree standing at the southwest corner of the lot conveyed to White by Boardman. Therefore the mandate must be,

Judgment for defendant.

LOWELL E. BAILEY, in Equity, *vs.* GROVER K. COFFIN, et als.

Washington. Opinion December 22, 1916.

Deeds impressed with a trust. Equitable proceedings to compel conveyance, where party making agreement to convey has sold or conveyed his rights and interest. Rule of law where grantee had no notice of any agreement. Burden of proof where appeal is entered from the finding of fact of a single Justice sitting in Equity. What will constitute "Notice of a deed impressed with a trust."

Process to determine equitable rights in real estate. In the court below the bill was dismissed as to all defendants, except John G. Ray. A decree was made ordering him to execute and deliver to the plaintiff a quit claim deed of the premises, conditional upon the plaintiff's payment to Ray of one hundred twenty-six dollars and forty-two cents, less plaintiff's costs. Exceptions to and appeal from this decree were taken by Ray.

The plaintiff introduced a written memorandum of the following tenor: "This certifies that Benjamin & Jacob Bailey is entitled to a contract from the trustees of the Bingham Estate, for lots No. 73, 74, 128 and Pt. Lots No. 62, containing 360 acres more or less, the purchase money being $250., payable $50. down and $50. yearly until paid, with interest.

"Baring, Nov. 17, 1873. A. B. Getchell."

He also introduced quit claim deeds, unrecorded, from the Baileys through a brief line of conveyances to himself.

The memorandum was recorded in the proper registry of deeds on January 17, 1903.

The defendant introduced a recorded quit claim deed from the Bingham estate to one Coffin and a like instrument, recorded, from Coffin to himself. The deed to Coffin was dated prior to the record of the memorandum introduced by the plaintiff, but the oral testimony showed that Coffin knew before he took his deed that the land had been bargained to the Baileys. The deed from Coffin to the defendant was dated subsequent to the record of plaintiff's memorandum.

While in a court of law an agreement to sell and convey land is wholly executory, and until executed the vendee acquires no interest in the land, and the legal title remains in the vendor who may convey it to any other person than the vendee, despite the protest of the latter, yet equity regards what ought to be done as done, and hence in an agreement for the sale of land, so far as the interest in the land is concerned, the agreement is con-

sidered as executed by the equity court, which treats the vendee as the equitable owner of the land and the vendor as owning the consideration, which consideration draws to it the equitable right of property in the land, and he who pays for it becomes the true beneficial owner, and a trust is thereby created in his favor. And while the contractor or vendor still holds the legal title, he holds it as the trustee for the vendee. And this naked trust, impressed upon the land, follows it into whosoever hands it may go by subsequent conveyances, until it reaches some holder who is a bona fide purchaser thereof for a valuable consideration without notice of the original vendee's title, and then it becomes relieved of the trust.

The purchase price to the Baileys was $250. on which $210 had been paid.

Held;

1. That Coffin was not a purchaser without notice, because of the oral testimony in the case.
2. That the defendant was not a purchaser without notice by virtue of R. S. chap. 75, sec. 15, which declares "The title of a purchaser for a valuable consideration . . . cannot be defeated by a trust, however declared or implied by law, unless the purchaser . . . had notice thereof. When the instrument, creating or declaring it, is recorded in the registry where the land lies, that is to be regarded as such notice."
3. That the plaintiff's memorandum, recorded before defendants' deed was obtained was an instrument creating the trust above referred to and its record is to be regarded as notice.
4. That the naked trust imposed upon the land by the memorandum followed the land into the hands of Coffin.
5. The contentions of the defendant as to form of the agreement, authority of Getchell to sign the same, occupancy of the premises, laches of plaintiff, in not paying balance of purchase price and obtaining deed, and staleness of plaintiff's claim were questions presented and combatted in the realm of fact and determined as such by the sitting Justice. "The findings of a single Justice, in equity procedure, upon questions of fact necessarily involved, are not to be reversed upon appeal unless clearly wrong, and the burden is upon the appellant to satisfy the court that such is the fact, otherwise the decree appealed from must be affirmed." *Haggett* v. *Jones,* 111 Maine, 348.

Bill in equity asking that defendant, Ray, be ordered and decreed to give to complainant a conveyance of certain real estate and that the other defendants, Edward Chase and Clifford Chase, be ordered to render an accounting of the timber, wood and growth cut on said land in dispute and taken by them. The defendant Ray filed a demurrer to the bill, which was overruled by the Justice presid-

ing, and also filed answer. After hearing, the Justice presiding filed a decree ordering that defendant, Ray, make said conveyance prayed for, and dismissed bill as to the other defendants, without costs. To this finding of the single Justice, defendant Ray filed exceptions, and entered his appeal to Law Court. Exceptions overruled. Appeal denied. Decree below affirmed.

Case stated in opinion.

Ashley St. Clair, H. H. Gray, and J. H. Gray, for plaintiffs.

John P. Deering, and A. D. McFaul, for defendants.

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

BIRD, HALEY and MADIGAN do not concur.

PHILBROOK, J. This is a proceeding brought to ascertain and determine the equitable rights of the parties in certain real estate. The plaintiff offered a written memorandum of the following tenor:

"This certifies that Benjamin & Jacob Bailey is entitled to a contract from the Trustees of the Bingham Estate, for lots No. 73, 74, 128 and Pt. Lots No. 62 containing 360 acres more or less, the purchase money being $250, payable $50 down and $50 yearly until paid with interest.

"Baring, Nov. 17, 1873. A. B. GETCHELL."

The above was recorded January 17, 1903, in the Registry of Deeds for the county in which the land was situated. He also offered conveyances as follows:

Jan. 30, 1903 Quit claim deed of interest in these lots, from Jacob Bailey to Benjamin Bailey, apparently not recorded.

May 22, 1906 Quit claim deed of interest in same lots, from Benjamin Bailey to Joseph F. Preston, apparently not recorded.

Feb. 24, 1909 Quit claim deed of interest in same lots from Joseph F. Preston to Lowell E. Bailey, the plaintiff, apparently not recorded.

There were also offered the following conveyances:

Jan. 8, 1901 Quit claim deed of interest in same lots (with other real estate) from the Trustees of the Bingham Estate to Joseph A. Coffin; recorded January 25, 1901.

Sept. 23, 1903 Quit claim deed of interest in same lots, from Joseph A. Coffin to Joseph G. Ray, the defendant, duly recorded.

Thus it will be seen that, while the defendant claims the land by virtue of the two recorded quit claim deeds last referred to, the plaintiff claims rights in the land which, as he says, a court in equity should recognize and enforce because of the documentary and other evidence which he offers.

The bill was dismissed below as to all defendants except John G. Ray. A decree was made ordering him to execute and deliver to the plaintiff a quit claim deed of the premises, conditional upon the plaintiff's payment to Ray of one hundred twenty-six dollars and forty-two cents, less plaintiff's costs. Exceptions to and appeal from this decree were taken by Ray.

The latter, together with his answer, had seasonably filed a demurrer which was overruled, and to this ruling also exceptions were seasonably taken and allowed.

Since the demurrer, by its terms, challenges the jurisdiction of the equity court as to this cause, we must first determine that question. It should be observed that this is not a proceeding between the original parties to a contract for a conveyance of real estate, in which plaintiff seeks a decree for specific performance, but one in which the plaintiff claims to have succeeded to the rights of the contractee for a conveyance, while the defendant is claiming by deeds from the contractor subsequent to the date of the agreement on which the plaintiff relies. If the controversy at bar were to be determined in a court of law, we should not overlook the fact that in such a forum an agreement to sell and convey land is wholly executory, that until executed the vendee acquires no interest in the land, and that the legal title remains in the vendor who may convey it to any other person than the vendee despite the protest of the latter. But we are in the court of the chancellor where equity regards what ought to be done as done, and hence in an agreement for the sale

of land, so far as the interest in the land is concerned, the agreement is considered as executed by the equity court, which treats the vendee as the equitable owner of the land and the vendor as owning the consideration. "The consideration draws to it the equitable right of property in the land, and he who pays for it becomes the true beneficial owner, and a trust is thereby created in his favor. And while the contractor or vendor still holds the legal title, he holds it as the trustee for the vendee. And this naked trust, impressed upon the land, follows it into whosoever hands it may go by subsequent conveyances, until it reaches some holder who is a bona fide purchaser thereof for a valuable consideration without notice of the original vendee's title, and then it becomes relieved of the trust." *Cross* v. *Bean et al.*, 83 Maine, 61.

The defendant admits that some money was paid by the Baileys at the date of the written memorandum, and some in 1882. The plaintiff claims, and we think the evidence fairly shows, payments of $50 at the date of the writing, $50 May 29, 1880, $50 May 27, 1881, $50 July 7, 1882, and that a further credit of $10 without definite date is shown on the book kept by one Getchell for the Bingham estate, making a total payment of $210 on the purchase price. Thus it would appear, while all the purchase price was not paid, that it was sufficiently paid to bring the transaction within the above rule, thereby creating such a trust as may be properly considered by and give jurisdiction to the equity court.

Such being true, let us first examine the documentary evidence already referred to. When Joseph A. Coffin, the grantor of this defendant, took his deed from the Bingham estate on January 8, 1901, the agreement signed by A. B. Getchell had not been recorded. It is not necessary for the purposes of this case up to this stage of our discussion to decide whether that agreement was or was not a paper which could be admitted to record in the registry of deeds, nor whether such record, if the paper were improperly admitted to record, would give constructive or actual notice to Coffin of any claim to the land under it, for as we have seen the agreement was not recorded until more than two years after the date of the Coffin deed. But in the latter deed we find the conveyance qualified by the following, "subject to contract rights, if any, with John Robb

for lots Nos. 73 and 74," also "subject however to all outstanding contract rights, if any, as mentioned herein or unmentioned." We also find in the testimony of Gorham P. Flood that before Coffin bought the lands in question the witness told him that they had been sold to the Baileys. From all the testimony in the case the Chancellor found necessarily that the conveyance to Coffin was not without notice and hence under the rule in *Cross* v. *Bean,* supra, the naked trust imposed upon the land by the agreement followed the land into the hands of Coffin.

Now let us consider the conveyance from Coffin to Ray, dated September 23, 1903. In that was found the qualification, "subject to contract rights, if any, with John Robb for lots No. 73 and 74." Except this, the record is barren of any testimony to show that Ray had any notice of the agreement with the Baileys or of any rights of those claiming under them unless such notice is found from the agreement recorded January 17, 1903. We find no authority for recording such an agreement as in the case at bar unless by inference from R. S., chap. 75, sec. 15, which declares "The title of a purchaser for a valuable consideration . . . cannot be defeated by a trust, however declared or implied by law, unless the purchaser . . . had notice thereof. When the instrument, creating or declaring it, is recorded in the registry where the land lies, that is to be regarded as such notice." Did the Legislature intend that the statute just quoted should cover a situation like the instant case? The statute language is broad. We have just seen, in *Cross* v. *Bean,* supra, that an agreement for the sale of lands imposes a naked trust upon the land in favor of the vendee and it would appear to be a fair proposition of law that the written agreement for the sale of land is the "instrument creating or declaring" the trust. If so, and we so hold, then the instrument was properly admitted to record and this record, eight months before the deed from Coffin to the defendant, was, by statute, notice to the defendant of the existing trust. The defendant therefore was not a purchaser without notice, and as in the case of his predecessor the naked trust imposed upon the land by the agreement followed the land into the hands of Ray.

We have not overlooked the contentions of the defendant as to form of the agreement, authority of Getchell to sign the same,

occupancy of the premises, laches of plaintiff in not paying balance of purchase price and obtaining deed and staleness of plaintiff's claim, but these to our minds were questions presented and combatted in the realm of fact and determined as such by the sitting Justice. "The findings of a single Justice, in equity procedure, upon questions of fact necessarily involved, are not to be reversed upon appeal unless clearly wrong, and the burden is upon the appellant to satisfy the court that such is the fact, otherwise the decree appealed from must be affirmed." *Haggett* v. *Jones,* 111 Maine, 348.

Exceptions overruled.
Appeal denied.
Decree below affirmed.

BIRD, HALEY and MADIGAN, JJ., do not concur.

JOSEPHINE S. SWAN, et als.,

Appellants from Decree of the Judge of Probate.

Penobscot. Opinion December 23, 1916.

Appeal from the allowance of a commission to an administrator or executor. Revised Statutes, Chapter 65, Section 28, as amended by Chapter 49, Public Laws of 1913, interpreted. Revised Statutes Chapter 65, Section 37, interpreted. Discretionary power of Judge of Probate in granting an allowance of commissions. Right of review of allowance of Judge of Probate. Necessary allegations in "an appeal and reasons of appeal" where party claims to be "aggrieved" by the decree. Persons "aggrieved" under the Statute giving the right to appeal to Supreme Court of Probate.

Where the account of an executrix correctly shows the amount she has actually paid the appellants on their claim against the estate, an appeal from the allowance of the account will not be sustained on the alleged ground that a larger sum ought to have been paid on said claim. If that grievance exists in fact, it is to be redressed by suit against the estate, and not by an appeal from the allowance of the account of the executrix.

The exercise by the Judge of Probate of the discretion conferred upon him by R. S. chap. 65, sec. 37, respecting the allowance of a commission to executors, administrators, guardians surviving partners and trustees, is not conclusive but is reviewable on appeal to the Supreme Court of Probate.

Creditors of an estate in process of settlement in the Probate Court are interested in a decree of the Judge of Probate allowing a commission to the executrix, if such estate is insolvent or is rendered insolvent by such allowance. And if the amount of the commission is excessive, the creditors are thereby aggrieved.

Where one reason of the appeal was that the Judge of Probate had allowed the executrix a commission in excess of what should have been allowed, a ruling by the Supreme Court of Probate dismissing the appeal without a hearing on that question is reversible error.

The appellants alleged in their appeal and reasons of appeal that they were "aggrieved" by the decree of the Judge of Probate allowing the executrix a commission of five per cent on an amount, which amount was in excess of the amount on which the commission should have been allowed. It was not affirmatively alleged that the estate was insolvent, or that it became so on account of the allowance of the commission. But it did appear in the appeal proceedings that the appellants' debt was a "priority claim"; that one item in the account allowed was for travel and attendance at the probate court "to represent the estate insolvent"; and reference was made to "the report of the commissioners, who were appointed to pass upon the claims of the estate of Edward T. Spencer." *Held;*

1. That in view of the allegations in the appeal proceedings the Supreme Court of Probate might have found, if the matter had been called to its attention, that it was sufficiently established by the appeal proceedings that the estate was in fact insolvent; or might have permitted the appellants to make proof of that fact under their appeal as it was, as was permitted in *Danby* v. *Dawes,* 81 Maine, 30; or might have allowed the appellants to amend their appeal by stating the fact that the estate was insolvent, thus showing their interest in the decree appealed from, as was done in *Smith* v. *Bradstreet,* 16 Pick., 264.

2. Where no objection is made before the Supreme Court of Probate, that it does not appear affirmatively in the appeal and reasons of appeal that the appellants are in fact aggrieved, when the appellants could have made proof of the fact or asked to be allowed to amend, and where the appeal was dismissed in the Supreme Court of Probate on the motion of the appellee which contained no suggestion that the appellants had not sufficiently alleged or established their right to appeal as parties "aggrieved" by the decree, *held,* that the appellee should not now be permitted to interpose this objection to the appellants' right to be heard in the appellate court on the merits of their appeal.

Appeal from the ruling of Judge of Probate, Penobscot county, State of Maine. At Supreme Court of Probate, appellee filed motion to have appeal dismissed. Motion was sustained, and the Justice presiding ordered appeal dismissed; to which ruling appellant filed exceptions. Exceptions sustained. Case remanded to the Supreme Judicial Court of Probate for hearing on the matter of the allowance to the executrix of the commission of five per cent on the $40,729.50, as complained of in the appeal.

Case stated in opinion.

Hudson & Hudson, for appellants.

W. H. Powell, for appellee.

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

KING, J. From the decree of the Judge of Probate of Penobscot county allowing the final account of Mary E. Spencer, executrix of the will of Edward T. Spencer, the appellants seasonably took an appeal to the Supreme Court of Probate. They state in their appeal that they are interested as creditors of said estate, and that they are aggrieved by said decree. They allege the reasons of their appeal to be, in substance: (1) that said account so allowed contained an item of $6,468.10 paid by the executrix to the Sterns Lumber Co., which sum, as they contend, is less than half the amount of said claim, and (2) that in said account the executrix was allowed a commission of five per cent on $40,729.50, which they claim is in excess of what ought to have been allowed.

In the Supreme Court of Probate the executrix filed a motion to dismiss the appeal for two reasons: (1) that the first matter complained of "is not a proper matter for hearing in these proceedings," and (2) that the matter of the allowance of a commission to the executrix is wholly within the discretion of the Judge of Probate, "from which no appeal lies." That motion was sustained and the appeal dismissed.

1. The record before us is somewhat imperfect. The copy of the account sent up does not show that it was allowed by the Judge of Probate. It is alleged, however, in the appeal that a decree was made allowing the account, and we think the allegations in the appeal

must be taken to be true on a motion to dismiss the appeal. Furthermore, the appellants in their brief state that the decree was made, and no suggestion to the contrary is raised. We shall, therefore, consider it admitted that the decree appealed from was in fact made.

2. It seems clear that the appellants have no sustainable ground for their complaint that the account allowed contains the item of $6,468.10 paid to the Sterns Lumber Company by the executrix. No suggestion is made that the sum was not in fact properly so paid on a legal claim against the estate. It was therefore a proper charge in the account of the executrix. The appellants' grievance in this particular seems to be that the executrix has not paid them as much as they claim they are entitled to be paid from the estate. If that grievance exists in fact, it is to be redressed by suit, and not by an appeal from the allowance of the account of the executrix because it does not show that they have been paid what they claim is still due them.

3. It is true that the allowance of a commission to an executrix is a matter within the discretion of the Judge of Probate, R. S., c. 65, sec. 37. But the exercise of that discretion is not final. It is reviewable on appeal. The statute expressly provides that the Supreme Court of Probate has appellate jurisdiction "in all matters determinable by the several Judges of Probate, and any person aggrieved by any order, sentence, decree, or denial of such judges, except the appointment of a special administrator, and from any order or decree requiring any administrator, executor, guardian or trustee to give an additional or new official bond, may appeal therefrom to the supreme court," etc. R. S., c. 65, sec. 28, as amended by chapter 49, Public Laws of 1913. The appellants were not bound by the determination of the Judge of Probate as to the amount of commission which the executrix should receive. If aggrieved by his decree in that matter they were entitled to appeal to the Supreme Court of Probate and have the judgment of that appellate court as to the amount of commission, if any, which should be allowed. That was their statutory right and they were deprived of it by the ruling dismissing their appeal without a hearing in the Supreme Court of Probate as to this matter of the allowance of commission. That ruling therefore must be held to be reversible error.

4. In claiming their appeal the appellants described themselves as creditors of the estate of Edward T. Spencer, and alleged that they are aggrieved by the decree of the Judge of Probate allowing the final account of the executrix in said estate. They state as the reasons of their appeal that the court erred in the allowance of that account in the two particulars which we have hereinabove mentioned and considered, that is, because the account contained the item of $6,468.10 paid the Sterns Lumber Company, and because there was allowed in the account a commission to the executrix of five per cent on $40,729.50.

It is now urged in the brief of the appellee that the appellants have not affirmatively alleged in their appeal and reasons of appeal sufficient facts to show that they are "aggrieved" by the decree. In other words, it is claimed that the mere allegation that the appellants are interested in the estate as creditors, and are aggrieved by the decree, is not sufficient to establish their rights to appeal, but that there should have been other averments in their appeal and reasons of appeal showing that the decree allowing the account so diminishes the estate that their claim against it is thereby impaired.

The persons indicated by the statute under the term "aggrieved" are those only who have enforceable rights, and whose pecuniary interest might be established or divested wholly or in part by the decree appealed from. *Briard* v. *Goodale,* 86 Maine, 100. It is true, therefore, that the appellants as creditors of the Spencer estate are not "aggrieved" by the allowance of the commission to the executrix thereof unless the estate was or thereby became insolvent. And it is not affirmatively alleged in the appeal that the estate was insolvent. But is that sufficient ground for sustaining the ruling dismissing the appeal in this case? In the absence of anything to show the contrary it must be assumed that the dismissal of the appeal was made on the grounds specifically stated in the motion to dismiss, and that contains no suggestion that the appellants had not sufficiently established their right to appeal as parties "aggrieved" by the decree, if it was erroneous. And we do not think it can be now held as a matter of law that the appeal should have been dismissed on that ground if the point had then been made. It must

be conceded that if it had been alleged in the appeal that the estate was insolvent that would have been sufficient, under the motion to dismiss, to show that the appellants' claim against the estate was impaired by the decree appealed from. But it is alleged in the appeal that the claim of the Sterns Lumber Company on which the $6,468.10 was paid was a "priority claim." And in the account itself, from the allowance of which the appeal was taken and which forms a part of the record of the appeal, there is an item allowed for travel and attendance at the probate court "to represent the estate insolvent." Reference was also made in the appeal proceedings "to the report of commissioners who were appointed to pass upon the claims of the estate of Edward T. Spencer." In view of these allegations we think the Supreme Court of Probate might have found that it was sufficiently established by the appeal proceedings that the estate was in fact insolvent; or might have permitted the appellants to make proof of that fact under their appeal as it was, as was permitted in *Danby* v. *Dawes,* 81 Maine, 30; or might have allowed the appellants to amend their claim of appeal by stating the fact that the estate was insolvent, thus showing their interest in the decree appealed from, as was done in *Smith* v. *Bradstreet,* 16 Pick., 264. And it may be added that the estate was in fact represented insolvent, for it clearly so appears in the brief for the appellee.

This contention, that the ruling dismissing the appeal should be sustained on the ground that the appellants had not sufficiently alleged that the estate was insolvent, should not now prevail we think. It is a technicality, and technicalities are not favored in such proceedings. As this objection was not raised before the Supreme Court of Probate when the appellants could have presented proof of the fact, it should not now be permitted to deprive them of their right to be heard before the appellate court on the merits of their appeal.

The court is therefore of the opinion that the exceptions must be sustained and the case remanded to the Supreme Court of Probate for hearing on the matter of the allowance to the executrix of the commission of five per cent on the $40,729.60, as complained of in the appeal.

So ordered.

BENJAMIN H. FARNSWORTH *vs.* ANDREW S. MACREADIE, et als.

Cumberland. Opinion December 26, 1916.

Admissibility of declaration of a former owner of land as against present owner. How far such declarations are admissible. Admissibility of deeds of former owner of land showing the extent and location of side lines of certain streets or avenues. Deeds and plans recorded as showing dedication as notice to subsequent purchasers.

1. The declarations of a former owner of real estate against interest, are not admissible to deny or disparage title. But they are admissible when they relate to the nature, character or extent of the declarant's possession, or to the identity of monuments, or to the location of boundaries called for in a deed.
2. The testimony of the parties to a deed as to the limits to which it was intended to extend is not admissible.
3. The conveyance to a town of a strip of land delineated on a recorded plan as a street, "as and for a public street," and the acceptance by the town of the dedication make the strip a public town way, over which the town and its representatives have the same authority as over other public ways.
4. The record of a deed of dedication of land "as and for a public street" as delineated upon a recorded plan is constructive notice to a subsequent purchaser of the extent of the dedication; and the limits of the dedication must be determined from the plan itself.
5. In this case, it is held that the plan referred to in the deed of dedication of land for a street, shows that the land in dispute was included within the street, and that the recorded deed and plan were constructive notice thereof to the plaintiff, a subsequent purchaser.

Action of trespass quare clausum. Defendant filed plea of general issue. At conclusion of testimony, case was reported to the Law Court upon so much of the evidence as legally admissible, the Law Court to render such judgment as the rights of the parties require. Judgment for defendants.

Case stated in opinion.

Fred V. Matthews, for plaintiff.

W. R. & E. S. Anthoine, for defendants.

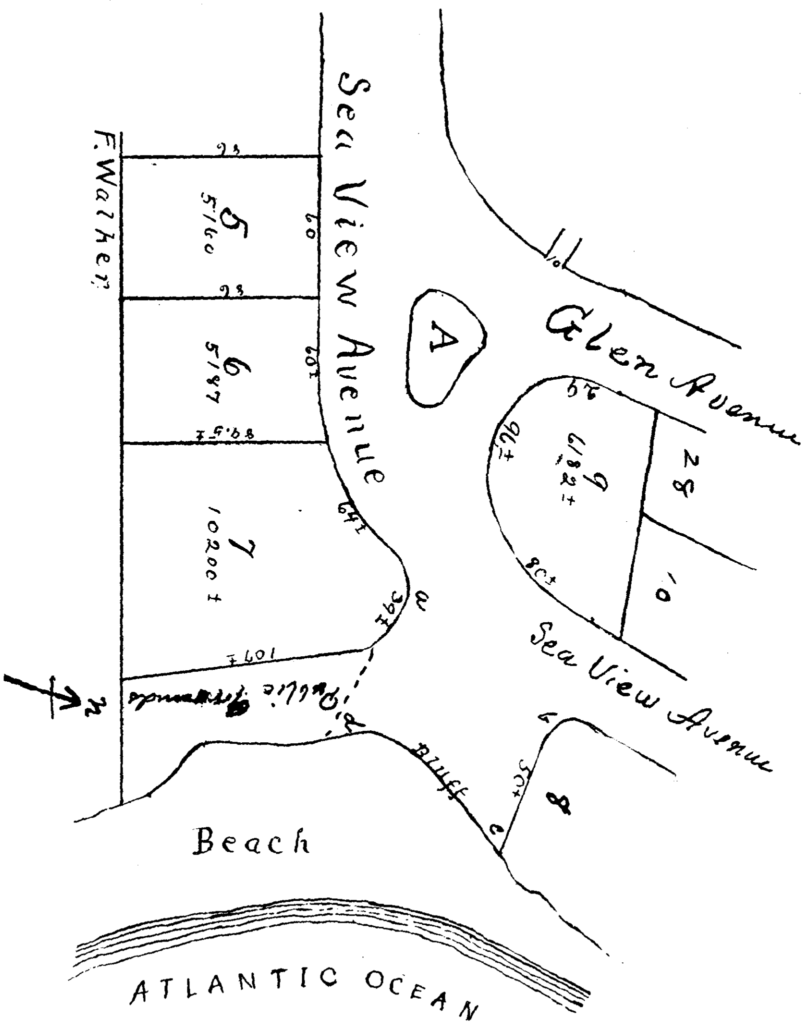
SITTING: SAVAGE, C. J., KING, BIRD, HALEY, PHILBROOK, MADIGAN, JJ.

SAVAGE, C. J. Trespass quare clausum. The defendants were, at the time of the alleged trespass, the selectmen of the town of Cape Elizabeth. The trespass complained of consisted in removing a fence which the plaintiff had erected in Ottawa Park in Cape Elizabeth. The defendants seek to justify on the ground that the fence was an obstruction in Sea View avenue, a public way. The plaintiff contends that the land where the fence was, was not within the avenue, but was his private property. This statement presents the issue. The case comes before this court on report.

The title of the plaintiff is not directly involved, because as we understand the record it is admitted that the plaintiff had such possession of the locus as would entitle him to maintain an action of trespass against one who should invade his possession without right. Nevertheless a brief statement of the situation of the parties as to title will throw some light upon the merits of the controversy.

The record is not clear as to the origin of title. But we assume, as counsel have done in argument, that the territory known as Ottawa Park was once owned by the Ottawa Park Company, and that afterwards the title to some part of it, at least, including the locus in quo, came to one Dalton. The plaintiff claims under Dalton. First, through deeds from Dalton and the Park Company to one Stanley, in 1906, and a deed from Stanley to himself, dated January 5, 1914; secondly, through a deed from Dalton, in which the Ottawa Park Company joined as grantor, dated June 5, 1914.

It appears that in 1899, the Ottawa Park Company, then owner, caused the Ottawa Park Tract to be platted into lots, streets, avenues, and so forth, and a plan thereof to be recorded in the proper registry of deeds. One of the avenues delineated on the plan was Sea View avenue. The following sketch shows approximately so much of the plan as is material to this case. In the sketch we have indicated the corners of the tract now in dispute by the letters a b c d. The fence in question was erected between points a and b.


Sea View Avenue
Glen Avenue
Sea View Avenue
F. Walker
A
5
6
7
9
10
8
Bluff
Beach
ATLANTIC OCEAN

The question is, did Sea View avenue as delineated on the plan include the tract a b c d? That it was so intended by the Park Company is reasonably clear. In 1900, the company conveyed lot 7, and with it practically all of the tract marked "Public Grounds." The northerly line of the "Public Grounds" thus sold we have indicated by a dotted line on the sketch. The description in this deed, and also that in a subsequent deed from the same grantor to another purchaser, the land having apparently been reconveyed in the meantime, tend to show that the company regarded Sea View avenue as extending seaward as far as the bluff line. The deeds were offered by the defendants as declarations of a former owner, against interest, and so admissible against those claiming under it. The plaintiff contends that they are inadmissible for that purpose. The application of the rule contended for by the defendants is limited. Such declarations are not admissible to deny or disparage title in the broad sense. They are admissible when they relate to the nature, character or extent of the declarant's possession, or to the identity of monuments of the location of boundaries called for in a deed. *Phillips* v. *Laughlin,* 99 Maine, 26. And in *Hyde* v. *County of Middlesex,* 2 Gray, 267, it was held that they are admissible as evidence of a dedication of land to a public use. It is indispensable, however, to the admissibility of declarations of a former owner against his successor in title, that they should relate to the premises in question. *Fall* v. *Fall,* 100 Maine, 98.

It is true in this case that the declarations related to the boundaries of lot 7 as enlarged by the "Public Grounds." That tract was bounded in the deed on the northeast, east and southeast by Sea View avenue as far as to the bluff line. But the boundary of lot 7 thus described, was also the boundary of Sea View avenue, which the declarant then owned, subject to an incipient dedication, and from whom the plaintiff claims title. The declaration in the deeds was in effect that the southerly side line of Sea View avenue was extended by various courses to the bluff line, at about the point d in the sketch. And this related to the land now in question. We think the deeds were admissible as evidence for the limited purpose of showing the extent and location of the side line of Sea View avenue.

As to the plaintiff's title, only this need be said. The deed from Dalton to Stanley conveyed no title to this tract. One essential call was apparently omitted. As it reads it is impossible to apply the description to the plan so as to make it include any of the land westerly of the bluff line. It may be noticed that in the mortgage given back by Stanley to Dalton on the same day the missing call is found. The mortgage with the missing call supplied included no land west of the bluff line. The deed of the Ottawa Park Company to Stanley purported to convey only such land as Dalton had given a deed of. As Stanley obtained no title the deed of Stanley to the plaintiff conveyed none.

But the deed of Dalton and the Ottawa Park Company to the plaintiff in 1914 was broad enough in description to cover the disputed tract. It purported to release and convey all the grantor's right, title and interest in all the land in Ottawa Park lying between the easterly side line of Glen avenue and low water, which had not been previously conveyed. Although this was a quitclaim deed, it seems to be conceded that either Dalton or the Ottawa Park Company then owned all of the Ottawa Park tract which had not previously been conveyed. The evidence leads us to conclude that this deed was given to cure the defect in the deed from Dalton to Stanley. That defect had been discovered. But the new deed was more comprehensive than the old one.

In the meantime, however, in 1911, the Ottawa Park Company had conveyed Sea View avenue, as delineated on the recorded plan, to the town of Cape Elizabeth, "as and for a public street." And the town in the same year accepted the dedication. This acceptance constituted Sea View avenue, a public town way, over which the town and its agents and representatives had the same authority as over other public ways. *Brown* v. *Bowdoinham,* 71 Maine, 144.

If the tract a b c d was a part of Sea View avenue as thus dedicated and accepted, the plaintiff had no right to build a fence across it, and the defendants were justified in taking it away. In such case, whatever title the plaintiff got in 1914 was subject to the public easement. If it was not a part of Sea View avenue, then so far as the rights of the town were concerned, it was the private property of the plaintiff, and he had a right to fence it off from

the avenue. In this case we have nothing to do with the rights of lot owners with respect to any incipient dedication of this tract for their benefit, created by platting the land, recording the plan, and selling lots in accordance with it. But the dedication is a circumstance showing that the tract was not intended for private use.

The tract itself is about eighty feet long and from forty to fifty feet wide. Upon the plan it is not numbered as a lot. Nor is any particular use for it designated. If it be not a part of the avenue, it has no name. It is an open space from the line of direct travel on the avenue to the brow of a high and precipitous bluff overlooking the beach and the ocean. It has been a thoroughfare for people who desired to go down to the beach. Though not yet graded and wrought for travel, its size and shape make it susceptible for use with carriages as well as on foot. At the time the land was platted, it was evidently intended that the tract should be reserved for the general benefit of the purchasers of lots in the Park, the same as the avenues were reserved. By platting and recording the plan, and by selling lots according to the plan, this tract was dedicated, as the avenues were dedicated. All these considerations, together with the declarations of the owner in the deeds of lot 7, constrain us to the conclusion that the disputed tract was intended to be dedicated as a part of Sea View avenue.

But this is not enough. The conveyances, both to the plaintiff and to the town were made with reference to the recorded plan. By the deed of dedication to the town in 1911, and the town's acceptance, the town took Sea View avenue as delineated on the recorded plan. It took no more. This deed, which was recorded, and the recorded plan were constructive notice to a subsequent purchaser of the extent of the dedication. The case does not show that the plaintiff had any other notice. He took title to the tract a b c d, subject, however, to the original incipient dedication, unless the recorded plan was notice to him that the tract was included in Sea View avenue. If it was notice, he took the title subject to the public easement created by the dedication to the town, and its acceptance. The plan itself must answer the question.

What should be the proper answer is by no means free from doubt. The plan was notice that the tract had been reserved from

private use. The tract bore no distinguishing mark to indicate its dedicated use separate from the avenue. It afforded a natural and easy access from the line of travel along the avenue to the brow of the bluff overlooking the sea. In any event the avenue in that vicinity was of irregular shape. Taking into account the whole situation, we think we shall interpret the plan more accurately by holding that it was notice to the plaintiff that the tract a b c d was dedicated as a part of Sea View avenue, which, as so dedicated, became in 1911, a public town way. It follows that the defendants could justifiably remove a fence which obstructed it.

Judgment for the defendants.

JOSEPH WALLACE,

Petitioner for Writ of Habeas Corpus,

vs.

T. HERBERT WHITE, Sheriff.

Penobscot. Opinion December 26, 1916.

Writ of habeas corpus. Revised Statutes, Chapter 29, Section 3, interpreted. Affirmation of sentences. Rights of Court under Section 63, Chapter 29, Revised Statutes. Rule where sentence is simply in excess of or in addition to what would be a legal sentence. Sentence being severable. Right of prisoner, who is held on an illegal sentence, to demand discharge where the sentence is or may be severable. Rule where sentence is not severable. Mittimus. Rule as to granting writs of habeas corpus for defects in matters of form only. Rule where persons have received a legal and proper sentence but have been remanded to jail or prison upon a defective mittimus.

1. It is competent for the legislature to provide that when one has been convicted of a misdemeanor in an inferior court, has been sentenced to

fine, or imprisonment, or both, has appealed, and has defaulted in the appellate court, the sentence may be affirmed by the latter court in his absence.

2. When on appeal from an inferior court, sentence is affirmed, it is the duty of the clerk to issue mittimus as a matter of course, without special order.

3. When on appeal from an inferior court, sentence is affirmed, in the absence of the respondent, the mittimus may be framed to serve as a capias as well as mittimus.

4. Under Revised Statutes, chapter 29, section 63, which provides that in appeals in cases of violation of the prohibitory liquor law, "if the respondent fails to appear for trial, the judgment of the court below shall be affirmed," the court has no authority in affirming sentence to impose additional costs.

5. When on appeal, the sentence imposed by the inferior court is affirmed, with the unauthorized addition of costs on appeal, the two parts of the sentence are severable. The authorized part may be in force, while the unauthorized part is void.

6. When a person has been convicted, or is in execution upon legal process, criminal or civil, the granting to him of a writ of habeas corpus is discretionary. If the judgment against him is void, as for want of jurisdiction, he is entitled to his discharge, but not if the sentence be merely erroneous.

7. An excessive sentence is merely erroneous and voidable. The whole sentence is not illegal and void by reason of the excess. On habeas corpus, it is to be regarded as invalid only as to the excess.

8. When a sentence is for a longer period than prescribed by law, and is severable, the prisoner is not entitled to be discharged on habeas corpus proceedings until he has served the definite prescribed term.

9. If a sentence is erroneous, and not severable, the prisoner, upon habeas corpus proceedings, is to be remanded for a legal sentence.

10. When a prisoner has been committed in execution of sentence, he will not be discharged on habeas corpus proceedings, because of a defect in the mittimus.

11. The petitioner in this case was sentenced in the lower court to imprisonment, and to the payment of fine and costs. On appeal he was defaulted, and the sentence below was affirmed with additional costs. *Held,* that the sentence was not wholly void, but void only as to the additional costs, and that, not having served the lawful sentence of imprisonment and not having paid the fine and costs lawfully imposed by the lower court, the petitioner is not entitled to discharge on habeas corpus.

Petition for writ of habeas corpus brought at April term, 1916, Supreme Judicial Court, Penobscot county. Case was reported to Law Court upon agreed statement of facts. Writ discharged.

Petitioner remanded to the custody of the jailer in execution of sentence.

Case stated in opinion.

Edward P. Murray, and Terence B. Towle for petitioner.

William B. Pierce, County Attorney, and Charles J. Hutchings, for defendant.

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

SAVAGE, C. J. Petition for writ of habeas corpus. The cause comes before this court on report. The facts are these: The defendant was convicted in the Bangor municipal court on two search and seizure processes, under section 49 of chapter 29 of the Revised Statutes, which chapter is the prohibitory liquor statute. On each process he was sentenced to pay a fine and costs, and to be imprisoned 60 days in the county jail. He appealed on each, and gave bail for his appearance at the next term of the Supreme Judicial Court. He did not appear at that term, but was defaulted; and in each case the judgment of the court below was affirmed, with additional costs, amounting to $3.30, in his absence. After the adjournment of the term, the clerk issued mittimuses upon the affirmed judgments, as of course, without special order, and the petitioner was arrested thereon by the sheriff's deputy, and committed to jail in execution of the sentences. From this imprisonment he seeks to be released on habeas corpus.

The affirmation of the sentences was made by virtue of Revised Statutes, ch. 29, sect. 63, which provides that in appeals in cases of violation of the liquor law, "if a claimant or other respondent fails to appear for trial in the appellate court, the judgment of the court below, if against him, shall be affirmed." The word "judgment" in this statute refers not only to the adjudication of guilt, but also to the sentence imposed, the entire judgment. Such appears to have been the intent of the Legislature, and such has been the construction placed upon it in all cases.

Each mittimus contained an order to the officer "to take the body" of the petitioner and commit him to jail.

The petitioner contends, 1, that since the petitioner was not in court at the time of the affirmation of sentence, the court had no jurisdiction over him to impose the payment of costs as a part of the sentence in addition to the original sentence; 2, that the clerk without special direction of the court had no authority to issue a mittimus by which the petitioner could be taken wherever he might be found, as well as in court.

By the common law, when imprisonment is to be inflicted as a punishment, it is absolutely necessary that the respondent be personally present. I Bishop on Criminal Procedure, sect. 275. But it is not claimed by counsel for the petitioner that it is not competent for the Legislature to provide that when one has been convicted of a misdemeanor, has been sentenced to imprisonment by an inferior court, has appealed, and has defaulted in the appellate court, the sentence may be affirmed by the latter court, in his absence. Such a statute violates no constitutional guaranty, and we know of no reason why it is not within legislative power.

The petitioner's contention is that the appellate court in this case by affirming the sentence below and imposing additional costs, virtually imposed a new sentence, that if the petitioner failed to pay the additional costs, as well as the original fine and costs, he was subject to additional imprisonment for at least thirty days, R. S., ch. 136, sect. 12, and that such a sentence could not lawfully be imposed in the absence of the petitioner. In this case it is not very material whether the additional detention for non-payment of the fine is a punishment or not, for certainly the penalty was increased by the amount of the additional costs. Some courts have held that the detention is not a punishment, but only a mode of enforcing the fine. *Son* v. *The People,* 12 Wend., 344; *People* v. *Markham,* 7 Calif., 208.

We will examine first the authority of the appellate court to impose the additional costs. The statute in terms merely authorizes the court to affirm the judgment below. It is silent on the matter of costs. By R. S., ch. 136, sect. 1, it is expressly provided that for violations of section 49 of chapter 29 the convict shall be sentenced to pay costs, and this was the section violated by the petitioner. But in the lower court this provision was complied with.

He was sentenced to pay costs. And the affirmance of that sentence likewise condemned him to pay those costs. So that if section 1 of chapter 136 applies to proceedings under section 63 of chapter 29, it was complied with. A reference to R. S., ch. 133, section 18 will, we think, throw some light on the question of legislative intention. That section relates to appeals in general from magistrates. It says: "If the appellant does not appear and prosecute his appeal, his default shall be noted on the record; and the court may . . . issue a capias against the body of the appellant, bring him into court, and then affirm the sentence of the magistrate *with additional costs.*" The distinction between the two statutes seems to be marked. In the one the respondent must be brought into court before the sentence is affirmed with additional costs. In the other, the sentence can be affirmed in the absence of the respondent but the statute is silent as to costs. We think this distinction in language should be observed in construction, and that it should be held that the statute, R. S., ch. 29, sect. 63, authorizing the appellate court to affirm a sentence did not authorize it to add to it or in any way change it.

The statute, however, is permissive. It does not require affirmation of sentence. If the appellate court is of opinion that the sentence below should be modified, increased or lessened, it can issue capias, have the respondent brought before it, and impose such sentence as the law authorizes and justice requires. In this case the appellant was not brought into court, but notwithstanding, the sentence was increased by the amount of the costs. To that extent, we think the appellate court exceeded its authority.

But it by no means follows that the petitioner is entitled to be discharged on habeas corpus. This was not, as the petitioner claims, the imposition of a new sentence. The old sentence was affirmed, and was right. The addition was unauthorized, and wrong. The two are severable. The unauthorized part may be void, and at the same time the authorized part in force.

The granting or refusing the writ in this case is discretionary. *O'Malia* v. *Wentworth,* 65 Maine, 129. "Persons convicted, or in execution upon legal process, criminal or civil, are not entitled of right to have the writ of habeas corpus." R. S., ch. 101, sect. 5.

But it is a discretion to be exercised according to settled legal principles, so far as they apply. And one principle is that if the judgment is void, as for want of jurisdiction, the prisoner is entitled to his discharge, but not if it is merely erroneous. See *In re Fenton,* 55 Neb., 703; and cases cited in note to same case in 70 Am. St. Rep., 418; *Re Taylor,* 7 S. Dak., 382; 45 L. R. A., 136, note.

Though there is some conflict in the cases, the very great weight of authority is to the effect that a sentence which imposes a punishment in excess of the power of the court to impose it is not necessarily void in toto, but is valid, when severable, to the extent that the court had power to impose it, although void as to the excess. Mr. Church in his work on Habeas Corpus says,—"A judgment is not void because an excessive punishment has been imposed, except as to the excess." Sect. 370. And again in sect. 373,—"The prevailing rule is that an excessive sentence is merely erroneous and voidable; that the whole sentence is not illegal and void because of the excess; that it is not void ab initio; and that it is good on habeas corpus so far as the power of the court extends, and invalid only as to the excess." This doctrine is sustained by *People* v. *Jacobs,* 66 N. Y., 8; *People* v. *Baker,* 89 N. Y., 460; *People* v. *Markham,* 7 Cal., 208; *Ex parte Mitchell,* 70 Cal., 1; *Ex parte Erdmann,* 88 Cal., 579; *In re Graham,* 77 Wis., 450; *Lowrey* v. *Hogan,* 85 Cal., 400; *Ex parte Mooney,* 26 W. Va., 36; *Ex parte Crenshaw,* 80 Mo., 447; *Ex parte Shaw,* 7 Ohio St., 81; *Ex parte* Van Hagan, 25 Ohio St., 427; *State* v. *Klock,* 48 La. Ann., 67, and cases cited in note to same case in 55 Am. St. Rep., 259; *In re Graham,* 138 U. S., 461; *Brooks* v. *Commonwealth,* 4 Leigh, 669; *Feeley's* case, 12 Cush., 598; *Sennott's* case, 146 Mass., 489. In the last cited case the court said, "The better rule seems to be that where a court has jurisdiction of the person and of the offense, the imposition by mistake of a sentence in excess of what the law permits is within the jurisdiction, and does not render the sentence void, but only voidable by proceedings upon a writ of error."

It is also generally held that when the sentence is for a longer period than prescribed by law the prisoner is not entitled to be discharged on habeas corpus until he has served the prescribed

definite term. *People* v. *Markham,* supra; *Ex parte Mooney,* 26 W. Va., 36; *In re Taylor,* 7 S. Dak., 382; *In re Paschal,* 56 Kansas, 123; *DeBarra* v. *U. S.,* 99 Fed. R., 982; *In re Fenton,* supra; *People* v. *Baker,* supra; *Feeley's* case, supra. *In re Swamp,* 150 U. S., a contempt case, but analogous on the question at issue to the case at bar, the court said,—"As the prisoner has neither restored the goods nor suffered the imprisonment for three months, even if it was not within the power of the court to require payment of costs, and its judgment to that extent exceeded its authority, yet he cannot be discharged on habeas corpus until he has performed so much of the judgment, or served out so much of the sentence, as was within the power of the court to impose."

If a court has jurisdiction of the person and cause, the fact that the sentence is excessive or otherwise erroneous is not ground for discharge on habeas corpus. A writ of habeas corpus cannot reach errors or irregularities which render proceedings voidable merely, but only such defects in substance as render the judgment or process absolutely void. *Ex parte Keeler,* 45 S. C., 537; *Barton* v. *Saunders,* 16 Or., 51; *State* v. *Kinmore,* 54 Minn., 135. The writ of habeas corpus does not perform the function of a writ of error. *Sennott's* case, 146 Mass., 489; *Ex parte Mooney,* 26 W. Va., 36; *People* v. *Baker,* 89 N. Y., 460; *In re Graham,* 74 Wis., 450; *Ex parte Crenshaw,* 80 Mo., 447. If the sentence is severable, the prisoner should not be discharged until he has served out the valid portion of his sentence. *Re Sweatman,* 1 Cow., 144; *People* v. *Woodworth,* 78 Hun., 586; *People* v. *Baker,* supra; *Ex parte Mooney,* supra; *Re Paschal,* supra; *Ex parte Henshaw,* 73 Cal., 486; *Ex parte Hunter,* 16 Fla., 575; *In re Swann,* supra. If it is not severable, he should be remanded for a legal sentence. In *People* v. *Kelly,* 97 N. Y., 212, a case where the sentence was excessive and not severable, the court said, "But the conviction is still valid, and the prisoner not entitled to his discharge. He should be remanded to the sheriff in order that the court may deal with him according to law. See *Feeley's* case, supra; *U. S.* v. *Pridgeon,* 153 U. S., 48. There are many other cases to the same effect. See note to *Re Taylor,* 45 L. R. A., p. 145.

We conclude, then, upon this branch of the case, that the imposition of additional costs in the appellate court was in excess of jurisdiction, but that this excess is clearly severable from the sentence affirmed, namely, imprisonment and the payment of a fine and costs. We also hold that the sentence was not wholly void, but void only for the excess. The petitioner has not served out the lawful sentence of imprisonment, and has not paid the fine and costs which were lawfully imposed. In accordance with the principles stated he is not entitled to be discharged on habeas corpus. If he is detained after he has served the jail sentence and has paid the fine and costs lawfully imposed, he will be entitled to a writ. Even if the sentence had not been severable he would not be entitled to a discharge. In that event he would be remanded for sentence. The case of *Tuttle* v. *Lang,* 100 Maine, 123, cited by the petitioner, is not analogous.

But the petitioner makes the further point that the mittimus was irregularly issued. He complains that the clerk issued it without a special order, and that without an order from the court he had no authority to issue a process by which the petitioner could be arrested. As we understand it, the contention is that while the clerk may, as a ministerial act, and as of course, without special order, issue a mittimus to commit a prisoner already in court to jail in execution of sentence, he cannot issue process to take the body and commit a convict not then in court.

We think there is no merit in the contention. The statute authorizing affirmation of sentence presupposes that the respondent is not in court, and that he is to be taken and committed. The issuing of proper process to carry the judgment of court into effect is a ministerial act. It is the duty of the clerk to issue the mittimus as a matter of course. There is no prescribed form for a mittimus. The statute, R. S., ch. 136, sect. 10, provides only that the clerk shall make out and deliver to the officer a transcript of the minutes of the conviction and sentence duly certified by him; which shall be sufficient authority for the officer to execute such sentence." The clerk must make the mittimus to fit the case. It is important only as a direction to the officer. *Sennott's* case, supra. The mittimus in this case was framed to serve as a capias as well as

mittimus. That was what the situation called for. It was lawfully issued. There is nothing in *Breton, Petr.,* 93 Maine, 39, cited by the petitioner, which is inconsistent with what is said in this case.

But were it otherwise, it would not avail the petitioner in this proceeding. It is the judgment of the court which authorizes detention. The mittimus is the evidence of the officer's authority. *People* v. *Baker,* 89 N. Y., 460. The judgment is the real thing, the precept is not. The important question on habeas corpus is, is the prisoner in the custody where the judgment commanded him to be put, and not how he was taken into custody. The writ of habeas corpus will not be granted unless the real and substantial merits of the case demand it. The writ will not be granted for defects in matters of form only; nor can it be used as a substitute for a writ of error. *O'Malia* v. *Wentworth,* 65 Maine, 129; *Welch* v. *Sheriff,* 95 Maine, 451. Said the court in *People* v. *Baker,* supra, "If a prisoner has been properly and legally sentenced to prison he cannot be released on habeas corpus because of a defect in the mittimus. When he is safely in the proper custody, there is no office for a mittimus to perform." *Sennott's* case, supra. This is ancient doctrine. As far back as *Bethell's* case, 1 Selk., 348, it was said that "where a commitment was without cause, a prisoner may be delivered by habeas corpus; but where there appears to be a good cause, and a defect only in the form of commitment, as in this case, he ought not to be discharged."

Writ discharged.
Petitioner remanded to the custody of the jailer in execution of sentence.

FRANK H. DRUMMOND *vs.* WALTER W. WITHEE.

Penobscot. Opinion December 30, 1916.

Declarations in actions of trespass quare clausum. Plea when abuttals, lines or monuments of close are not set out in plaintiff's declaration. Effect of plea of general issue to such declaration. Necessary plea if defendant desires accurate description of close.

Action of trespass for breaking and entering the plaintiff's close "situate in Bangor." There was no other description of the close. The defendant filed a general demurrer, and the case is here on the plaintiff's exceptions to the order of the presiding Justice sustaining the demurrer.

Held;

1. It is not necessary, in such cases, for the plaintiff to describe his close. If the defendant has occasion for a description he can have it upon filing the proper plea. If he omits to do so, it is presumed that he consents that the plaintiff may prove the act to have been done upon any land in his possession within the limits of the town named in the writ.

2. The defendant having failed to file a proper plea, and in the absence of a statute requiring particular description of the close, the declaration is adjudged sufficient.

Action of trespass quare clausum. In plaintiff's writ, no abuttals or lines were given describing the close upon which plaintiff claimed defendant had committed trespass, but the close was described simply as "situated in Bangor." Defendant filed a general demurrer, upon which issue was joined, and the presiding Justice sustained the demurrer pro forma. To the ruling of the presiding Justice sustaining the demurrer, the plaintiff filed exceptions. Exceptions sustained.

Case stated in opinion.

Morse & Cook, for plaintiff.

H. L. Mitchell, for defendant.

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

HANSON, J. Action of trespass for breaking and entering the plaintiff's close "situate in Bangor." There was no other description of the close. The defendant filed a general demurrer, and the case is here on the plaintiff's exceptions to the order of the presiding Justice sustaining the demurrer.

We think the exceptions should be sustained.

The defendant contends "that the writ is defective because it does not describe the close, and does not give the defendant notice of the plaintiff's claim," and cites *Moody* v. *Hinkley,* 34 Maine, 200, as sustaining his contention. In that case the declaration alleged that "the defendant's cattle broke into the plaintiff's close, and destroyed his growing crops," but did not describe the close or specify any venue, and the court held that "a declaration charging trespass upon the plaintiff's close is bad, *on general demurrer,* if it do not describe the close or allege the venue;" but that is not this case. On the contrary, *Moody* v. *Hinkley* is in harmony with cases sustaining the doctrine since earliest times, that while such form of pleading was not to be commended, it was not bad, where the venue was alleged as in this case. The better pleading, and the one most to be commended, is where particular description is given of the close on which trespass is alleged to have been committed. That is the shortest road to the merits of a case. The other course leads back to the field of special pleading, long since abandoned, in theory at least, while present day necessities require the more direct and plain statement characterizing modern pleading. It was the ancient rule, in trespass quare clausum fregit, "that where the declaration is general, without giving the name or abuttals of the close, and the defendant pleads that the close is his soil and free hold, the defendant, unless there be a new assignment, must have a verdict in his favor if he proves a title to any land in the same township." *Ellet* v. *Pullen,* 12 N. J. Law, 359. Another way of stating the rule as adopted by a leading authority is this: "When trespass was brought for breaking and entering a dwelling house of the plaintiff" in the parish of ..... in the county of ....., the ancient rule was that a misdescription in the situation of the house would be fatal and preclude the plaintiff from recovering; but it was also the rule "that if there be any

doubt as to the situation of the premises, merely state them to be situate in the county of ....." Chitty on Pleading, Vol. 2, p. 863. And the author adds: "It is in general advisable to set out the abuttals or names of the closes, when they can be ascertained with certainty," and one of the chief reasons assigned is avoidance of the necessity for a new assignment in case the defendant should plead liberum tenementum.

Our conclusion is supported by a leading Michigan case, where it is held, "When an action is brought for trespass upon lands in a certain township, if the plaintiff declares generally without giving a particular description of the lands, and the defendant pleads title in himself, he will make out a defense by proof of ownership in himself of any parcel of land in the township mentioned in the declaration. . . . It was always at the option of the plaintiff whether he would declare generally, or set forth a particular description of the premises. If he did the former, and the defendant interposed the general issue only, the latter was always liable to be surprised by proof of a different transaction from what he supposed was complained of, since proof of an entry on any parcel of land in the township, in the plaintiff's possession, would be within the declaration. One object of the plea liberum tenementum in such a case was to compel the plaintiff by giving a specific description of the land, to confine his cause of complaint, and consequently his proofs, to a specified parcel."

McFarlane v. *Ray,* 14 Michigan, 465; Waits Actions and Defences, Vol. 6, p. 90.

A case directly in point, and identical in pleading, is found in *Noyes* v. *Colby,* 10 N. H. (Foster) 143, which was an action of trespass for breaking and entering the close of the plaintiff, situated in "Franklin." The close was not described by boundaries or abuttals, but was called merely the plaintiff's close in Franklin. The court held that "the declaration was well. It is not necessary, in such cases, for the plaintiff to describe his close. If the defendant has occasion for a description, he can have it upon filing the proper plea. If he omits to do so, it is presumed that he consents that the plaintiff may prove the act to have been done upon any

land in his possession within the limits of the town named in the writ."

The defendant having failed to file a proper plea, and in the absence of a statute requiring particular description of the close, the declaration is adjudged sufficient.

The entry will be,

Exceptions sustained.

INHABITANTS OF TOWN OF FREEDOM *vs.* IDA C. MCDONALD.

Waldo. Opinion January 3, 1917.

Chapter 27, Section 47, interpreted. What can be considered as pauper supplies. Duties of Selectmen in furnishing supplies where parties are "destitute and in need." Scope of authority of selectmen in furnishing supplies where person receiving same has ample financial means. Question of necessity of supplies to be determined by whom.

This is an action of assumpsit to recover, pursuant to the provisions of section 47, chapter 27, R. S., for pauper supplies alleged to have been furnished by the plaintiff to the defendant, a minor, who is represented by her guardian. Plea, is the general issue and infancy. The case is before the court on an agreed statement.

The McDonald family being in distress, the mother applied to the town of Freedom, where the family had a pauper settlement, for relief. With the mother's consent, the father being dead, the defendant was placed by the plaintiff town in the Girls' Home, a charitable institution in Belfast, where, in consideration of an entrance fee, of fifty dollars paid by the plaintiff, she was to be cared for until eighteen, a period of about twelve years. For this entrance fee, $11.65 paid for clothing and sustenance, and for $8.60 interest on the account, the plaintiff brings this action.

Held;

1. Defendant, being in distress, it was her right to receive and the plaintiff's duty to render immediate reasonable assistance, regardless of her interest in a small distributive share in her father's estate, the same not being then available and the amount thereof uncertain.
2. Clothing and sustenance being proper pauper supplies, the plaintiff is entitled to judgment for all sums expended therefor, notwithstanding defendant's minority.

3. There was no statutory authority for the placing of defendant by the plaintiff in the Children's Home, and therefore the entrance fee and the incidental expenses in connection with defendant's commitment are not chargeable to the defendant as pauper supplies.

Action of assumpsit to recover for supplies and money expended, under chapter 27, section 47, for the benefit of the defendant, a minor; defendant being represented by her guardian. Defendant pleaded general issue, and upon an agreed statement case was reported to Law Court to determine the questions of law and fact and render such judgment as the Law Court should determine to be proper, the principal point at issue being what items could be properly charged to defendant as pauper supplies, under chater 27, section 47. Judgment for plaintiff in the sum of eleven dollars and sixty-five cents and interest from date of writ.

Case stated in opinion.

Williamson, Burleigh & McLean, for plaintiff.

Arthur Ritchie, for defendant.

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

MADIGAN, J. The plaintiff asks judgment for several amounts alleged to have been furnished by its overseers to the defendant as pauper supplies. Defendant being a minor, appears by her guardian, and the case is before the court on report.

The McDonald family being in distress, the mother applied to Freedom, where they had a settlement, for relief. The overseers, with the mother's consent, placed the defendant in the Girls' Home, a charitable institution in Belfast, where in consideration of an entrance fee of fifty dollars paid by the plaintiff, she was to be cared for until eighteen, a period of about twelve years. For this amount, for $11.75 expenses incidental to her commitment to the home, for $11.65 paid for clothing and sustenance, and for $8.60 interest on the account plaintiff asks judgment.

As her distributive share in her deceased father's estate the defendant will receive, less probate and other expense, about eighty dollars. The contention of her counsel that because of this she

was not entitled to aid from the town is without merit. The pittance due was not available, and being in distress it was her right to receive and the town's duty to render immediate aid. For all items which properly can be classed as pauper supplies the plaintiff is legally entitled to judgment. Revised Statutes, chap. 27, sec. 47. *Norridgewock* v. *Solon,* 49 Maine, 385, and *Hutchinson* v. *Carthage,* 105 Maine, 134. The entrance fee and the expense of commitment do not come under this classification. Her commitment to the Home by the plaintiff, being absolutely without statute authority, sums paid therefor are not chargeable to the defendant as pauper supplies. Sec. 12, chap. 27, R. S., relied on by the plaintiff neither expressly or by implication gives the right contended for. Care and relief of paupers, supervision of their employment, do not mean commitment to institutions for a term of years. *Smith* v. *Peabody,* 106 Mass., 262, and *Smith* v. *Toles,* 106 Mass., 265, are based on a statute expressly stating that paupers may be relieved or employed either in the workhouse or alms house, or in such manner as the city or town directs, *or otherwise* at the discretion of the overseers. Under such broad authority the court most properly justified the placing of needy minors in an institution suited to their care.

Judgment for $11.65 and interest from date of the writ.

M. ALBERT KING, Pro Ami, *vs.* ERNEST P. PILLSBURY.

Androscoggin. Opinion January 9, 1917.

Right of Court to pass upon the legal effect of words or expressions used in a libelous communication. Admissibility of evidence tending to show what is the common meaning of certain words or expressions set forth in a libellous communication. Rule where words used in a libel may be fairly capable of two meanings, one harmless and the other defamatory.

The father of a young woman to whom the plaintiff was attentive received from the defendant a letter containing this statement: "Did you know that Albert King is a damaged goods chap," alleging that thereby the defendant meant to state that the plaintiff was then afflicted with syphilis. The plaintiff brought on action of libel and recovered a verdict. The case is before the Law Court on exceptions.

Held;

1. It was not error to allow the plaintiff to testify, that after the receipt of the letter before continuing his attentions, he was obliged to satisfy the young woman's father that he was physically "all right," and that he did this by means of a doctor's certificate. The certificate itself was not introduced in evidence and had no bearing on the truth or falsity of the contents thereof. The testimony had certain probative force as to the injurious nature of the language as reasonably understood by the recipient of the letter.
2. It was proper to allow a witness to testify that the words "damaged goods chap" meant that one was afflicted with syphilis or gonorrhea. The qualification of the witness to so testify was addressed to the discretion of the presiding Justice.
3. The presiding Justice did not err in instructing the jury that it was a matter of law for the court, as to whether the words "damaged goods chap" were susceptible of a libellous meaning, and that the words were susceptible of the meaning that the plaintiff was then and there afflicted with syphilis; not whether the words did mean that, but whether they could mean that.

Action on the case for libel on account of a certain letter written by defendant to a third person, in which letter defendant charges the plaintiff as being a "damaged goods chap." Defendant

pleaded general issue, and also filed brief statement. Verdict for plaintiff in the sum of one hundred dollars.

During the progress of the trial, plaintiff offered certain evidence as bearing on what was commonly known and meant by the expression "damaged goods chap." Defendant filed exceptions to the admissibility of this evidence, and also to another piece of evidence, and also filed exceptions to a certain portion of the charge of the presiding Justice. Exceptions overruled.

Case stated in opinion.

George S. McCarty, for plaintiff.

McGillicuddy & Morey, for defendant.

SITTING: CORNISH, KING, BIRD, HALEY, PHILBROOK, MADIGAN, JJ.

MADIGAN, J. The father of a young woman to whom the plaintiff was attentive received from the defendant a letter containing this statement: "Did you know that Albert King is a damaged goods chap. I write this for your daughter's sake." Alleging that thereby the defendant intended to charge that he was afflicted with syphilis, the plaintiff brought an action for libel and recovered a verdict. The case is before the Law Court on two exceptions to the admission of evidence and one to a portion of the charge of the presiding Justice.

First, plaintiff was allowed to state to the jury that after the receipt of the letter before continuing his attentions he was obliged to satisfy the parties that he was "physically all right," and that this he did by a doctor's certificate. The certificate itself was not introduced and the statement had no bearing on the truth or falsity of the contents thereof. It had however certain probative force as to the injurious nature of the language as reasonably understood by the recipient of the letter. There was nothing improper in the admission of this evidence and the first exception is therefore overruled.

SECOND EXCEPTION.

A witness was permitted to testify that the words "damaged goods chap" meant that one was afflicted either with syphilis or

gonorrhea. The preliminary query as to whether the witness was qualified to so testify was within the discretion of the presiding Justice. The propriety of receiving such evidence is well settled. "The meaning of the defendant in the language used, when it is ambiguous or consists of expressions not in common use, but bearing a known meaning among certain persons, may be explained by those who know their application." *Commonwealth* v. *Morgan,* 107 Mass., 199. Odgers on Libel and Slander, 5 ed., page 684. This exception is therefore overruled.

THIRD EXCEPTION.

The presiding Justice instructed the jury in effect as follows: "In libels the court ordinarily from an inspection of the language used can determine whether it was in its matter libellous or could be libellous. That is a matter for the court, not a matter for the jury. It is a question of law as the courts have held, whether the language used is susceptible of the meaning attributed to it,—*not whether it did mean that*—in this case—but whether it could mean that. That is a matter of law. The meaning attributed to the language used in this case was that the plaintiff was there and then suffering from the loathsome and infectious disease of syphilis. Language is sometimes used that without some information the court cannot say from the words themselves what they do mean. Yet the words may be in more or less common use so that the parties using them know what the words mean and the court may not. In this case I have listened to the evidence of the parties in regard to the meaning attributed to the words in this locality where these parties live. You have heard the evidence, but it is for me to decide the question and I instruct you, as a matter of law, that the use of the words "he is a damaged goods chap" is susceptible of meaning that he is afflicted with syphilis in some degree or form. Not that he had suffered from it sometime before and has been cured, but the language is susceptible of the meaning that he then was afflicted with it in some degree, in some way. So that the language in the light of the evidence we have as to its use and meaning is of a nature to be libellous."

What imputations in the abstract are actionable is a question of law, and when the language is clear and unambiguous the ques-

tion as to whether or not it is actionable is one for the court, as is also the question whether or not the words as explained by the inducement or colloquium are reasonably susceptible of the meaning which is attributed to them by the innuendos. Ency. Law, Vol. 18, page 990.

Where the words in a particular case are ambiguous and are fairly capable of two meanings, one harmless and the other defamatory, according to the occasion on which they were used or the surrounding circumstances with reference to which they are to be construed the question as to the meaning of the words and the sense in which they were used is for the jury. Ency. Law, Vol. 18, page 991.

Written or printed language alleged to be defamatory, is in law capable of the same sort of modification by explanatory evidence as oral language, and when upon trial the question depends upon evidence to be introduced in connection with the publication it is properly left to the jury to say whether the language is libellous or not, the same rule prevailing as in similar cases of slander. Whether or not the language used will bear the interpretation given to it by the plaintiff, whether or not it is capable of conveying the meaning which he ascribes to it, is in such a case a question of law for the court. What meaning the words did convey to the readers is in such a case a question of fact for the jury. It is not the intention of the writer, or the understanding of any particular reader that is to determine the question. It is rather the effect which the language complained of was fairly calculated to produce and would naturally produce upon the minds of readers of reasonable understanding, discretion and candor, after it has been examined and considered in connection with all other parts of the writing, and in the light of all the facts and circumstances known to them. *Thompson* v. *Sun Publishing Co.,* 91 Maine, 203.

The words must be fairly susceptible of the defamatory meaning put upon them by the innuendos or the judge at the trial will stop the case. The judge must decide if the words are reasonably capable of two meanings; if he so decides the jury must determine which of the two meanings was intended. Odgers on Slander & Libel, 5 ed., page 129, citing 6 App. Cases, page 158, *Jenner* v. *A. Becket,* L. R. 7, Q. B., 11, 41 L. J. Q. B., 14.

It is for the court to determine whether the words are capable of the meaning alleged in the innuendo, it is for the jury to determine whether that meaning was properly attached to them. Odgers, pages 5 and 9. Under the authorities above quoted we can see no error in this part of the charge to which exception is taken, the same dealing solely with the province of the court. The entire charge was not made a part of the printed record, and if the defendant's attorney felt that the duty of the jury was not made sufficiently clear, the omission could have been easily supplied by a request for further instruction.

Two elements were involved, first, was a statement that plaintiff had the syphilis at the time of the allegation libellous if untrue; second, were the words "he is a damaged goods chap" in the mind of the court reasonably susceptible of meaning that plaintiff had the syphilis. It having been settled by the law from time immemorial that such a statement would be libellous if untrue, it was clearly the duty of the court to so state. It is equally well established that if the words used could not by any reasonable person understanding all the surrounding circumstances be understood to infer that the plaintiff had the syphilis the court should withdraw the case from the jury. The converse of this proposition must also be true, and in fact is so held. A witness was apparently truthful and informed as to the common understanding in that locality of the expression used having testified that the words imputed a charge of syphilis, and no evidence to the contrary having been presented, it was the duty of the court to submit the case to the jury and give his reasons therefor. The presiding Justice was careful to add, "not whether the language did mean that, but whether it could mean that." The instruction as to law was therefore entirely proper and correct. The question as to whether "is a damaged goods chap" meant that he was at the time suffering from syphilis or had been at some time in the past, was a proper matter for the ruling of the Justice, and was not a matter for the jury. This is too well-settled to need citations. All of the exceptions therefore are overruled, and the judgment is to stand.

Exceptions overruled.

TRUE REAL ESTATE COMPANY *vs.* JABEZ TRUE AND NORMAN TRUE.

Cumberland. Opinion January 15, 1917.

Rule of law where the words "children" are used in a deed as to this meaning children then living, or including after-born children. Rights and powers of trustees where the disposition of the trust fund is clearly intended to be left to the discretion of the trustees. Right of cestui que trust to assign shares in trust fund where the language of the trust clearly shows limitations over upon the happening of certain contingencies. General rule of law as to perpetuities. Meaning and application of rule against perpetuities.

Bill in equity to compel the defendants, as trustees under a trust deed to them by DeCarterett True, to deliver to the plaintiff, as assignee of the cestui que trustent, $15,000 of the trust funds with interest from demand.

The deed transferred both real and personal property to the trustees, brothers of the grantor, in trust, to pay therefrom any debts which the grantor then owed; to pay him from time to time such sums as the trustees should deem proper for the support of himself and family; to pay toward the support and education of his children such sums as the trustees in their discretion should find necessary and proper; to keep the real estate conveyed, or the avails of it, as a separate fund, only the interest of which should be used for the purposes of the trust during the grantor's life, and at his death one third of that fund to be conveyed or paid to his widow, if any, and what is not so conveyed or paid to be carried to the general fund; and, "Fifth, The rest and residue remaining in their hands at the time of his death shall be used for the support and education of his children, according to the discretion of the trustees, provided, however, that they may pay over to any one or more of his children or the issue of any deceased child, their respective distributive shares in the estate, or any portion thereof, whenever they shall deem it advisable to do so; but if none of his children shall survive him, or if all shall die before the estate is paid over to them, leaving no issue, said residue shall be divided equally between his surviving brothers and sisters and the issue of any brother or sister who has now deceased, or shall hereafter decease, by right of representation."

At the time the trust deed was given the grantor had a wife and three minor children, and they all survived him. The trustees paid all the debts of the grantor, paid to him for the support of himself and family, and toward

the support and education of his children, during his lifetime, sundry sums of money, and at his death conveyed or paid to his widow certain of said trust estate in full satisfaction and discharge of all her rights and interests therein, and they have paid to the grantor's three children, since his death, sundry sums of money as income of the residue of the estate. On February 8, 1915, each of the grantor's surviving children, being then of age, executed and delivered to the plaintiff an assignment of $5,000 of the trust funds then held by the trustees, requesting them to pay it to the assignee, which they refused to do upon demand. The value of the trust property now in the hands of the trustees exceeds $30,000 which they claim to hold under the terms of the trust established by the fifth paragraph of said deed

Held;

1. In ascertaining the proper construction of the fifth paragraph of the trust deed the intention of the grantor is to control, to be determined from the terms of the instrument, if plain and unambiguous, considered in the light of his situation and circumstances at the time.
2. The direction of the grantor that the residue of the estate should be used for the support and education of his children, according to the "discretion" of the trustees imposed a duty upon the trustees to exercise that discretion bona fide, and for their failure to do so the intended beneficiaries are not without remedy. But no such relief is asked for in this case.
3. The right to have a bona fide exercise by the trustees of their discretion in using the residue of the estate for the support and education of the grantor's children is wholly personal to each of the children, and could not be transferred by them to others.
4. The exercise by the trustees of the authority given them to pay over to any one or more of the children or to the issue of any deceased child their respective distributive shares in the estate, or any portion thereof, "whenever they shall deem it advisable to do so," is optional with the trustees, and the children take nothing under that provision which they can control and alienate until the trustees deem it advisable to, and actually do, pay it over to them.
5. The provision for the limitation over of the residue of the estate to the brothers and sisters of the grantor, in the event of the happening of the contingency mentioned in the fifth paragraph, shows that the grantor did not intend that at his death his children should take the entire unqualified and unlimited equitable interest in the residue of the trust property, such as would vest in them an equitable fee simple or fee simple in trust.
6. The word "children" when used in a deed refers only to such persons as are in life at the time the deed is executed and delivered, unless there is something in the instrument indicating that the grantor intended to use the word with a different meaning.
7. The word "children" used in the trust deed does not include any after-born children of the grantor, even if there could have been such.

8. The limitation over to the brothers and sisters of the grantor, provided for in the fifth paragraph of the trust deed, is not too remote and does not violate the rule against perpetuities.
9. The plaintiff's assignors did not have an alienable interest in the trust property remaining in the hands of the trustees at the time of the attempted assignments to the plaintiff.

Bill in equity brought by the plaintiff company against the defendants as trustees under a certain trust deed executed and delivered by DeCarterett True, praying for an accounting and seeking also to enforce payment to the plaintiff company as assignee of the three children of DeCarterett True, said children being beneficiaries under said trust deed, said children having given separate assignments, for the sum of five thousand dollars each to the plaintiff, of certain funds in the custody of the defendants as such trustees. Defendants demurred to the plaintiff's bill. The demurrer was overruled. Defendants thereupon filed their answer, and the case was set down, by agreement, for hearing upon bill and answer. The court thereupon entered a decree in favor of the plaintiff, ordering that the sum of fifteen thousand dollars, the amount of the assignments, be paid over to the plaintiff. From this decree, the defendants entered an appeal. Appeal sustained. Decree below reversed. Bill dismissed.

Case stated in opinion.

William Lyons, and Clinton C. Palmer, for complainants.

Woodman & Whitehouse, for respondents.

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

KING, J. Bill in equity to compel the defendants, as trustees under a trust deed executed and delivered to them by DeCarterett True July 5th, 1900, to deliver to the plaintiff, as assignee of the cestuis que trustent, $15,000 of the trust funds with interest from date of the demand therefor.

The defendants' demurrer to the bill was overruled, and thereupon they filed their answer, and after a hearing upon the bill and answer, the sitting Justice entered a decree in the plaintiff's favor

for the relief prayed for. From that decree the defendants appealed.

The trust deed in question transferred both real and personal property to the defendants, brothers of the grantor, upon the following trusts:

First, To pay therefrom any debts which said DeCarterett True may now owe.

Second, To pay over to him from time to time, such sums as they may deem proper for the support of himself and family.

Third, To pay toward the support and education of his children from time to time, such sums as said trustees, in their discretion, may find necessary and proper.

Fourth, the real estate hereinbefore described and hereby conveyed, or the avails thereof, shall be held and kept as a separate fund, only the income of which shall be used under the preceding articles during his life, and at his death one-third of this fund shall be conveyed or paid to his widow, if any, and what is not so conveyed or paid shall be carried to the general fund.

Fifth, The rest and residue remaining in their hands at the time of his death shall be used for the support and education of his children, according to the discretion of the trustees; provided, however, that they may pay over to any one or more of his children or the issue of any deceased child, their respective distributive shares in the estate, or any portion thereof, whenever they shall deem it advisable to do so; but if none of his children shall survive him, or if all shall die before the estate is paid over to them, leaving no issue, said residue shall be divided equally between his surviving brothers and sisters and the issue of any brother or sister who has now deceased, or shall hereafter decease, by right of representation.

Said trustees have power to sell, assign and convey the trust property, invest and reinvest the fund, and in all respects to manage the same as if it were their own property and as fully and completely as I could do myself, if this conveyance thereof had not been made.

In case of death of either of said trustees, the title to all the property shall vest in the survivor, and it shall be his duty at once

to convey one-half of said property to Ernest True of said Portland, if living, to be held by him as trustee jointly with said survivor on the same trusts, and with the same powers and duties as if he had been one of the original trustees; or if the said Ernest shall not be then living, or if after such conveyance to him either of the then trustees shall die, the property shall vest in the survivor who shall continue to act with all the powers and duties of the original trustees.

On July 5, 1900, when said trust deed was given, DeCartarett True had a wife, Elizabeth A. True, who joined in said deed, and three children, viz., Elizabeth M. True, aged 18 years; Thomas D. True, aged 15 years, and Benjamin S. True, aged 9 years. DeCarterett True died March 31, 1903, leaving surviving him his said wife and said three children.

It appears from the bill and answer, that the trustees paid all the debts of said DeCarterett True, and in his lifetime paid over to him sundry sums of money for the support of himself and family, and also during his lifetime paid toward the support and education of his children sundry sums of money, and that since his death they have conveyed or paid to his widow, said Elizabeth A. True, certain of said trust estate in full satisfaction and discharge of all her rights and interests therein, and have paid to his three children sundry sums of money as the income on their distributive shares in the rest and remainder of the trust estate. And the trustees admit that the value of the trust property now in their hands exceeds $30,000, which they claim to hold under the terms of the trust established by the fifth item in said deed.

On February 8, 1915, each of said surviving children, being then of lawful age, executed and delivered to the plaintiff an assignment of $5,000 of the funds then held by the trustees. Thereafter, on February 23, 1915, the plaintiff notified the defendants of said assignments and demanded payment of the $15,000 of the trust funds which demand was refused.

The question presented is, whether at the death of DeCarterett True his children, the assignors, took such an interest in the rest and residue of the trust estate that they can assign and transfer it in whole or in part, or whether they took only a qualified interest

in the trust property which gives them no power to assign or otherwise dispose of any part or portion of it in advance of its payment or transfer to them by the trustees under the terms of the trust. This question is to be determined by ascertaining what the terms of the trust are, and what was the intention of the grantor in creating it.

Under the fifth paragraph of the deed the grantor provided that the rest and residue of the trust property remaining in the hands of the trustees at his death "shall be used for the support and education of his children, according to the discretion of the trustees;" and he further provided that his trustees, "may pay over to any one or more of his children, or the issue of any deceased child, their respective distributive shares of the estate, or any portion thereof, whenever they shall deem it advisable to do so." He then provided that if none of his children survived him, or if they all shall die, leaving no issue, before the estate is paid over to them, the residue shall be equally divided between his surviving brothers and sisters and the issue of any deceased brother or sister, by right of representation. What interests did the grantor's children take in the residue of the trust estate remaining in the hands of the trustees at his death?

We understand the contention of the plaintiff to be, that the children of the grantor, at his death, took the residue of the trust property in equitable fee simple or a fee simple in trust; in other words, that the provision in the trust deed, that the residue of the property remaining in the hands of the trustees at the grantor's death "shall be used for the support and education of his children," was effective to vest in the children the whole unqualified and unrestricted equitable ownership of the residue of the trust property. If that is the effect of the provision, then, undoubtedly, it should be held, in accordance with the doctrine recently approved in *Holcomb* v. *Palmer,* 106 Maine, 17, that the interest of the children was an equitable fee simple or fee simple in trust, which they could assign or transfer in whole or in part. *Palmer* v. *Palmer,* 112 Maine, 149.

It is to be noted at the outset that the surviving brothers and sisters of the grantor, and the issue of any deceased brother or

sister, have a contingent interest in the residue of the trust property remaining at the death of the grantor, provided the limitation over to them is valid; and, therefore, they are interested and entitled to be heard in the determination of the question here involved, including, of course, the question of the validity of the limitation over to them. They have not been made parties, and are not before the court. However, inasmuch as we are of the opinion that the plaintiff's contention is not sustainable, it may avoid further litigation if we here state the reasons for that opinion.

Whether the plaintiff is entitled to the relief asked for depends upon the proper construction of the fifth paragraph of the trust deed. And in ascertaining that construction the intention of the grantor is to control, to be determined from the terms of the instrument, if plain and unambiguous, considered in the light of his situation and circumstances at the time.

The provisions of paragraph fifth are, (1) a *direction* that the residue of the trust estate at the time of the grantor's death "shall be used for the support and education of his children according to the discretion of the trustees;" (2) an *authority* to his trustees to pay over to any one or more of his children their respective distributive shares of the estate, or any part thereof, "whenever they shall deem it advisable to do so;" and (3) a limitation over to his brothers and sisters of the residue in the event that none of his children survive the grantor, or that they all shall die leaving no issue, "before the estate is paid over to them."

Respecting the meaning of the first provision of the fifth paragraph, that the residue of the trust property shall be used for the support and education of his children, the first inquiry naturally suggested, but not very material perhaps to the issue here involved, is, whether that provision applies to both the income and corpus of the residue. We think it was the grantor's thought and purpose that it applied to both, that if it was necessary in the exercise of the discretion of the trustees to use more than the income of the residue for the support and education of his children, then a part or the whole of the corpus of the residue would be so used.

The direction of the grantor that the residue of the estate should be used for the support and education of his children according

to the "discretion" of the trustees imposed a duty upon the trustees to exercise that discretion bona fide, and for their failure to do so the intended beneficiaries are not without remedy. Undoubtedly a court of equity, upon proper proof of the necessity for such relief, would require the trustees to exercise that discretion in good faith, according to their best judgment and uninfluenced by improper motives. But that right to have a bona fide exercise by the trustees of their discretion in using the residue of the estate for the support and education of the grantor's children is wholly personal to each of the children and could not be transferred by them to others. No such relief is asked in this case. Here the only question presented is whether this provision for the use of the residue for the support and education of the children according to the "discretion" of the trustees, taken in connection with the other provisions of item fifth, vested in the children an alienable interest in the trust property.

The exercise by the trustees of the authority given them to pay over to any one or more of the children or to the issue of any deceased child their respective distributive shares in the estate, or any portion thereof, "whenever they shall deem it advisable to do so," is optional with the trustees, and the children take nothing under that provision which they can control and alienate, until the trustees deem it advisable to, and actually do, pay it over to them.

We perceive a plain distinction between the provision of this trust for the support and education of the beneficiaries out of the residue of the trust fund in the hands of the trustees, and the trust involved in the *Palmer* cases, supra, which was held to vest in the beneficiary an equitable fee simple or fee simple in trust. There the testatrix gave to her son Clinton one-fourth of the remainder of her estate, the same as she gave to each of her other four children, stipulating, however, that Clinton's part should be held in trust "to be used for his comfort and necessities according to the discretion" of the trustee. There was no attempt by the testatrix to make any gift or devise over. That trust necessarily terminates at the death of Clinton, and any portion of the trust estate left at that time goes to the devisees or heirs of Clinton as a part of his estate, and not under and by virtue of the terms of the trust. In

the case at bar, however, the trustees were directed to use the residue of the trust estate, already in their hands, for the support and education of the children according to the discretion of the trustees. True, as we have said, they might in the exercise of their discretion use all the residue for that purpose, or they might exercise their discretionary authority given them by the grantor and pay over all the residue to the beneficiaries, so that in the event of the death of all the children leaving no issue there would be none of the residue left. But, as plainly indicating the grantor's thought that the residue might not all be used for the support and education of his children, or be paid over to them by the trustees under the discretionary authority he had given them to do so, and as manifesting his intention that in such contingency the residue left was not to pass to his children's heirs, if they all died leaving no issue, he expressly provided a limitation over of any such residue to his brothers and sisters. In the event of the happening of the contingency the brothers and sisters will take the residue by virtue of the trust. The provision for the limitation over shows, we think, that the grantor did not intend that at his death his children should take the entire unqualified and unlimited equitable interest in the residue of the trust property, such as would vest in them an equitable fee simple or fee simple in trust in the residue.

But the plaintiff urges the contention that the limitation over violates the rule against perpetuities and is therefore void. If that were so, the other provisions of the trust, being in themselves valid, would not be thereby invalidated. The vital question now before the court is not the validity of the limitation over, but the meaning, effect and validity of the prior and independent provision for the grantor's children. But we think the limitation over does not violate the rule against perpetuities. In *Pulitzer* v. *Livingston,* 89 Maine, 359, 364, our court, defining a perpetuity, said: "It is the grant of property wherein the vesting of an estate or interest is unlawfully postponed. The law allows an estate or interest, and also the power of alienation, to be postponed for the period of a life or lives in being and twenty-one years and nine months thereafter; and all restraints upon the vesting that may suspend it beyond that period are treated as perpetual restraints and void,

and estates or interests that are dependent on them are void." It is with the vesting of estates and interests that the rule against perpetuities concerns itself, and not with their termination. Contingent estates or interests vest upon the happening of the contingency. The interest or estate limited over to the grantor's brothers and sisters is a contingent interest. Whether it will ever take affect at all depends on the contingency of the death of all the grantor's children, leaving no issue, and before the estate is paid over to them. If that contingency will not necessarily happen, if it happens at all, within the period of a life or lives in being and twenty-one years and nine months after the time the limitation was created, then the limitation is too remote. That is the plaintiff's contention. It is predicated upon the premise that the words "his children" used in the fifth paragraph of the deed describes a class, which includes all the children of the grantor living at his death whether they were living when the deed took effect or were born thereafter; and the argument proceeds upon the theory, that it was possible for a child to have been born to the grantor, or to have been adopted by him, after the deed took affect, who would be entitled to an interest in the residue of the estate at the grantor's death, and, therefore, that the vesting of the limitation over might be postponed beyond the period of a life or lives in being, at the time the deed was executed and delivered, and twenty-one years and nine months thereafter. We think the plaintiff's premise is not sound. A deed, unlike a will, speaks from the date of its execution and delivery. Nothing appears in the deed in question showing that the word "children" as used in the fifth paragraph imports any different meaning than that to be accorded to it as used elsewhere in the deed. And it is a well settled rule that the word "children" when used in a deed refers only to such persons as are in life at the time the deed is executed and delivered, unless there is something in the instrument indicating that the grantor intended to use the word with a different meaning. We are of opinion, therefore, that the word "children" used in the trust deed was not intended to include, and does not include, any after born children of the grantor, even if there could have been such. *Hollis* v. *Lawton,* 107 Ga., 102; *Varnum* v. *Young, Executor,* 56 Ala., 260; *Gay* v.

Baker, 38 N. C.; *Fosch* v. *Walter,* 228 U. S., 109; 31 Pa. St., 165. In our view the limitation over to the brothers and sisters of the grantor is not too remote and does not violate the rule against perpetuities. And we perceive no other invalidity of the limitation over.

From what has been said it follows that our conclusion is, that under the provisions of item fifth of the trust deed the children of the grantor, at his death, took no interest or estate in the residue of the trust property which they could assign or transfer; first, because the provision that the residue should be used for their support and education, according to the "discretion" of the trustees, secured to them only the right to a bona fide exercise by the trustees of their discretion in so using the residue, a right which was wholly personal to each of the children and could not, of course, be transferred by them to others; second, because the exercise of the authority given to the trustees to pay over to the children any part or the whole of their distributive shares of the residue was wholly optional with the trustees, and, accordingly, the children can take nothing under that provision which they can control and alienate until the trustees deem it advisable to, and actually do, pay it over to them; and lastly, because there was a valid limitation over to the brothers and sisters of the grantor of a contingent interest in the residue of the trust estate, showing that the grantor did not intend that at his death the whole unrestricted equitable interest in the residue of the trust estate should be vested in his children.

It is, therefore, the opinion of the court that the plaintiff's assignors did not have an alienable interest in the trust property remaining in the hands of the trustees at the time of the attempted assignments to the plaintiff.

This conclusion which we have reached renders it unnecessary to consider the further contention urged by the defendants, that the trust created by the grantor for the benefit of his children in the residue of the estate is a spendthrift trust.

The entry will be,

Appeal sustained.
Decree below reversed.
Bill dismissed.

STATE OF MAINE *vs.* ANDREW L. KNOWLTON.

Waldo. Opinion January 16, 1917.

Returning indictment into Court. General rule as to what the Court record should contain. Necessary allegations in a plea of abatement, when indictment has not been properly returned.

1. In case of an indictment, the record must show that it was returned into court by the grand jury, either by a docket entry made at the time of the return, or by an indorsement of the fact upon the indictment itself, or it will be held bad on plea in abatement.
2. A plea in abatement to an indictment which denies that it was docketed, but does not deny that it was indorsed by stating the fact of its return, is bad.
3. When a plea in abatement to an indictment is overruled, a respondeas ouster is awarded.

Indictment for selling intoxicating liquor contrary to statute, returned by the grand jury for Waldo county, April term, 1916. It appears that at said term the indictment was returned against the respondent, but the clerk of court did not enter upon his docket any fact relating to this indictment. Soon after the April term adjourned, respondent was arrested and gave bail to September term, 1916, at which term respondent filed plea in abatement to said indictment, alleging "that said indictment was never legally returned into said court, for the reason that no entry upon the docket of said court nor record of said indictment was ever made in said court until after the final adjournment of that term of court, at which said indictment purports to have been found." To this plea in abatement, the attorney for the State demurred. Issue was joined on the demurrer. The demurrer was sustained. The plea in abatement was overruled; to which ruling respondent filed exceptions. Exceptions overruled.

Case stated in opinion.

Walter A. Cowan, County Attorney, for State.

J. D. Harriman, for respondent.

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

SAVAGE, C. J. To the indictment in this case, the respondent pleaded in abatement, and the State demurred to the plea. The demurrer was sustained, and the respondent excepted.

The question presented is whether, when an indictment is regularly returned into court by a grand jury and is placed in the custody of the clerk, proof of the fact that the clerk does not enter it upon the docket until after adjournment of the term is fatal to the indictment. We think it is not necessarily so.

It is a common practice not to enter upon the docket indictments where the respondents have not previously been apprehended, and are not in custody, nor under bail. The practice is a necessary one; otherwise the parties indicted might be apprised of the fact, and escape before arrest. This necessity is recognized in section 8, of chapter 135 of the Revised Statutes, which provides that "no grand juror or officer of the court shall disclose that an indictment for felony has been found against any person not in custody, or under recognizance, until he is arrested, except by issuing process for his arrest." A court docket is open to public inspection, and to enter an indictment for a felony upon the docket before an arrest has been made would be violative of this statute, unless the indicted party is in custody or under recognizance. Though the statutory prohibition extends only to indictments for felonies, the principle which it seeks to enforce applies as well to all grades of offenses.

The respondent contends that it was the duty of the clerk to docket the indictment during the term, and that he had no authority to do so after adjournment. It is the general rule that the record must show that the indictment was returned into court by the grand jury, either by an entry made at the time of the return, or by an indorsement of the fact upon the indictment itself; and that in the absence of a record entry, or of such an indorsement, the indictment will be had on plea in abatement. 10 Cyc. of Pleading and Practice, 410, and cases cited. In view of this rule, the defendant's plea is bad. It denies that the indictment was docketed, but it does not deny the alternative requirement of indorsement by the clerk. All that is alleged in the plea may be true and yet the

indictment may be good. On this ground, in any event, the demurrer was properly sustained.

We have no necessity to discuss the authority of the clerk to docket the indictment in vacation.

The exceptions must be overruled and respondeas ouster awarded. *State* v. *Pike,* 65 Maine, 111.

Exceptions overruled.

MEMORANDA DECISIONS

CASES WITHOUT OPINIONS

FRED S. SHERBURNE *vs.* JOSEPH BOUGIE.

York County. Decided June 6, 1916. An action on the case to recover damages for the alleged negligence of the defendant while a servant of the present plaintiff, on account of which negligence the present plaintiff was obliged to pay damages on account of the injuries occasioned through the negligence of the present defendant. The verdict was for the defendant, and the case is before this court upon a motion for a new trial.

The only issue of fact was whether the defendant was performing his duties in accordance with such directions from his principal, the present plaintiff, as would excuse his negligence.

The verdict was for the defendant. There was nothing improbable in the defendant's version, and the jury having seen and heard the witnesses upon both sides of the disputed questions of fact, and there being evidence that, if believed by them, justified them in believing the defendant's version, we are not authorized to substitute our judgment for theirs. Motion overruled. *George W. Hanson,* for plaintiff. *Allen & Willard,* for defendant.

J. ALLEN SMITH *vs.* WILLIAM J. CAMPBELL, and Trustee.

Aroostook County. Decided July 8, 1916. The suit was to recover the price of fertilizer sold. The defence was payment.

The testimony of the parties was flatly contradictory. The jury found for the defendant. The burden now is on the plaintiff to show that the verdict is clearly wrong. The court is of opinion that the plaintiff has failed to sustain the burden. Motion for a new trial overruled. *Hersey & Barnes,* for plaintiff. *Fred P. Whitney, and W. R. Roix,* for defendant. *John B. Roberts,* for trustee.

GEORGE F. HILL *vs.* ARTHUR A. KEEZER.

Penobscot County. Decided July 18, 1916. An action for replevin for one horse, one meat cart, and one jigger carriage, alleged to be of the value of $225. The verdict was for the defendant, and the case is before this court on motion. It is not enough to sustain a verdict that there is evidence which, if believed by the jury, would justify them in returning it; that evidence must be so reasonable and so probable that an unprejudiced man, when considering all the evidence and all the circumstances in the case, would be justified in believing it. The record in this case does not show such a state of facts, and it is evident that the jury, through bias, prejudice or misapprehension of the weight of evidence and the rules of law, returned a verdict not authorized, and the entry must be motion sustained. New trial granted. *Morse & Cook,* for plaintiff. *G. E. Thompson,* for defendant.

GEORGE H. PINKHAM, et al. *vs.* WILLIAM H. WITHAM.

Lincoln County. Decided July 26, 1916. Action on the case for damages alleged to have been caused by a fire set by the defendant on his own land and which spread to and over the land of the plain-

tiffs. A verdict for $62.12 was returned for the plaintiffs and the case comes to the Law Court on defendant's motion for a new trial.

Held;

The court is not convinced that the jury erred in finding for the plaintiffs, or in the amount of damages awarded. Motion overruled. *Andrew C. Halpen,* for plaintiff. *George A. Cowan,* for defendant.

STATE OF MAINE *vs.* GEORGE E. BENSON.

Waldo County. Decided September 9, 1916. The respondent was indicted for maintaining a liquor nuisance. At the conclusion of the evidence for the State, the respondent asked the presiding Justice to direct a verdict in his favor. This was refused and the case was submitted to the jury who brought in a verdict of guilty. The respondent introduced no evidence.

Upon respondent's exception to the refusal of the presiding Justice to direct a verdict in his favor, it is *held;*

1. That when the evidence in support of a criminal prescution is so weak or so defective that a verdict of guilty based upon it cannot be sustained, it is the duty of the presiding Justice to direct a verdict in favor of the respondent.

2. That the evidence on the part of the State in this case was neither weak nor defective, but was ample to justify the jury in finding a verdict of guilty. There was therefore no error in the ruling of the presiding Justice and the entry must be exception overruled. Judgment for the State. *Walter A. Cowan,* County Attorney, for the State. *Arthur Ritchie,* for the respondent.

WALTER W. HILTON *vs.* GEORGE C. ERSKINE.

Lincoln County. Decided September 8, 1916. Action of trespass quare clausum to recover damages because of defendant's entering

upon and crossing plaintiff's land and cutting trees thereon. The defendant attempted to justify by setting up a right of way across the lot in question acquired by prescription. The jury returned a verdict in favor of the plaintiff for one dollar.

Upon defendant's motion for a new trial, it is *held;*

That a patient examination of the evidence convinces the Court that the verdict was not manifestly wrong. The burden was upon the defendant to establish his claim, and we are unable to say that the jury clearly erred in finding that he had not proved all the necessary elements required by law to constitute such an adverse user. Motion overruled. *A. S. Littlfield, and Charles L. Macurda,* for plaintiff. *George A. Cowan,* for defendant.

STATE, by Indictment, *vs.* JAMES A. DUANE. (Two cases.)

Lincoln County. Decided September 9, 1916. Indictment against respondent as common seller of intoxicating liquors. The indictment is in the precise form prescribed by statute. We have no doubt of its sufficiency. Exceptions overruled. Judgment for the State. *James B. Perkins,* County Attorney, for the State. *J. H. Montgomery,* for respondent.

ALEXANDER BILODEAU *vs.* MAINE CENTRAL RAILROAD COMPANY.

CLOTTIE BILODEAU *vs.* MAINE CENTRAL RAILROAD COMPANY.

Kennebec County. Decided September 26, 1916. Action on the case brought under the provisions of chapter 52, section 73 of the Revised Statutes, 1903, to recover damages sustained by the plaintiff on account of the destruction of her farm buildings by means of a

fire communicated by a locomotive engine of the defendant company. The case was tried to a jury and a verdict returned for the plaintiff in the sum of $3,775, and the case is before this court upon a motion to set aside the verdict, which motion is urged solely upon the ground of excessive damages.

Held;

The plaintiff was entitled to a verdict that would make her whole for her loss, but a proper deduction from the cost of the property destroyed, considering its age, use and depreciation, and a fair value of the buildings destroyed and the injury to the real estate, shows that the jury erred in fixing the value as shown by their verdict. We think that the largest amount that the jury were authorized to return was $3,000, and we hesitate in saying that they were authorized in returning a verdict for that amount. If the plaintiff files a remittitur of all the verdict above $3,000 within thirty days from receipt of the mandate by the clerk of the superior court, the entry will be "Motion overruled;" otherwise the entry will be "Motion sustained. New trial granted." *Andrews & Nelson,* for plaintiffs. *Johnson & Perkins,* for defendant.

CURTIS DURGAIN *vs.* MAINE CENTRAL RAILROAD COMPANY.

Penobscot County. Decided October 5, 1916. Action of trover for a carload of staves. The plea was the general issue with brief statement denying the plaintiff's title and alleging the staves to be the property of one James F. Gerrity. The verdict was for the plaintiff, and the case is before the Law Court on the defendant's motion for a new trial. *Held;*

An action of trover cannot be maintained without proof that the defendant did some positive wrongful act with the intention either to appropriate the property to himself, or to deprive the rightful owner of it, or to destroy it. *Whiting* v. *Whiting,* 111 Maine, 13, 16.

Considering the evidence presented by the record of this case in the most favorable light possible for the plaintiff, it does not justify a finding that the defendant converted the property sued for.

Motion overruled. New trial granted. *George E. Thompson, and William N. Warren,* for plaintiff. *A. L. Thayer, and Ryder & Simpson,* for claimant. *Fellows & Fellows,* for defendant.

J. W. INGRAHAM, JR., AND NANCY K. WHITMORE

vs.

CHARLES S. ROBERTSON.

Knox County. Decided October 5, 1916. In an action of assumpsit to recover $485.05 for pressed hay sold and delivered, the defendant claimed that the hay was unmerchantable, having been wet after pressing and before delivery. The jury found for the plaintiff in the sum of $443.89.

Upon defendant's general motion to set aside the verdict and upon a special motion based upon newly discovered evidence, it is *held;*

1. That the quality, condition and value of the hay, and the extent of the injury by rain, if any, were purely questions of fact. They were matters peculiarly within the experience of the jury. The evidence was contradictory. We see no reason to disturb the verdict on the general motion.

2. That the newly discovered evidence is not of sufficient weight and materiality to affect the result or warrant the granting of a new trial.

Motions overruled. *O. H. Emery,* for plaintiffs. *A. S. Littlefield,* for defendant.

LUTIE H. HOBBS *vs.* E. MARSHALL PRESTON.

Franklin County. Decided October 5, 1916. The plaintiff obtained a verdict of $1,700 for injuries sustained by her on account of her horse being frightened by the defendant's automobile. The plaintiff's wagon was overturned and she was thrown upon the ground and dragged for some distance.

Defendant filed motion to set aside the verdict.

Held;

1. That the jury were warranted in finding the defendant's conduct to have been negligent. He was a man sixty-three years old and quite inexperienced in the handling of cars. He was driving on the left or wrong side of the road. He saw the plaintiff approaching in her team. His speed was not excessive, but the evident cause of the accident was his failure to seasonably turn from the left to the right side of the road.

2. That the jury were also justified in finding the plaintiff free from contributory negligence.

3. The damages, while perhaps large, cannot be deemed so excessive as to require the intervention of the court.

Motion overruled. *Elmer E. Richards,* for plaintiff. *Thomas D. Austin,* for defendant.

ARTHUR G. TAYLOR

vs.

LEWISTON AND WATERVILLE STREET RAILWAY.

Androscoggin County. Decided October 28, 1916. An action to recover for personal injuries sustained by the plaintiff by a collision between a two-horse team driven by the plaintiff, and an electric car of the defendant. The verdict was for the defendant, and the case is before this court on a motion to set aside the verdict.

The only question necessary to consider is, was the jury authorized in finding the plaintiff guilty of contributory negligence in turning the two-horse team, loaded with three tons of sand, on the highway and attempting to drive across the tracks of the defendant when there was a car approaching that he could have seen at least eight hundred feet before he attempted to make the turn and the car remained in plain sight until the collision.

We think the jury were authorized from the evidence in their finding that the plaintiff was guilty of contributory negligence. Motion overruled. *Tascus Atwood,* for plaintiff. *Newell & Woodside,* for defendant.

HENRY M. YOUNG

vs.

LEWISTON, AUGUSTA AND WATERVILLE STREET RAILWAY.

Androscoggin. Decided October 28, 1916. In this case the plaintiff was the owner of the team driven by the plaintiff in case of *Taylor* v. *L. A. & W. St. Ry.,* and he seeks to recover damages for the injury to the team caused by the collision. The case is governed by the same rules of law as *Taylor* v. *L. A. & W. St. Ry.,* and the judgment must be the same as the judgment in that case. Motion overruled. *Tascus Atwood,* for plaintiff. *Newell & Woodside,* for defendant.

ARTHUR F. TALBOT *vs.* CHARLES LOCKE.

Cumberland County. Decided November 1, 1916. Action in assumpsit on account annexed consisting of a number of items, but the only controversy is over two charges, viz., a block of cylinders

for an automobile and an express charge thereon. Verdict upon these items, as well as the others, being in favor of the plaintiff, the defendant asks that the judgment of the jury be set aside. Neither counsel presented any argument to sustain his contentions. The testimony of the plaintiff stands alone on one side, and that of the defendant and his wife on the other. One side flatly contradicts the other. The issues were solely issues of fact. The jury saw the witnesses and heard them testify and we are not convinced from the printed record that the finding of the jury is so clearly wrong as to warrant us in setting that finding aside. Motion for new trial overruled. *C. L. Beedy,* for plaintiff. *L. F. Crockett, and C. E. Sawyer,* for defendant.

ELISE E. LETOURNEAU *vs.* ARCHIE L. JACQUES.

York County. Decided November 1, 1916. Action on the case to recover damages sustained by the plaintiff on account of the erection and maintenance by the defendant of an automobile garage for public use in such close proximity to the plaintiff's dwelling house that the noises and odors arising therefrom created a nuisance. rendering the occupation of the dwelling unsafe and unpleasant and interfering with the renting of the rooms therein. The plaintiff recovered a verdict of five hundred dollars and the defendant comes to this court on the customary motion to have that verdict set aside.

After careful reading of the testimony, we are not convinced that the verdict is so clearly wrong as to require us to set it aside upon the main question, but we are of the opinion that the damages are too large. If the plaintiff remits all of her damages in excess of two hundred dollars then the verdict may stand, otherwise new trial is ordered. *Clarence Webber,* for plaintiff. *Joseph R. Paquin, and Emery & Waterhouse,* for defendant.

PETER H. DAVIS

vs.

BANGOR RAILWAY & ELECTRIC LIGHT COMPANY.

Penobscot County. Decided December 14, 1917. This is an action on the case, brought by the plaintiff to recover damages which he alleges he sustained by a collision of his milk wagon, driven by an employee, with one of the defendant's cars, August 6th, 1914. The verdict was for the plaintiff, and the defendant brings the action to this court on a motion for a new trial.

Held;

1. That the car was proceeding at it's usual rate of speed, and not an excessive rate; that there was no evidence that justified the jury in finding that the defendant was not operating it's car with due care at the time of the accident and immediately preceding.

2. That the plaintiff's servant was guilty of contributory negligence in driving his team on to the track in front of the approaching car without looking to see whether he had time to cross or not. As the servant of the plaintiff knew that the car was approaching him, and did not take proper steps to avoid it, he is chargeable with contributory negligence.

3. That "The last clear chance" doctrine does not apply in this case, because the testimony shows conclusively that as soon as the plaintiff's servant attempted to drive across the track in front of the approaching car the motorman saw him and did all that he could to avoid the accident and, by the exercise of due care, could not avoid it.

Motion sustained. New trial granted. *George E. Thompson,* for plaintiff. *Ryder & Simpson,* for defendant.

THE DEVEREUX COMPANY *vs.* FORREST C. SILSBY.

Honcock County. Decided December 14, 1917. This is an action on the case in which the plaintiff sues to recover damages for the

loss of the steamer "Corinna," her tackle, apparatus and furniture, through the alleged negligence of Maurice L. Grindle, a deputy of the sheriff appointed by the defendant and for whose conduct the defendant is answerable. The jury found for the defendant. The plaintiff moves for a new trial because the verdict is against the law and evidence.

On the fifth day of May, 1915, Maurice L. Grindle, the deputy of the sheriff, attached the steamer on a writ issued out of the Supreme Judicial Court. On the twelfth day of September, 1915, the steamer was accidentally destroyed by fire. The two questions of fact that the jury passed upon were, did the officer use ordinary and reasonable care after the attachment and prior to the fire, and since the fire has he done what an ordinary prudent and cautious man should have done to preserve and care for the property remaining under water? The jury found, under proper instructions, as to the care, that it was the duty of the deputy to exercise, both before and after the fire, that he did exercise the care requird, and there was evidence, if the jury believed it, that justified their finding, and we can find nothing in the record that tends to show that the jury were influenced by prejudice, bias or mistake; that the evidence was sufficient to authorize the verdict we think is clear from the reading of the testimony, and the finding of the jury upon the questions of fact must be sustained. Motion overruled. *D. E. Hurley,* for plaintiff. *Deasy & Lynam,* for defendant.

HERBERT A. PRESCOTT *vs.* BLACK & GAY, Canners.

Knox County. Decided December 14, 1916. An action on the case to recover damages for injuries received by the plaintiff while working as a sealer of cans in the defendant's canning factory at Thomaston. The verdict was for the plaintiff, and the case is before this court upon a motion for a new trial.

Held;

As the only questions in the case were questions of fact; and the jury having found, as they necessarily must have found to have returned a verdict for the plaintiff, those facts in favor of the plaintiff, although it is a close case we do not feel authorized to disturb their findings, as there is evidence which they were authorized to believe that, if believed, justified the findings.

It is urged that the damages are excessive. They are large, but the plaintiff was severely burned. He is a young man, and by reason of the injuries received he is disfigured for life. Parts of his ears were burned off and his hands and arms, by the testimony, were greatly injured by the burns, and he has not yet recovered from the injuries, and it was his claim that he never will be able to work as he could before he received the injuries, while the defendant claimed that he has nearly recovered and is able to labor practically as before the accident. The jury saw his condition and the disfigurement caused by the burns, and from an inspection of his hands and arms were better able than we are to determine his condition, and with the evidence of the burns before them, as well as hearing the witnesses, we think they were better qualified to assess the damages than we are, and, although we think the damages are large, we cannot say that they are so excessive that the verdict should not be set aside. Motion overruled. *M. A. Johnson,* for plaintiff. *Edward I. Taylor, J. W. Britton, and Hinckley & Hinckley,* for defendants.

CHAUNCY M. GUY *vs.* BOSTON & MAINE RAILROAD.

York County. Decided December 14, 1917. An action on the case to recover for injuries sustained by the plaintiff on the 17th day of August, 1914. The plaintiff was forty-nine years of age, and the foreman of the sole leather department of the E. W. Warren Shoe Company, located at Somersworth, New Hampshire, and at the time of the injury, and for some time prior, had received $2,000 per year as salary. On the 17th day of August, 1914, in the

forenoon, the defendant had placed on a side track of its railroad and adjacent to the E. W. Warren Shoe Company factory, a box car, containing sole leather and stock consigned to the E. W. Warren Shoe Company. The track upon which said car was left was used exclusively for said shoe factory to load and unload freight carried by the defendant railroad. The car had been placed by the defendant at a point opposite the gateway leading into said shoe factory, for the purpose of unloading the contents of the car for the factory. The car was connected with a platform at the gateway by a movable gang-plank which formed a bridge, one end of which rested in the car doorway and the other upon said platform, so that trucks could be wheeled in and out of the car to unload its contents. The plaintiff, under his employment, was engaged in weighing and checking up the sole leather in the car preparatory to unloading, and at the time of the injury was alone in the car, his helpers having wheeled out, over the gang-plank through the gateway to the factory, some loads of leather. The plaintiff was seated upon a box, about 18 inches high, about midway of the car, adding up figures which he had taken in checking up and weighing the leather. The defendant's train men were engaged in shifting cars in the vicinity of the car in which the plaintiff was working at the time of the injury, and they backed down on the side track, against the car in which the plaintiff was then at work, a train made up of five freight cars and a locomotive engine. It is the claim of the defendant that the rail was bad and slippery, and that the engineer could not, by the exercise of due care, control his engine and stop the train because of the slippery condition of the rail. At the time of the accident, the train had been in operation in that vicinity from two to three hours, and the rail was the same all of the time. The freight train backed into the car in which the plaintiff was checking up the material, with such force that he was thrown from the box against the leather on the floor and received the injuries complained of.

The plaintiff was lawfully in the car, in the exercise of due care, and the defendant owed him the duty to warn him of any movement of the cars in that neighborhood that would render it unsafe for him to remain there. The car having been placed upon the track for

the consignee to unload, the plaintiff had a right to be there unloading it, and it was the duty of the defendant, in the exercise of due care, not to move it's other cars or engine so as to endanger his safety, without warning to him. It was not his duty to keep a watch for cars that might be shifted upon the track, but it was the duty of the defendant not to shift cars upon the track so as to endanger him without warning, and when the defendant backed it's train upon the car in which he was working, with such force that it threw him from his seat causing the injuries which he received, it was not in the exercise of due care, and there can be no question but that the defendant was liable for the injuries the plaintiff received. There is no question but that the plaintiff was injured, and that, at the time of the trial he was not a well men; but from a careful reading of the evidence it seems improbable that he was injured by the fall in the car to the amount awarded by the jury. It will serve no useful purpose to discuss the evidence bearing upon that question, but the damages, it seems to us, are clearly excessive, and that the most, under any circumstances, that the jury were authorized to award the plaintiff should not have exceeded $2,000. If the plaintiff, within thirty days after the certificate is filed with clerk of courts remits all of the verdict in excess of $2,000, motion overruled. Otherwise motion sustained. *Mathews & Stevens,* for plaintiff. *G. C. Yeaton, and Emery & Waterhouse,* for defendant.

FRED H. THOMPSON

vs.

LEWISTON, AUGUSTA AND WATERVILLE STREET RAILWAY.

Sagadahoc County. Decided December 14, 1916. In this action the plaintiff seeks to recover damages for personal injuries to himself, damages to his automobile, and for the loss of the services of

his wife and expenses incurred by him, all of which it is claimed were caused by a collision between the plaintiff's automobile and an electric car of the defendant, on a highway at a grade crossing in Brunswick.

Held;

1. That the evidence did not authorize the jury to find that the defendant, by it's servants and agents, was not operating its car with due care.

2. That the plaintiff failed to exercise due care when he drove his automobile on to the track of the defendant. That if he had exercised due care he would have heard the whistle and the hum of the wires and the noise of the approaching car in time to have avoided the accident; that he failed to exercise due care in the operation of his automobile and was guilty of contributory negligence.

3. That the doctrine of the last clear chance does not apply to this case. *Southern Railway Company* v. *Gray, Adm.*, 241 U. S., 339.

Motion sustained. New trial granted. *Walter S. Glidden, and George W. Heselton,* for plaintiff. *Newell & Woodside,* for defendant.

HERBERT LUCE *vs.* WALTER G. DAVIS, et als.

Piscataquis County. Decided December 22, 1916. Motion by defendant to set aside verdict. Plaintiff on November first, 1910, contracted to plant, cultivate, gather and deliver sweet corn in a suitable condition for canning at the defendant's factory during the following season. Delivery was to be made at any time when the defendants ordered. Defendants agreed to take the corn in such condition and pay an agreed price therefor. It is not in dispute that during the season of 1911, while corn was being gathered and delivered by the plaintiff, and others having similar contracts with the defendants, an unusually heavy frost occurred in the region of the plaintiff's farm and, indeed, over quite a portion of the State.

Defendants refused to accept and pay for a part of plaintiff's corn because, as they claimed, it had been rendered unsuitable for canning by the frost. The contention between the parties centers about this issue. The plaintiff claimed that by reason of the high altitude of his farm, and other favorable conditions, his corn was not frosted to such an extent as to render any part of it unsuitable for canning. Two men who helped pick the corn testified that in their opinion the corn had not been injured by the frost. A neighbor who passed plaintiff's farm frequently testified that the location of this land was favorable to an escape from the effect of frost, and further said that he observed the corn after the frost and saw no indication of damage. Another neighbor, whose farm was nearly opposite that of the plaintiff's, also testified similarly.

On the other hand the defendant's field man declared that the corn which was refused had been frost bitten, that the husks were white, and that it was unfit for packing. The foreman of defendant's factory, a man of nearly forty-eight years' experience, testified that the ears of corn were wilted and withered, and that the corn was bitter and unfit for canning. A neighbor of the plainift, whose farm was separated from that of the latter only by a driveway, said the leaves on the stocks were quite white and he thought the corn had been hit some by the frost. A man who worked for the last witness described the weather conditions as "more than frost, it was a freeze," that ice was formed in a tub from a third to a half inch in thickness and that the ground was frozen quite hard. He also stated that the corn which he picked for his employer, after the frost, "was froze quite hard," and that the plaintiff's land and the land of his employer where on practically the same level and only just across the road. A grocer who examined the corn after the frost, found it white and frost bitten. A man who picked some of the plaintiff's corn after the frost said that it looked as though the field had been struck by frost and that while some of the corn was greener than others yet all was practically white on the outside.

A more detailed and extended analysis of the testimony might be made but after a careful study of all the evidence we are satisfied that either because of sympathy for the plaintiff, or for some

other reason, the jury did not fully and impartially weigh the testimony in the case, that consequently the verdict was manifestly wrong and should not be allowed to stand. Motion granted. New trial ordered. *L. B. Waldron,* for plaintiff. *Bradley & Linnell, and W. E. Parsons,* for defendant.

ALFRED NADEAU *vs.* PETER SHILINSKI.

Androscoggin County. Decided January 3, 1917. An action for trespass to the person. Plea, general issue. Verdict for $290.50, which defendant moves to have set aside as against law and the evidence and because of excessive damages. The correctness of this verdict depends on the credibility of the witnesses, which the jury could better determine than the Law Court. There being no denial that the plaintiff's arm was broken and that as a result he was unfit for labor for several weeks, the jury having decided that the injury resulted from an unjustifiable assault with a club upon one who was already a cripple, the damages are not excessive. Motion overruled. *McGillicuddy & Morey,* for plaintiff. *George S. McCarty,* for defendant.

WILLIAM S. WARD,

Appellant from the Decree of the Judge of Probate.

Cumberland County. Decided January 16, 1917. Appeal from the allowance of a will. The case was submitted to a jury on the issue of undue influence, and the jury returned a verdict for the proponent. A careful examination of the evidence leads to the conclusion that the jury were warranted in finding as they did. Motion overruled. *Richard Webb, for appellee. Richard J. McGarrigle, Arthur L. Robinson, Harry E. Nixon, and Jacob H. Berman,* for appellant.

ADAM GERSU *vs.* EDMOND TARDIFF.

Penobscot County. Decided January 26, 1917. An action for the recovery of damages for injuries resulting from an alleged assault of plaintiff by defendant. The defendant pleads the general issue of not guilty and by brief statement sets up self defense. The jury rendered a verdict for plaintiff and defendant filed the usual general motion for new trial.

An examination of the evidence reveals much conflict as to the party who was the first aggressor. But, however that may be, we think there was sufficient evidence, assuming the plaintiff to be the assailant, to justify the jury in finding that the defendant grossly exceeded the limits permitted in self defense.

Nor can we say that the damages awarded are so excessive as to require the setting aside of the verdict. That this court might have found a less sum is unimportant when the excess, as we must hold, is not such as to indicate that the jury was moved by improper considerations or motives in reaching their conclusions.

The motion must be overruled and it is so ordered. *Samuel Cohen, and B. W. Blanchard,* for plaintiff. *George E. Thompson,* for defendant.

ERNEST U. ARCHIBALD *vs.* QUEEN INSURANCE COMPANY.

Androscoggin County. Decided February 5, 1917. Action to recover insurance on an automobile which was destroyed by fire December 23rd, 1915.

The plaintiff recovered a verdict for $1,507.94, and the case comes up on the defendant's general motion for a new trial.

The case discloses that the principal, if not the only fact involved was upon the question of waiver on the part of the defendant of its rights under the stipulation in the policy that "this entire policy shall be void . . . if the interest of the insured in the policy be other than unconditional and sole ownership, or if the

subject of this insurance be or become encumbered by any lien or mortgage."

In the absence of exceptions it is assumed that the issue was stated to the jury with proper instruction.

There was evidence to justify the jury in finding for the plaintiff, if in weighing the evidence the plaintiff's testimony impressed them as being true as it apparently did.

In such circumstances we think the verdict should stand. Motion overruled. *McGillicuddy & Morey,* for plaintiff. *W. R. Pattangall,* for defendant.

ALDEN J. VARNEY *vs.* JOHN C MCCLUSKEY.

Aroostook County. Decided March 6, 1917. This is an action involving the following contract:

"This Indenture made this 19th day of May, A. D. 1913, by and between Alden J. Varney of Hodgdon, Maine, of the first part, and John C. McCluskey of Houlton, Maine, of the second part, Witnesseth as follows, to wit: the said McCluskey agrees to plant on his farm in Houlton, Maine, 25 bbls. or 5 acres of the New Snow Potatoes and to sell and deliver to said Varney all merchantable potatoes grown on said 5 acres, excepting 50 bbls. 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 1 first, 1914 within two days notice from said Varney, said McCluskey 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, said 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 McCluskey 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 McCluskey fifty cents per barrel for said New Snow Potatoes, than is paid for potatoes for table use, on the day said McCluskey delivers said potatoes to the station. Said McCluskey further agrees to pay said Varney $75, seventy-five dollars if said Varney fulfills this contract.

A. J. VARNEY
J. C. MCCLUSKEY."

The plaintiff recovered a verdict for $194.95 and the case is before this court on the defendants general motion for a new trial. The record discloses conflicting testimony throughout, and on the question whether or not the plaintiff made demand, or gave notice, "within two days before April 1st, 1914," there appears great conflict, so great in fact that the decision of the jury must have depended largely, if not wholly, upon the credibility of the witnesses. The jury having determined that question, we think the verdict should not be set aside, especially as it does not appear that it is wrong. Motion overruled. *R. W. Shaw, and W. S. Lewin,* for plaintiff. *Hersey & Barnes,* for defendant.

CELIA M. HARVEY *vs.* WILTON WOOLEN COMPANY.

Androscoggin County. Decided March 12, 1917. The plaintiff claims to have been injured in the Woolen Mill of the defendant by slipping on some oil on the floor and falling so that one of her hands was caught in a revolving pulley. At the close of the plaintiff's evidence the presiding Justice granted a motion for nonsuit and the case is before the court on the plaintiff's exception to the ruling of the presiding Justice. The accident occurred on the 13th of November, 1915, and the plaintiff had been operating the same loom in the same location of the defendant's mill from the last day of July preceding. She had worked in this and other woolen mills as a loom operator off and on for fifteen years prior to the accident.

According to her testimony the conditions at the time of the accident were no different from what they had been many times, if not continuously, during all the term of her employment. She claims that the oil in which she slipped at the time of the accident came from a coupling in the machinery over the floor and alleges that the defendant was at fault in not having some receptacle under this particular coupling to catch the oil that dripped thereform. If her contention is true that the oil did drip from this coupling to the floor, it is clear from her testimony that it was not an unusual happening. She testifies that the floor around these looms, in this as in other mills in which she had worked, was always greasy and slippery, that on this morning she was hurrying and not thinking of slipping. It is evident that the conditions of which she complains in her writ were known to her during all of the time of her employment and were not unusual. The conclusion that she assumed the risks of the dangers from which the accident occurred and that, therefore, the ruling of the presiding Justice under all the evidence presented by her was correct, seems fully justified. Exceptions overruled. *McGillicuddy & Morey,* for plaintiff. *Hinckley & Hinckley,* for defendant.

SPRINGVALE NATIONAL BANK *vs.* GEORGE ASHWORTH.

York County. Decided March 16, 1917. This is an action against the alleged endorser of two promissory notes. The defendant pleaded the general issue and, by brief statement, denied the signatures upon the notes, alleged to be his, and filed his affidavit in support of his denial. The genuineness of the signature was the chief, if not the only issue, in the case. The jury rendered a verdict for defendant and plaintiff filed the usual motion for new trial.

The grounds upon which new trials may be granted have been exhaustively considered in our decisions. It is not enough that the court might have come to a different conclusion. The credibility of the witnesses and the weight to be given to evidence found credible is for the jury. We are unable to say that there was no evidence,

which if believed, was sufficient to justify the finding of the jury or that upon all the evidence it is apparent that the jury was biased or prejudiced, laboring under a misapprehension or guilty of misconduct. The motion is therefore overruled. *George A. Goodwin,* for plaintiff. *Ruggles S. Higgins,* for defendant.

ANTHONY JOZUKEWICZ, Admr.

vs.

WORUMBO MANUFACTURING COMPANY.

Androscoggin County. Decided March 30, 1917. This is an action brought by the plaintiff, as administrator of the estate of John Shenkunis, to recover of the defendant damages for injuries which the plaintiff's intestate sustained by reason of which he died. The verdict was for the plaintiff for the sum of $2,150. The case is before this court on a motion for a new trial.

The plaintiff's intestate met his death by falling into a vat or kettle of boiling dye, which scalded him so badly that he died some hours afterwards. At the time of the accident he was a servant of the defendant, and just before the accident was turning a reel standing upon a platform that was placed along side of the vat. The acts of negligence complained of were the failure to provide a platform of sound wood, and to keep the same in repair, and failure to provide a platform held together with safe fasteners and to keep the same in repair. The defendant pleaded contributory negligence upon the part of Shenkunis, but the evidence authorized the finding of the jury that he was not guilty of contributory negligence. Immediately after Shenkunis was discovered in the boiling vat, it was discovered that one of he plank supports upon which the platform stood was broken. The platform was repaired a few days before the accident, and was before the jury for examination, and also before this court at the argument.

We think, from an examination of the platform, that the jury were authorized to find that the wood with which it was repaired was not suitable for the purpose for which it was used. It was not sound wood. No one saw Shenkunis fall into the vat, but a careful consideration of all the evidence and circumstances as disclosed at the time of the accident we think did authorize the jury to find that the accident happened by reason of one of the plank supporting the platform, which had been defectively repaired, breaking, which caused him to fall into the vat. Of course, it is not proved conclusively. Accidents of this kind can not be proved beyond a reasonable doubt, but all the circumstances and probabilities we think authorized the jury to find negligence of the defendant in providing an unsafe platform, as alleged in the writ. We do not say that a verdict for the defendant would *not* have been sustained, but upon the question of fact submitted to the jury, there being evidence that reasonable, honest men might believe that tended to prove the plaintiff's claim, and no evidence of any contributory negligence upon the part of the intestate, we think that the jury's finding upon the question of fact must prevail, and the mandate be motion overruled. *Herbert E. Holmes, and W. R. Pattangall,* for plaintiff. *McGillicuddy & Morey,* for defendant.

WILLETT MARTIN CO. v. S. E. & H. L. SHEPHERD CO.

Knox County. Decided April 12, 1917. A careful analysis of the evidence leads the court to the conclusion that the verdict is clearly too large.

If the plaintiff within thirty days after the mandate is received shall remit all of the verdict in excess of $900, motion overruled; otherwise, motion sustained. *Frank B. Miller,* for plaintiff. *H. L. Withee, and A. S. Littlefield,* for defendant.

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AFFIDAVITS.

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ATTORNEYS AT LAW.

In an action of assumpsit, brought in the Supreme Judicial Court to recover the sum of $60.82, the ad damnum stated in the writ was $125. The defendant filed a plea in abatement, alleging that the attorney who instituted the suit and brought and entered the writ was, at the time, the Judge of the Eastport Municipal Court. A demurrer to this plea was filed by the plaintiff, but was overruled by the presiding Justice, and the writ was ordered to be quashed. Upon plaintiff's exceptions to this ruling.

Held:

That this action was within the concurrent jurisdiction of the Eastport Municipal Court and the Supreme Judicial Court.

National Publicity Society v. *Raye*, 147.

That the Judge of the Municipal Court was therefore expressly prohibited from bringing and maintaining the action.

National Publicity Society v. *Raye*, 147.

See *Sanders Engineering Co.* v. *Small*, 55.

AUTOMOBILES.

The Legislature has the right to limit or control the use of the highways of the State whenever necessary to provide for and promote the safety, peace, health, and general welfare of the people.

McCarthy v. *Inh. of Leeds*, 134.

Where plaintiff was injured by reason of a defective bridge in defendant town, while operating an automobile registered under the license of a dealer from whom he had recently purchased the machine, plaintiff not having been provided with necessary license and registration, under public laws of 1911, chapter 162, *held:*

His rights upon the highway were only the rights of a trespasser upon the lands of another and the defendant town owed him no duty to keep the highway safe and convenient for him to travel on.

McCarthy v. *Inh. of Leeds*, 134.

It is held that the owner of an unregistered automobile being operated upon the public highway has no other rights than that of being exempt from reckless, wanton or wilful injury. *McCarthy* v. *Inh. of Leeds*, 140.

When the statute provides for the registration of automobiles and fixes a penalty for their operation upon the highways and streets of the state, unless registered, their operation upon the highways and street, while unlawful, does not of itself bar the owner from recovering damages for

BOARDS OF HEALTH.

BONDS.

BRIDGE AND WATER DISTRICTS.

The act of incorporation of the plaintiff district provided that it should take effect when approved by a majority vote of the legal voters of the two sections of the district voting separately at special meetings, to be called, warned and conducted according to the law relating to municipal elections; that if disapproved by one section, it should still be effective as to the other; that the district should have authority to take the property of the defendant by the right of eminent domain, by petition therefor to the county commissioners; that the county commissioners should fix the valuation of the property and file their report "in the clerk's office for the county of Oxford;" that a justice of the Supreme Judicial Court, in term time or vacation might confirm, reject or recommit the report; that the procedure, and all subsequent proceedings and right of appeal thereon should be had under the same restriction, conditions and limitations as are by law prescribed in the case of damages by the laying out of highways.

The district took the property as provided by the act. The county commissioners fixed the value of the property, and filed their report in the office of the clerk of the Supreme Judicial Court for Oxford County.

Upon proceedings to determine the validity of the proceedings, it is *held:*

That the act is constitutional.

That the requirement that the special meetings of the two sections should be warned according to the law relating to municipal elections was complied with when they were warned in accordance with the statutory provisions for warning town elections.

That the act, being approved by one section, became effective as to that section.

That the report of the county commissioners was properly filed in the office of the clerk of the Supreme Judicial Court.

That the act gave the Bridge Company a right of appeal from the award of the county commissioners, to be exercised within the time limited by statute in case of assessment of damages occasioned by the laying out of highways.

That in case of a seasonable appeal, further action upon the report of the county commissioners by a justice of the Supreme Judicial Court should be stayed until the amount of damages is determined on appeal.

That, if no seasonable appeal be taken, hearing is to be had on the affirmance, rejection or recommittal of the report, as provided by the act.

Rumford & Mexico Bridge Dis. v. *Mexico Bridge Co.*, 154.

BURDEN OF PROOF.

See *Haslam* v. *Perry*, 295.

See *Berman* v. *Rosenberg*, 19.

CARMACK AMENDMENT.

See *Continental Paper Bag Co.* v. *M. C. R. R. Co.*, 449.

CARRIERS.

The exclusiveness and paramount character of a Federal Law in relation to any subject within constitutional powers of Congress cannot be questioned.
Continental Paper Bag Co. v. *M. C. R. R. Co.*, 449.

In actions under such statute brought in the state courts, while questions of procedure and evidence are to be determined according to the laws of the forum, questions inseparably connected with the right of action, such as those of liability of defendant and the measure of damages must be settled according to the general principles of law as administered in the Federal courts. *Continental Paper Bag Co.* v. *M. C. R. R. Co.*, 449.

In actions upon a bill of lading where the shipment is interstate, the rights and liabilities of the parties depend upon the acts of Congress, the bill of lading and common law as accepted and applied in the Federal tribunals.
Continental Paper Bag Co. v. *M. C. R. R. Co.*, 449.

Where in an action upon a bill of lading, the shipment being interstate, the arrival of the goods at the place of destination is delayed by the negligence of one or more connecting carriers and after such arrival they are injured by an unprecedented flood amounting to an act of God, the flood, and not the delay, is the proximate cause of the injury.
Continental Paper Bag Co. v. *M. C. R. R. Co.*, 449.

The prime object of the Carmack Amendment was to bring about a uniform rule of responsibility as to interstate commerce and interstate bills of lading, and the principal subject of responsibility embraced by the act of Congress carries with it necessarily the incidents.
Continental Paper Bag Co. v. *M. C. R. R. Co.*, 450.

Where freight cars were equipped with automatic couplers so as to couple by impact, as required by Act of Congress, March 2, 1893, chapter 196, section 2, a brakeman who after failing to recouple cars by the automatic coupler went between moving cars and attempted to recouple them with his hands, when there was no necessity or circumstances that made it his duty to try such an unsafe method of work, was guilty of contributory negligence, defeating his right of recovery for injuries sustained by being caught in a guard rail where he was run over and injured.
Swasey v. *M. C. R. R. Co.*, 215.

Where the master has provided a safe method for the servant to perform the work assigned to him and the servant knows it and instead of using the safe method provided uses an unsafe method, without directions so to do from his employer, he does so at his own risk and is guilty of contributory negligence if injured while performing the labor in such manner.
Swasey v. *M. C. R. R. Co.*, 215.

It is the duty of a common carrier to use reasonable care and diligence in the transportation of freight given to it to carry.
Smith et al. v. *B. & A. R. R. Co.*, 223.

What is reasonable diligence by a railroad company in the transportation of freight depends upon circumstances, and one of the circumstances in transportation is the perishable character of the freight, or otherwise.
Smith et al. v. B. & A. R. R. Co., 223.

When a railroad company accepts perishable property, such as potatoes, to be shipped over the line at a season of the year when in the course of nature severely cold weather is to be apprehended, it is bound to use great diligence in forwarding the property.
Smith et al. v. B. & A. R. R. Co., 223.

A shipper, even of perishable goods, cannot require his freight to be started until the arrival of a freight train.
Smith et al. v. B. & A. R. R. Co., 223.

But when there were accidents and delays, avoidable or not, and when the freight has lost its regular schedule, and, being perishable, is in imminent danger of being lost, reasonable care may require a carrier to do special service, and expedite the carriage, without waiting for a regular train.
Smith et al. v. B. & A. R. R. Co., 223.

When a carrier permitted a car of potatoes to stand upon a siding, in freezing weather, from 36 to 40 hours, without apparent necessity, or apparent reason, except the waiting for the arrival of a regularly scheduled freight train which might take it along, the jury was warranted in finding that it was guilty of negligence. *Smith et al.* v. *B. & A. R. R. Co.*, 223.

CHATTEL MORTGAGES.

A chattel mortgage carries the whole legal title to the property mortgaged to the mortgagee conditionally, and if the condition is not performed the mortgagee's title becomes absolute at law. The only right remaining to such a mortgagor is the equity of redemption. *Donnell* v. *Deering Co.*, 32.

CHILDREN.

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See *Continental Paper Bag Co.* v. *M. C. R. R. Co.*, 449.

CONDEMNATION PROCEEDINGS.

See *Rumford & Mexico Bridge District* v. *Mexico Bridge Co.*, 154.

CONFIRMATION.

Where a transaction is vitiated at its inception by undue influence or by oppression, pressure or constraint, confirmation induced by undue influence or oppression, pressure or constraint or by a continuation merely of the influence of the original transaction, operates as nothing and is unavailing. *Bither* v. *Packard*, 315.

To constitute a confirmation, the act must have been done with that intention by one who was not under the influence of the previous transaction and with a knowledge of its invalidity. *Bither* v. *Packard*, 315.

CONSTITUTIONAL LAW.

The act of incorporation of the plaintiff district provided that it should take effect when approved by a majority vote of the legal voters of the two sections of the district, voting separately at special meetings, to be called, warned and conducted according to the law relating to municipal elections; that if disapproved by one section, it should still be effective as to the other; that the district should have authority to take the property of the defendant by the right of eminent domain, by petition therefor to the county commissioners; that the county commissioners should fix the valuation of the property and file their report "in the clerk's office for the county of Oxford;" that a justice of the Supreme Judicial Court, in term time or vacation might confirm, reject or recommit the report; that the procedure, and all subsequent proceedings and right of appeal thereon should be had under the same restrictions, conditions and limitations as are by law prescribed in the case of damages by the laying out of highways.

The district took the property as provided by the act. The county commissioners fixed the value of the property, and filed their report in the office of the clerk of the Supreme Judicial Court for Oxford County.

Upon proceedings to determine the validity of the proceedings, it is *held:*

That the act is constitutional.

CONTRACTS.

CORPORATIONS.

COSTS.

COURTS.

When the court has heard a libel for divorce, has made a decree of divorce, and afterwards during the same term has revoked the decree, it is not error to dismiss the libel at a subsequent term, if no further evidence on the merits be offered. *Barber* v. *Barber*. 327.

It is undoubted law that the power of a court over its judgments during the entire term at which they are rendered, is unlimited. It has full power to amend, correct or vacate a decree or judgment. During the term, the judgment is still in fieri, as it is said. It is subject to the further action of the court. *Barber* v. *Barber*, 327.

While in strictness the doctrine of res adjudicata does not apply to the decision of a motion and the court may on proper showing allow a motion once denied to be renewed, a motion once denied on the merits cannot, as a general rule, be renewed on the same state of facts without leave of court. *Cilley* v. *Limerock R. R. Co.*, 382.

Where a case is sent to the Law Court upon report, it is then acting with jury powers and the question of the preponderance of evidence is open and the burden is upon the plaintiff to substantiate her claim. *Garmong* v. *Henderson*, 422.

Where upon former evidence, plus a verdict, the plaintiff was not allowed to recover and the case is now reported, without a verdict, unless the plaintiff's case has been strengthened by additional and effective testimony to such an extent that the plaintiff could now sustain the burden of proof, the plaintiff must fail. *Garmong* v. *Henderson*, 422.

It is not error to refuse to give requested instructions, the granting of which would, in substance, amount to an expression of opinion upon the facts in the case. *Bingham* v. *Marcotte, Cote & Co.*, 459.

See *Harmon* v. *Flood*, 116.

CRIMINAL LAW.

In a complaint charging the respondent, who had been duly licensed by the Commissioner of Sea and Shore Fisheries with obstructing a warden in the discharge of his official duties by refusing to stop his vessel in order to allow the warden to come on board for the purpose of inspection, it is held, that section eleven does not make this act on the part of the licensee a criminal offense. It may warrant the revocation of his license and may work a forfeiture of his bond, but does not constitute a crime. *State* v. *LeBlanc*, 142.

DAMAGES.

DEBT.

DEBT OR DAMAGE.

See *National Publicity Society* v. *Raye*, 148.

DECEIT.

In an action for deceit in the sale of property, the plaintiff must show that the defendant intentionally made a false representation to him, with the intent that he should act upon it or in such manner as would naturally induce him to act upon it, that the representation was material, that it was known to the defendant to be false, or, being of matter susceptible of knowledge, was made as of a fact of his own knowledge, that he was thereby induced to act upon it, and that he was deceived and damaged.
Allan v. *Wescott*, 180.

In an action of deceit, the defendant is responsible for such meaning as his words, spoken as of a fact of his own knowledge, reasonably conveyed to the plaintiff. *Allan* v. *Wescott*, 180.

DECLARATIONS.

See *Palmer* v. *Inh. of Blaine*, 287.

DECREE.

The entry of the decree "petition denied" after hearing on the merits must be regarded as a final decree barring a future action between the same parties on the same subject matter, despite the language of the statute to the effect that "the court shall decree it affirmed or annulled according to the proof." We do not think that the Legislature intended to tie the hands of the court as to the form of the decree, but that the court is free to enter such decree as, being in accordance with its usual practice, finally disposes of the suit. In *Baker* v. *Cummings*, where in the prior case the appellate court ordered the court below to set aside its decree and dismiss the bill, the court says, "It was not a conditional dismissal, without prejudice or words to that effect, but a general one. A dismissal of the bill under such direction is presumed to be upon the merits, unless it be otherwise stated in the decree of dismissal." *Sargent, Pet'r.*, 133.

See *Barber* v. *Barber*, 327.

DEDICATION.

Dedication exists only when so intended by the party, and permissible use does not prove it. *Wooster* v. *Fiske,* 161.

The conveyance to a town of a strip of land delineated on a recorded plan as a street, "as and for a public street," and the acceptance by the town of the dedication make the strip a public town way, over which the town and its representatives have the same authority as over other public ways. *Farnsworth* v. *Macreadie,* 507.

The record of a deed of dedication of land "as and for a public street" as delineated upon a recorded plan is constructive notice to a subsequent purchaser of the extent of the dedication; and the limits of the dedication must be determined from the plan itself. *Farnsworth* v. *Macreadie,* 507.

DEEDS.

In an action to recover stumpage for granite taken from a quarry in which plaintiff claimed an undivided two-fifths ownership, the burden was upon the plaintiff to show that there was a delivery of the deeds covering said property to the plaintiff or to someone in her behalf. *Smith* v. *Booth Bros. & Hurricane Isle Granite Co.,* 50.

The general rule of construction of a deed may be thus stated; whenever land is described as bounded by other land, or by a building or structure, the name of which, according to its legal and ordinary meaning, includes the title to the land of which it has been made a part, as a house, a mill, a wharf, or the like the side of the land or structure referred to as a boundary is the limit of the grant; but when the boundary line is simply by an object, whether natural or artificial, the name of which is used in ordinary speech as defining a boundary and not as describing a title in fee, and which does not in its description or nature include the earth as far down as the grantor owns, and yet which has width, as in case of a way, a river, a ditch, a wall, a fence, a tree, or a stake and stone, then the center of the thing so running over or standing on the land is the boundary of the lot granted. *Coombs* v. *West,* 489.

Where a grant is bounded upon a non-navigable fresh water stream, a highway, a ditch or a party wall, or the like such stream, way, ditch or wall are to be deemed monuments located equally upon the land granted and the adjoining land, and in all such cases, the grant extends to the center of such monument. It is, however, competent for the grantor to limit his

DEFECTIVE MACHINERY.

DIVORCE.

Under R. S. 1903, chap. 62, sect. 15, (R. S. 1916, chap. 65, sect. 15) providing for annulment of marriage, an entry of "petition denied" after a hearing upon the merits, must be held to be a final decree, barring a future action between the same parties involving the same subject matter, despite the language of the statute to the effect that "the court shall decree it affirmed or annulled according to the proof." *Sargent, Pet'r.*, 130.

The proceedings is as of a libel for divorce and the entry, after hearing upon the merits, "petition denied," without the addition of the words "without prejudice," purports to be a final judgment on the merits.
Sargent, Pet'r., 130.

The court has full power, of its own motion, to amend, correct or vacate a decree of divorce, during the term at which the decree was made. And it may do so without notice to the lebellant. *Barber* v. *Barber*, 327.

When the court has made a decree of divorce, and afterwards during the same term has vacated the decree, a petition to discharge the vacating order is addressed to the judicial discretion of the court, to the exercise of which exceptions do not lie. *Barber* v. *Barber*, 327.

When the court has heard a libel for divorce, has made a decree of divorce, and afterwards during the same term has revoked the decree, it is not error to dismiss the libel at a subsequent term, if no further evidence on the merits be offered. *Barber* v. *Barber*, 327.

In general, divorce decrees are open to attack in the same manner and upon the same grounds as other judgments. *Barber* v. *Barber*, 329.

DOCK OR WHARF.

The owner of a dock is not an insurer of its safety; but he is bound to use reasonable care to have it reasonably safe for use by vessels which enter it by his invitation, express or implied.
Rockland & Rockport Lime Co. v. *Coe-Mortimer Co.*, 184.

When the owner of a dock has employed a competent dredging company to dredge his dock, and it has done so and has reported to the owner that the dock is free from rocks and safe, such representations are admissible for the owner on the question of his exercise of due care, when he is sued for damages to a barge caused by grounding on a rock in the bottom of the dock. *Rockland & Rockport Lime Co.* v. *Coe-Mortimer Co.*, 184.

DURESS.

EASEMENTS.

Where a claimant has shown an open, visible, continuous and unmolested use of land for twenty years or more, inconsistent with the owner's rights, and under circumstances from which may be inferred the knowledge and acquiescence of the owner, the rule ordinarily is that the use will be presumed to be under a claim of right, and adverse to the owner; and the burden is on the owner to rebut the presumption by showing that the use was permissive. But when a tract of land, attached to a public building, is designedly left open and unenclosed, for convenience or ornament, the rule is otherwise, and the passage of persons over it is presumed to be permissive under an implied license. *Thompson et al.* v. *Bowes*, 6.

In this case, the admission that "the way in question has been so used by the owners of the block as would give them a right of way if the property over which it is claimed were private property" is an admission necessarily that the use has been adverse, and hence, no presumption of permissive use can be applied. *Thompson et al.* v. *Bowes*, 6.

A prescriptive easement of a right of way is not defeated by the fact that others than the claimant have used the way.
Thompson et al. v. *Bowes*, 6.

When it is stipulated in the report of a case involving a prescriptive easement of a right of way that "if the plaintiffs have a right of way, judgment is to be awarded for them" the question of the indefiniteness of the description of the way in the declaration is not open to consideration.
Thompson et al. v. *Bowes*, 6.

Where an easement granted gave plaintiff the right to the use of a particular entrance consisting of a stairway and hallway then existing of definite and fixed limits, it was entitled to use, in common with others, all of the common entrance as it existed at the time of the grant of the easement, and not merely a suitable and convenient passage way through the entrance, and any diminution of the common entrance, without the plaintiff's consent, was an infringement of its rights.
Ashe, Noyes & Small Co. v. *Woodbury*, 48.

A prescriptive easement is created only by a continuous use for at least twenty years under a claim of right adverse to the owner, with his knowledge and acquiescence, or by a use so open, notorious, visible and uninterrupted that knowledge and acquiescence will be presumed.
Dartnell v. *Bidwell*, 227.

To create a prescriptive easement, acquiescence, in the sense of passive assert, is essential. It raises the presumption of a grant.
Dartnell v. *Bidwell*, 227.

ELECTION OF OFFICERS.

EQUITY.

his death, and it would be a fraud on the part of the grantee to refuse to perform her promise, equity declares that promise is a trust binding on her conscience, and, therefore, that she took and held the property impressed with that trust. *Savings Bank* v. *Tracy,* 433.

Where the proceeds of the sale of real estate that was impressed with a trust are not in the hands of any bona fide holder thereof, equity can and should reach those proceeds and turn them over to the party to whom they equitably and rightfully belong. *Savings Bank* v. *Tracy,* 434.

When a note or bond is given, the mortgage which secures it is to be construed with it, while a mortgage may describe the debt as well as the note or bond and thus qualify their terms. *Eugley* v. *Sproul,* 463.

Upon a writ of entry for foreclosure of a mortgage for support, the sum to be paid by defendant to redeem should be a present equivalent for full performance. *Eugley* v. *Sproul,* 463.

The redemption of mortgages is part of the broad field of equity jurisdiction for relief from forfeiture. For forfeiture it substitutes compensation. It is exercised by the courts of common law in writs of entry for the foreclosure of mortgages under R. S., chap. 92, sect. 10.
Eugley v. *Sproul,* 466.

Since redemption is an equitable right, it can be claimed by a mortgagor, only on terms of his paying all that is just and equitably due under the mortgage, even though the debt should not be recoverable at law, being barred by the statute of limitations. *Eugley* v. *Sproul,* 466.

Where an injunction is sought on account of unfair competition, it is a principle of equity based upon caution that to justify an injunction the case must be unmistakably clear and the proof full and convincing.
Lapointe Machine Tool Co. v. *J. N. Lapointe Co.,* 472.

While in a court of law an agreement to sell and convey land is wholly executory, and until executed the vendee acquires no interest in the land, and the legal title remains in the vendor who may convey it to any other person than the vendee, despite the protest of the latter, yet equity regards what ought to be done as done, and hence in an agreement for the sale of land, so far as the interest in the land is concerned, the agreement is considered as executed by the equity court which treats the vendee as the equitable owner of the land and the vendor as owning the consideration, which consideration draws to it the equitable right of property in the land and he who pays for it becomes the true beneficial owner and a trust

is thereby created in his favor. And while the contractor or vendor still holds the legal title he holds it as the trustee for the vendee. And this makes trust, impressed upon the land, follows it into whosoever hands it may go by subsequent conveyances, until it reaches some holder who is a bona fide purchaser thereof for a valuable consideration without notice of the original vendee's title, and then it becomes relieved of the trust.

Bailey v. *Coffin*, 495.

The findings of a single Justice, in equity procedure, upon questions of fact necessarily involved, are not to be reversed upon appeal unless clearly wrong, and the burden is upon the appellant to satisfy the court that such is the fact, otherwise the decree appealed from must be affirmed.

Bailey v. *Coffin*, 501.

EQUITY OF REDEMPTION.

Since redemption is an equitable right it can be claimed by a mortgagor, only on terms of his paying all that is just and equitably due under the mortgage, even though the debt should not be recoverable at law, being barred by the statute of limitations. *Eugley* v. *Sproul*, 466.

EVIDENCE.

Anything said by the party may be used against him as an admission, provided it exhibits the quality of inconsistency with the facts now asserted by him in pleadings or in testimony.

Sanders Engineering Co. v. *Small*, 52.

It is immaterial, when an opponent's statement is offered as an admission, that it was uttered to a third person and not to the other party to the cause. *Sanders Engineering Co.* v. *Small*, 52.

Such admission made by the attorney of the party are admissible against him if they concern the management of the litigation.

Sanders Engineering Co. v. *Small*, 52.

When evidence is admitted without qualification or restriction, it is in the case for all legitimate probative purposes. Its effect is not to be limited to the precise purpose for which it was stated to be offered.

Booth Bros. & H. I. G. Co. v. *Smith*, 89.

A defendant sued in trespass for acts done upon another's land sought to justify by showing that she had a prescriptive right of way over the land, and that the acts of illegal trespass were done in making repairs on the way. In a brief statement, she set up that she had a right of way, but did not set up that the acts complained of were done in the use or repair of the right of way. *Held,* that evidence of repairs is inadmissible. *Dartnell* v. *Bidwell,* 228.

In a case where the defendant claimed a prescriptive right of way over the plaintiff's land, a letter from the plaintiff to the defendant expressly denying the latter's right to use the land protesting its present, and forbidding its future exercise, is held to be sufficient evidence of the plaintiff's non-acquiescence, and of an interruption of the defendant's inchoate easement. *Dartnell v. Bidwell, 227.*

Where a list of securities belonging to an estate, although made by the original executor, if examined by the administrator de bonis non and approved by him, and if for a long period of time he sends the dividends accruing and the coupons maturing from such securities to a beneficiary under the will, such list may be regarded as being adopted by the administrator as a true list, and becomes proper evidence against him for the purpose of charging the assets in his hands as belonging to the estate of which he is administrator. *Warren* v. *Leonard,* 324.

Where a statement is made by a witness out of court at variance with his testimony on the stand, such statement is admissible for the purpose of impeaching his credibility, but can be given no other or further weight. *Kolasen* v. *G. B. P. Co.,* 368.

Testimony of plaintiff and his common law assignee that statements of account were mailed to all debtors of plaintiff at or about a certain date and the fact that a few days later defendant delivered to the assignee goods, which were included in the account against defendant, justifies the finding as matter of fact that the statement was mailed by the assignee to defendant and received by the latter. *Perley* v. *McGray,* 398.

The original books of account having been destroyed by fire, a book made by the assignee containing balances of all of the accounts of plaintiff is admissible to show the amount of the balance of the account of defendant at the time of the assignment. *Perley* v. *McGray,* 398.

The defendant having made no reply to the account mailed to him by the assignee, his silence not being satisfactorily explained, is under the circumstances of this case an admission that the balance shown by the statement is correct. *Perley* v. *McGray,* 398.

EXCEPTIONS.

EXECUTORS AND ADMINISTRATORS.

by the decree held, that the appellee should not now be permitted to interpose this objection to the appellants' right to be heard in the appellate court on the merits of their appeal. *Swan, et al., Applts.*, 502.

FAIR AND UNFAIR COMPETITION.

Competition in trade is of two kinds, fair and unfair; and unfair competition may be subdivided into the ethically unfair and the legally unfair. Courts have to do only with the latter. Many acts between keen business rivals which might offend the golden rule do not violate the legal rule.
Lapointe Machine Tool Co. v. *J. N. Lapointe Co.*, 472.

Unfair competition consists in beguiling or attempting to beguilt the purchasing public into purchasing the wares of the offender under the belief that they are buying the wares of a rival. The essence of the action is fraud, and the prohibition is confined to cases where the wrongdoer has resorted to some form of deception. The plaintiff must prove a fraudulent intent to deceive or show facts or circumstances from which such an intent can be reasonably inferred.
Lapointe Machine Tool Co. v. *J. N. Lapointe Co.*, 472.

If the defendant, although a sharp and vigorous competitor, so conducts its business as not to palm off its own products as those of the plaintiff, the action fails. It has kept within its legal rights.
Lapointe Machine Tool Co. v. *J. N. Lapointe Co.*, 472.

The question of unfair competition is one of fact, to be determined by the evidence and circumstances in each particular case, considered in the light of certain well defined rules of law.
Lapointe Machine Tool Co. v. *J. N. Lapointe Co.*, 472.

In the absence of contract, estoppel or fraud, any person can use his own name in all legitimate ways and either as a part or the whole of a corporate name. *Lapoint Machine Tool Co.* v. *J. N. Lapointe Co.*, 473.

The test on the question of similarity is the likelihood of deceiving an ordinary purchaser who is exercising ordinary care. In applying the test regard must be had to the nature and physical requirements of the article itself, its cost, the class of persons who purchase it and the circumstances under which it is purchased.
Lapointe Machine Tool Co. v. *J. N. Lapointe Co.*, 473.

Every person has a right to the honest use of his own name in his own business, but he will not be permitted by imitation and unfair devices to mislead the public in regard to the identity of the firm or corporation or

the goods manufactured by it. If the use of the name be reasonable, honest and a fair exercise of his right, the user is not rendered liable for the incidental damage caused a rival thereby. The inconvenience or loss is damnum absque injuria. The injury which results from similarity in name alone is not actionable. But the offender cannot resort to any artifice or adopt any methods calculated to deceive the purchasing public.

Lapointe Machine Tool Co. v. *J. N. Lapointe Co.*, 482.

The methods adopted to practice this deception are as varied as human ingenuity can devise. It may be by closely simulating a particular device, mark or symbol, by assuming the same or practically the same name, by the use of crafty and misleading advertisements or by false oral representations. Such conduct, calculated to steal away the custom, good will and business established and maintained by another works both a fraud upon the purchasing public and actionable injury upon the defenseless rival. The rights of both are to be protected.

Lapointe Machine Tool Co. v. *J. N. Lapointe Co.*, 478.

FAMILY NAME.

See *Lapointe Machine Tool Co.* v. *J. N. Lapointe Co.*, 472.

FEDERAL LAW.

See *Continental Paper Bag Co.* v. *M. C. R. R. Co.*, 449.

FELLOW-SERVANT DOCTRINE.

The plaintiff, a girl fourteen years of age, was injured while in the defendant's employ. She was working at the rear end of a machine used for the manufacture of skewer sticks. Her contention is that the machine clogged, that one LaPointe, who operated and controlled the machine, stopped it; that she was clearing out the knives attached to the central set of cylinders when LaPointe, without giving her any warning started the machine, and her hand was caught and severed at the wrist. Upon defendant's motion to set aside a verdict rendered in favor of the plaintiff, it is *held:*

It was no part of the plaintiff's duty to remove the clog. That was a part of the operation of the machine, and was the sole duty of the operator.

Cote v. *Jay Mfg. Co.*, 300.

FENCES.

FORCIBLE ENTRY AND DETAINER.

FOREIGN CORPORATIONS.

FRAUD.

FRAUDULENT TRANSFERS.

See *Lewiston Trust Co.* v. *Cobb*, 264.

GIFTS.

GOVERNOR AND COUNCIL.

Under the Constitution the Governor with the advice and consent of the Council, has authority to fill by appointment a judicial office when a vacancy in such office exists. *State* v. *Harmon*, 268.

The tenure of office of judges of municipal and police courts is fixed by the Constitution to be "for the term of four years."
State v. *Harmon*, 268.

The Governor has no authority, either alone or with the advice of the Council, to remove a judicial officer whose term of office is fixed by law, except "on the address of both branches of the Legislature."
State v. *Harmon*, 268.

Where the term of the appointing power extends beyond the time when a vacancy arises, a prospective appointment may be made; and, conversely, where the term of the appointing power does not extend until a vacancy arises in the appointive office no appointment, prospective or otherwise, may be made. *Pattangall, Payson* v. *Gilman*, 344.

GUARDIANS.

See *Androscoggin County Savings Bank* v. *Tracy*, 437.

HABEAS CORPUS.

When a person has been convicted or is in execution upon legal process, criminal or civil, the granting to him of a writ of habeas corpus is discretionary. If the judgment against him is void, as for want of jurisdiction, he is entitled to his discharge, but not if the sentence be merely erroneous. *Wallace* v. *White*, 514.

An excessive sentence is merely erroneous and voidable. The whole sentence is not illegal and void by reason of the excess. On habeas corpus, it is to be regarded as invalid only as to the excess. *Wallace* v. *White*, 514.

When a sentence is for a longer period than prescribed by law, and is severable, the prisoner is not entitled to be discharged on habeas corpus proceedings, until he has served the definite prescribed term.
Wallace v. *White*, 514.

HIGHWAYS.

HOTELS AND INNKEEPERS.

HUSBAND AND WIFE.

IMPUTED NEGLIGENCE.

INCOMPETENT SERVANTS.

INDEPENDENT CONTRACTOR.

INDICTMENTS.

INJUNCTION.

INSTRUCTIONS.

INSURANCE.

INTEREST.

INTERSTATE COMMERCE.

INTOXICATING LIQUORS.

JOINT DEPOSITORS.

JOINT SURVIVORSHIP AND OWNERSHIP.

See *Barstow* v. *Tetlow*, 96.

JUDGES OF MUNICIPAL COURTS.

Under section 4 of chapter 219, Private and Special Laws of 1903, the Eastport Municipal Court is given "original jurisdiction, concurrent with the Supreme Judicial Court of all civil actions in which the debt or damage demanded, exclusive of costs, does not exceed one hundred dollars;" section 1 provides that the judge "shall not act as attorney or counsel in any action, matter or thing within the jurisdiction of said court."
National Publicity Society v. *Raye*, 147.

In an action of assumpsit, brought in the Supreme Judicial Court to recover the sum of $60.82, the ad admnum stated in the writ was $125. The defendant filed a plea in abatement, alleging that the attorney who instituted the suit and brought and entered the writ was, at the time, the Judge of the Eastport municipal court. A demurrer to this plea was filed by the plaintiff, but was overruled by the presiding Justice, and the writ was ordered to be quashed. Upon plaintiff's exceptions to this ruling,
Held:
That this action was within the concurrent jurisdiction of the Eastport municipal court and the Supreme Judicial Court.
National Publicity Society v. *Raye*, 147.

That the Judge of the municipal court was therefore expressly prohibited from bringing and maintaining the action, and the writ was properly abated. *National Publicity Society* v. *Raye*, 147.

Where quo warranto proceedings are prosecuted in behalf of the State to determine by what authority the respondent is holding a public office, it is immaterial that the relator's term of office expired by limitation pending the proceedings. *State* v. *Harmon*, 268.

Under the Constitution the Governor, with the advice and consent of the Council, has authority to fill by appointment a judicial office when a vacancy in such office exists. *State* v. *Harmon*, 268.

The tenure of office of judges of municipal and police courts is fixed by the Constituton to be "for the term of four years." *State* v. *Harmon*, 268.

The Governor has no authority, either alone or with the advice of the Council, to remove a judicial officer whose term of office is fixed by law, except "on the address of both branches of the Legislature."
State v. *Harmon*, 268.

The abandonment of an office is ipso facto a vacation of it, because the abandonment necessarily implies a voluntary and intentional disclaimer and surrender of it by him to whom it pertains, which in its effect is like a resignation of it. *State* v. *Harmon*, 268.

The official neglect of the incumbent of a public office, or his misconduct therein, although constituting just and legal grounds for a forfeiture of the office, do not produce a vacancy therein until it has been judicially determined and declared that the incumbent is guilty thereof, and that he has thereby forfeited his right to continue in the office.
State v. *Harmon*, 268.

The office in question did not become vacant, because the relator had forfeited it by failure to perform its duties, or by any misconduct therein, since no adjudication of that queston has been made by any tribunal having authority to do so. *State* v. *Harmon*, 268.

A public office may be abandoned by the incumbent so that a vacancy in the office is thereby created. *State* v. *Harmon*, 268.

Whether the incumbent of a public office intended to abandon it is a question of fact, and may be inferred from the party's acts. If his conduct is such as to clearly indicate that he had relinquished the office, an intention to do so may be imputed to him. *State* v. *Harmon*, 269.

The provision in the charter of the municipal court of Saco that the Judge of said court "shall reside during his continuance in said office in said Saco," means that the Judge of that court is required to actually reside in Saco, in the sense of being personally present there substantially all the time during his continuance in said office. Mere temporary absence from Saco, for a reasonably limited time, for business or pleasure, would not constitute a failure to reside there within the meaning of the charter.
State v. *Harmon*, 269.

The incumbent of a public office may abandon it so as to create a vacancy therein by removing from the state, county, or other district to which the officer's residence is restricted by the law of the office.
State v. *Harmon*, 269.

Where evidence justifies a finding, that about the middle of July, 1912, the relator voluntarily and intentionally moved from Saco to Piscataquis county, there to give his entire attention to a new employment, intending to continue in that employment so long as it was open to him, and was satisfactory to him, and having no fixed intention to return to Saco to reside at any definite time, if at all, and did not return to Saco to live

during the rest of his term of office and for a long time thereafter at least; and that from and after June or July, 1912, he was voluntarily personally absent from Saco practically all the time, and was therefore not in a situation to perform, and did not perform, any of the duties of his office as Judge of said court, except in one or two instances. *Held:* that the relator ceased to "reside" in Saco. prior to the respondent's appointment on December 19, 1912, according to the meaning of that term as used in the Act establishing the municipal court of Saco.

State v. *Harmon,* 269.

Where the Judge of a local court, which has two sessions each month for civil business and is constantly in session for the disposal of criminal matters, voluntarily removes from the district where he is required to reside by the law establishing the court, without any fixed intention to return and reside there, but with an intent to make an indefinite stay elsewhere carrying on other business, thereby placing himself in a situation which he knows will prevent his attending to the duties of the office, and which will, under the law establishing the office, disqualify him to continue in it, he is presumed to have intended in so doing to abandon that office.

State v. *Harmon,* 269.

JUDGMENT.

In an action to replevin wood alleged to be detained in W. county, where the writ was returnable at the superior court of K. county and where the court granted the motion of the defendant therein to dismiss for want of jurisdiction, with judgment for the return of the wood, the judgment was conclusive only upon the queston of such return, and did not determine the question of title. *Harmon* v. *Flood,* 116.

Where, in an action of replevin of wood, defendant's motion to dismiss for want of jurisdiction was granted with judgment for the return of the wood, without determining title, and after the breach of the bond by failure to return, an acton was brought thereon, the defendants, plaintiffs in the replevin action, might set up their ownership in defense or in mitigation of the damages. *Harmon* v. *Flood,* 116.

It is undoubted law that the power of a court over its judgments, during the entire term at which they are rendered, is unlimited. It has full power to amend, correct or vacate a decree or judgment. During the term, the judgment is still in fieri, as it is said. It is subject to the further action of the court. *Barber* v. *Barber,* 328.

JURISDICTION.

JURORS.

line. And we have not stopped to inquire whether the attempt was successful, nor whether the mind of a juror was actually influenced, but only whether or not the mind of a juror might have been influenced by the attempt, or whether the attempt might have any tendency to influence the mind of a juror. *York* v. *Wyman*, 353.

JUSTICES.

The findings of fact of a sitting Justice have the force of a verdict of a jury and must stand, unless manifestly wrong.
Young v. *Mosher*, 62.

It is the authoritative expression of an opinion by the presiding Justice as to an issue of fact arising in the case which is prohibited by R. S., ch. 84, sect. 97, and not the suggestion of an obvious inference from admitted facts and circumstances, made to assist the jury in coming to a clear understanding of the law and the evidence. *State* v. *Mathews*, 84.

The power of the Justices of the Supreme Judicial and Superior Courts to grant new trials in civil cases, given them by R. S., chap. 84, sect. 54, must be fully and completely exercised by them at the term at which the verdict was rendered. *Hasten* v. *B. & O. R. R.*, 205.

A general motion for new trial in a criminal case is to be addressed to and heard by the Justice presiding at the trial. *State* v. *Steeves*, 220.

So a motion for new trial upon the ground of surprise must be addressed to and heard by the Justice presiding at the trial. *State v. Steeves*, 220.

Where a motion for new trial is based upon alleged ground of surprise at the trial and such ground is not apparent from the record, it is not to be inferred but is a fact to be proved and the motion must be verified by affidavit. *State* v. *Steeves*, 220.

It is a rule well established in this jurisdiction that the decision of a single Justice upon matters of fact in an equity case should not be reversed unless the appellate court is clearly convinced of its incorrectness and that the burden of showing error is upon the appellant. The rule prevails where the issue must be supported by full, clear and convincing evidence.
Stewart v. Gilbert, 262.

The finding of a single Justice in equity procedure, upon questions of fact necessarily involved, are not to be reversed on appeal, unless clearly wrong. *Savings Bank v. Tracy*, 433.

LAST CLEAR CHANCE DOCTRINE.

LAW COURT.

LEGISLATIVE REGULATIONS

LICENSEE OR INVITEE.

MANDAMUS.

MARRIAGE CONTRACTS.

MASTER AND SERVANT.

MITTIMUS.

MONEY HAD AND RECEIVED.

Where there is nothing to be done by the plaintiff to place the defendant in statu quo, the action for money had and received is in itself a rescission as well as a demand. *Bither v. Packard,* 306.

A person induced by fraud to enter into a contract, under which he pays money, may at his option rescind the contract and recover back the price, as money had and received. *Bither* v. *Packard,* 306.

See *Brackett* v. *Chamberlain,* 335.

See *Clark* v. *Stetson,* 72.

MONUMENTS OF TITLE.

The general rule of construction of a deed may be thus stated; whenever land is described as bounded by other land, or by a building or structure, the name of which, according to its legal and ordinary meaning, includes the title to the land of which it has been made a part, as a house, a mill, a wharf, or the like, the side of the land or structure referred to as a boundary is the limit of the grant; but when the boundary line is simply by an object, whether natural or artificial, the name of which is used in ordinary speech as defining a boundary, and not as described a title in fee, and which does not in its description or nature include the earth as far down as the grantor owns, and yet which has width, as in case of a way, a river, a ditch, a wall, a fence, a tree, or a stake and stone, then the center of the thing so running over or standing on the land is the boundary of the lot granted. *Coombs* v. *West,* 489.

Where a grant is bounded upon a non-navigable fresh water stream, a highway, a ditch or a party wall, or the like, such stream, way, ditch or wall are to be deemed monuments located equally upon the land granted and the adjoining land, and in all such cases, the grant extends to the center of such monument. It is, however, competent for the grantor to limit his grant as he may choose. He may exclude or include the entire monument, and run his line either side, or to the center thereof, at his pleasure, by the use of apt words to indicate his intention so to do. *Coombs* v. *West,* 489.

When walls, fences and the like are referred to as monuments, if they are of considerable thickness or width, the boundary line is always in the center of the monument, as has been seen in the case with streams and highways. *Coombs* v. *West,* 489.

MORTGAGES.

MOTION.

MOTIONS TO DISMISS.

MUNICIPAL CORPORATIONS.

NEGLIGENCE.

But if that question did arise, we have no hesitancy in saying that a finding by the jury that the parents of the child were not negligent in allowing her to go unattended from their home, across the street in the day time to and from the schoolyard playground, ought not to be set aside.
Meserve v. *Libby*, 282.

The plaintiff, a girl fourteen years of age, was injured while in the defendant's employ. She was working at the rear end of a machine used for the manufacture of skewer sticks. Her contention is that the machine clogged, that one LaPointe, who operated and controlled the machine, stopped it; that she was clearing out the knives attached to the central set of cyclinders when LaPointe, without giving her any warning, started the machine, and her hand was caught and severed at the wrist. Upon defendant's motion to set aside a verdict rendered in favor of the plaintiff, it is

Held:

It was no part of the plaintiff's duty to remove the clog. That was a part of the operation of the machine, and was the sole duty of the operator.
Cote v. *Jay Mfg. Co.*, 300.

The plaintiff was performing an uncalled for and inexcusable act, one entirely disconnected from the service for which she was employed and which she was accustomed to perform. *Cote* v. *Jay Mfg. Co.*, 300.

Even assuming the plaintiff's contention as to the facts to be true, the fellow servant rule precludes recovery unless the defendant could be proven guilty of negligence either in employing LaPointe or in retaining him in its employ. *Cote* v. *Jay Mfg. Co.*, 300.

In order to maintain this proposition, the plaintiff must prove first, that LaPointe was in fact incompetent, and second, that the defendant knew that fact, or, by the exercise of reasonable diligence, should have known it.
Cote v. *Jay Mfg. Co.*, 301.

Although the original employment of LaPointe, when only thirteen years of age, was in contravention of Public Laws 1909, chap. 257, sect. 2, yet it did not create any evidence of negligence here, because at the time of the accident he had attained the legal age, and the question of competency must relate to the time of the injury and not to the time when the employee first assumed his duties. *Cote* v. *Jay Mfg. Co.*, 301.

Incompetence in the law of negligence means want of ability suitable to the task, either as regards natural qualities or experience, or deficiency of disposition to use one's natural abilities and experience properly.
Cote v. *Jay Mfg. Co.*, 301.

That even if LaPointe had been in some way negligent at the time of the injury, his incompetency cannot be established by that single act. It is admissible evidence, but not of itself sufficient. *Cote* v. *Jay Mfg. Co.*, 301.

Upon the question of actual incompetence, the evidence is negligible, and the verdict was manifestly wrong. *Cote* v. *Jay Mfg. Co.*, 301.

Whether it was negligence on the part of the defendant to allow its trolley wire to remain in such an unusual and dangerous position without warning to the plaintiff depends upon the legal relation existing between the parties, and the defendant's duty to the deceased at the time.
Allen v. *A. V. R. R. Co.*, 361.

The measure of duty varies according as the deceased was an invitee or a mere licensee or trespasser. *Allen* v. *A. V. R. R. Co.*, 361.

If he was an invitee the defendant owed him the duty of having the top of the car reasonably safe or of giving him ample warning if it was unsafe. *Allen* v. *A. V. R. R. Co.*, 361.

If he was a trespasser, or a mere licensee, the defendant owed him no higher duty than to abstain from wantonly injuring him.
Allen v. *A. V. R. R. Co.*, 361.

Where the evidence shows that the injuries to the plaintiff were received through the plaintiff's inexperience, ignorance of the exact situation and lack of warning, the jury were justified in finding that the plaintiff was himself in the exercise of due care and had not assumed the risk.
Kolasen v. *G. N. P. Co.*, 368.

An operative by agreeing to operate and operating a particular machine, without stipulation to the contrary, assumes the risk of injury not only from those features of the machine called to his attention, but also from those open to observation. These are familiar principles of law, and the test of defendant's liability in each case must be, was there a danger which in view of the plaintiff's experience, intelligence and capacity, was not appreciated by or apparent to him, or which should have been apparent to him by the exercise of reasonable care and diligence on his part? If there was not, there was no negligence in exposing him to it; if there was, then the duty devolved upon the employer to give him the necessary information and warning. *Kolasen* v. *G. N. P. Co.*, 370.

It is not the legal duty of an employer of labor upon machines to provide and use the safest possible or even safest known machines. There must be no weakness, no want of repair, no dangerous feature, not visible, to

an observing operative or made known to him and such as the employer should have known. If such a machine be provided, the employer has done his full legal duty in that respect. *Kolasen* v. *G. N. P. Co.*, 370.

The peculiar facts and circumstances of each case determines liability or non liability, not the mere fact that the dangerous feature complained of is a set screw. Each case must be decided on its own merits.
Kolasen v. *G. N. P. Co.*, 370.

Where the plaintiff was working as a laborer in the construction of a section of state aid highway in the defendant town, which was being rebuilt or improved under the provisions of chapter 130 of the Public Laws of 1913, it is *held:* that the town was not liable for injuries received through the alleged negligence of the road commissioner of said town.

And it was further held that if the road commissioner had been constructing said road in his capacity as road commissioner, without any interference or special direction by the town, he would then have been acting in the capacity of a public officer and while so acting he would not have been in legal contemplation the servant or agent of the town, and the town would not be liable for his wrongful or negligent acts, though done in the course and within the scope of his employment.
Graffam v. *Poland*, 375.

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.
Graffam v. *Poland*, 373.

Incompetency cannot be inferred from a single act of negligence. Before the master could be held responsible, the evidence must show that the defendant knew, or by the exercise of due care should have known, that he was an incompetent and negligent servant. This must be known, or, by the exercise of due care should have been known, before the accident. Knowledge after the accident is not sufficient.
Wing v. *Bradstreet & Sons Co.*, 394.

To entitle a plaintiff to recover damages on account of injuries received through an alleged defective machine, it is encumbent upon her to establish by a fair preponderance of the evidence that the machine was defective and out of repair as alleged, or at least that it was defective in some one of the particulars alleged, and that such defective condition was the sole cause of her injury. *Aldrich* v. *Boothbay*, 444.

NEGOTIABLE INSTRUMENTS.

NEW TRIAL.

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. *Garmong* v. *Henderson,* 425.

It is not enough to sustain a verdict that there is evidence which, if believed by the jury, would justify them in returning it; that evidence must be so reasonable and so probable that an unprejudiced man, when considering all the evidence and all the circumstances in the case, would be justified in believing it. *Hill* v. *Keezar,* 548.

NONSUIT.

See *Preble* v. *Preble,* 31.

NOTARY PUBLIC.

By virtue of the provisions of chapter 58, Public Laws, 1905, a notary public may act as one of the magistrates, with all the powers of a justice of the peace, in a poor debtor's disclosure. *McDougall* v. *Ricker,* 357.

OPEN AND CLOSE IN A TRIAL.

See *Reed* v. *Reed,* 441.

ORDINANCES.

To maintain an action for the forfeiture provided for in an ordinance for failure to comply with its provisions, full and definite proof is required of all facts and proceedings necessary to show a case within its terms. *City of Saco* v. *Jordan,* 278.

It was an essential part of the plaintiff's case to establish by competent proof the fact that there was in October, 1914, a board of health of Saco composed of three members, each duly and legally appointed and qualified, upon whose acts and proceedings, had under the provisions of the ordinance, the action is based. *City of Saco* v. *Jordan,* 278.

The evidence which the plaintiff offered to establish the fact that there was a board of health of Saco in October, 1914, if competent for that purpose,

shows only the appointment of two members of such board. There is a total lack of proof of the appointment of a third member of the board for 1914. *City of Saco* v. *Jordan*, 278.

If only two members of a board of health are appointed, they cannot legally do acts authorized to be done by a majority of the board, since in such case no official board of health exists of which they would be a majority. *City of Saco* v. *Jordan*, 278.

When a municipal ordinance is passed under a general law authorizing municipalities to make regulations for the health, safety and welfare of the people, the court may declare the ordinance invalid if it contravenes the State or Federal Constitution or an existing statute, or if in their judgment it is unreasonable, even though it may conflict with neither constitution nor statute. *State* v. *Mahue*, 317.

In the absence of a general law regulating the subject throughout the State, each city or town has the right to insist upon inspection by its own officials. The inspection by private inspectors is without legal force. *State* v. *Mahue*, 317.

The right of a municipal corporation in the exercise of this power to enact reasonable ordinances for the purpose of promoting the health of its citizens is settled. The scope and limitations of the supervisory authority of the court over municipal ordinances are also well established. When a municipality has been given by the Legislature in express language the power to enact a particular ordinance in a prescribed manner, the courts may not adjudge the ordinance to be invalid merely because it is deemed unreasonable. Its reasonableness or unreasonableness is a matter of legislative discretion. The Legislature having exercised that discretion in the passage of the authorizing act, their action is not subject to review by the court. Such ordinances so expressly authorized can be declared invalid by the court only when they are in violation of the Constitution, State or Federal. *State* v. *Mahue*, 318.

An ordinance may be invalid, first, when it is unconstitutional, whether authorized in express or general terms; second, when it conflicts with an existing statute, if authorized in general terms, but not if authorized in express terms, as in the latter case the special authorizing act takes precedence of the general law; and third, if authorized in general terms, it may be declared void as being unreasonable or discriminatory even though it contarvenes neither constitution nor statute. *State* v. *Mahue*, 318.

Reasonableness of an ordinance is a judicial question, all honest and substantial doubts being resolved in favor of the municipal power. The test of reasonableness cannot be expressed by any ironclad rule. No hard and fast definition can be coined. It is here, as always, a relative term. Is the ordinance an appropriate measure for the promotion of the public health, safety or welfare? Does it have a real and substantial relation to that object? *State* v. *Mahue*, 319.

In the absence of a general law enacted by the Legislature, regulating the subject throughout the State, each city or town has the right to insist upon inspection by its own officials. It may well be that the system varies as to its reliability and efficiency in different places, being strict in one locality and lax in another, but it certainly cannot be deemed oppressive or discriminatory if in the absence of a general statute each city takes the necessary steps to inspect its own meat supply.

State v. *Mahue*, 320.

ORIGINAL OR COLLATERAL PROMISE.

An obligation or promise is "original" if the promise is made at the time, or before the debt is created and the credit is given solely to the promissor, but "collateral" if the promise is merely super-added to the promise of another, he remaining primarily liable. No precise form of words is necessary to show an original promise, or conclusive as to the evidence of the parties. *Fairbanks* v. *Barker*, 11.

PARENT AND CHILD.

The plaintiff, a girl six years of age, while crossing Center street in Portland about noon of August, 1915, was struck and knocked down by an automobile driven by the defendant and thereby her leg was broken and she received other severe bodily injuries.

Held:

That a reasonably prudent man would not have started the car ahead until that little child was safely out of danger; and that the jury did not err in their conclusion that the defendant was negligent.

Meserve v. *Libby*, 282.

That it cannot be held as a matter of law that this child, six years of age at the time, was or was not old enough to be capable of exercising some care for herself under the circumstances. That was a question for the jury.

Meserve v. *Libby*, 282.

PARENTS AND GUARDIANS.

PART PERFORMANCE.

PARTIAL PAYMENTS.

PAUPERS.

PERISHABLE PROPERTY.

PERJURY.

PHOTOGRAPHS.

Held:

That they were obviously prejudicial, and so much so as to require a new trial. *Dartnell* v. *Bidwell*, 228.

See *Smith et al*, v. *B. & A. R. R. Co.*, 223.

PLEA IN ABATEMENT.

In case of an indictment, the record must show that it was returned into court by the grand jury, either by a docket entry made at the time of the return, or by an indorsement of the fact upon the indictment itself, or it will be held bad on plea in abatement. *State* v. *Knowlton*, 544.

A plea in abatement to an indictment which denies that it was docketed, but does not deny that it was indorsed by stating the fact of its return, is bad. *State* v. *Knowlton*, 544.

When a plea in abatement to an indictment is overruled, a respondeas ouster is awarded. *State* v. *Knowlton*, 544.

PLEADING.

In making an order of nonsuit, the Justice does not determine any disputed questions of fact, nor does he pass upon the credibility of the witnesses, nor upon the weight of the evidence. He rules that there is no evidence to support the action. This is a ruling upon a question of law. Whether the evidence is sufficient is a question of fact. Whether there is any evidence is a question of law. *Preble* v. *Preble*, 31.

A nonsuit is properly ordered when there is no evidence to support a finding which is essential to the plaintiff's right to recover. *Preble* v. *Preble*, 31.

When a defendant would justify or excuse an act which is unlawful unless justified or excused, justification must be pleaded. *Dartnell* v. *Bidwell*, 228.

Justification may be pleaded by way of a brief statement under the general issue, but the brief statement must be precise and certain to common intent. *Dartnell* v. *Bidwell*, 228.

Action of assumpsit on an account annexed. Each defendant town demurred, assigning as the ground thereof that it had been declared against jointly with the other towns.

Held:

The declaration is sufficient to admit proof of a several liability of some one of the defendant towns; and upon such proof, judgment could be entered against that defendant, although a joint liability was not established. *Palmer* v. *Inh. of Blaine,* 287.

A misjoinder of another party defendant is not a good ground of demurrer for a defendant against whom the declaration alleges a good cause of action on a several liability. *Palmer* v. *Inh. of Blaine,* 287.

PLEADING AND PRACTICE.

Where the plaintiff declares in account annexed for a balance due according to bill rendered on account of groceries and other supplies furnished defendant by plaintiff, and defendant, having neither demurred nor asked a bill of particulars, pleads the general issue which is joined, the existence of the balance declared upon is the only issue raised.
Perley v. *McGray,* 398.

The right to open and close in a trial is a legal right, to the denial of which exceptions lie. *Reed* v. *Reed,* 441.

The right to open and close in a trial is to be determined by the state of the pleadings at the beginning of the trial, and depends upon which party has the initial or primary burden of proof. *Reed* v. *Reed,* 441.

In actions under a Federal statute brought in the State courts, while questions of procedure and evidence are to be determined according to the laws of the forum, questions inseparably connected with the right of action, such as those of liability of defendant and the measure of damages must be settled according to the general principles of law as administered in the Federal courts. *Continental Paper Bag Co.* v. *M. C. R. R. Co.,* 449.

In an action of trespass quare clausum it is not necessary for the plaintiff to describe his close. If the defendant has occasion for a description, he can have it upon filing then proper plea. If he omits to do so, it is presumed that he consents that the plaintiff may prove the act to have been done upon any land in his possession within the limits of the town named in the writ.

The defendant having failed to file a proper plea, in the absence of a statute requiring particular description of the close, the declaration will be adjudged sufficient. *Drummond* v. *Withee,* 522.

When an action is brought for trespass upon lands in a certain township, if the plaintiff declares generally without giving a particular description of the lands, and the defendant pleads title in himself, he will make out a defense by proof of ownership in himself of any parcel of land in the township mentioned in the declaration ..... It was always at the option of the plaintiff whether he would declare generally, or set forth a particular description of the premises. If he did the former, and the defendant interposed the general issue only, the latter was always liable to be surprised by proof of a different transaction from what he supposed was complained of, since proof of an entry on any parcel of land in the township, in the plaintiff's possession, would be within the declaration. One object of the plea liberum tenementum in such a case was to compel the plaintiff by giving a specific description of the land, to confine his cause of complaint, and consequently his proofs, to a specified parcel.
Drummond v. *Withee,* 524.

POLICE POWER.

See *State of Maine* v. *Latham,* 178.

POOR DEBTOR BOND.

Where a poor debtor arrested on an execution had given a bond for his release and the bond had been approved in writing by the attorney for the creditor, such approval is sufficient compliance with the statute requiring, among other forms of approval, that the instrument be approved in writing by the creditor. *McDougall* v. *Ricker,* 357.

POOR DEBTOR DISCLOSURE.

Where two justices have been chosen and a third justice is called in, because of a disagreement as to the law governing the case, but no disagreement as to the facts, it is not necessary that the debtor should be re-examined under oath upon the facts by the third justice.
McDougall v. *Ricker,* 357.

By virtue of the provisions of chapter 58, Public Laws, 1905, a notary public may act as one of the magistrates, with all the powers of a justice of the peace, in a poor debtor's disclosure. *McDougall* v. *Ricker,* 357.

PRESCRIPTIVE RIGHTS.

A prescriptive easement is created only by a continuous use for at least twenty years under a claim of right adverse to the owner, with his knowledge and acquiescence, or by a use so open, notorious, visible and uninterrupted that knowledge and acquiescence will be presumed.
Dartnell v. *Bidwell*, 227.

PRESUMPTION.

Where there has been a cessation for twenty years, unexplained, to use a way originally acquired by use, it is regarded as a presumption, either that the former presumptive right has been extinguished in favor of some adverse right, or, when no such adverse right appears, that the former has been surrendered, or that it never existed. *Wooster* v. *Fiske*, 161.

It is a prima facie presumption that where different parties are signers to a note that they were successive signers in the order in which their names appear. *Haslam* v. *Perry*, 299.

PROBATE ACCOUNTS.

See *Cook* v. *Titcomb*, 38.

PROBATE APPEAL.

Where the account of an executrix correctly shows the amount she has actually paid the appellants on their claim against the estate, an appeal from the allowance of the account will not be sustained, on the alleged ground that a larger sum ought to have been paid on said claim. If that grievance exists in fact, it is to be redressed by suit against the estate, and not by an appeal from the allowance of the account of the executrix.
Swan et als., Applts., 501.

The exercise by the Judge of Probate of the discretion conferred upon him by R. S., chap. 65, sect. 37, respecting the allowance of a commission to executors, administrators, guardians, surviving partners and trustees, is not conclusive, but is reviewable on appeal to the Supreme Court of Probate.
Swan et als., Applts., 501.

PROBATE BONDS.

PROBATE COURTS.

PUBLIC AND PRIVATE PROPERTY.

PUBLIC POLICY.

QUANTUM MERUIT.

QUO WARRANTO.

Where quo warranto proceedings are prosecuted in behalf of the State to determine by what authority the respondent is holding a public office, it is immaterial that the relator's term of office expired by limitation pending the proceedings. *State* v. *Harmon*, 268.

RAILROAD FENCES.

Section 26 of chapter 52 of the Revised Statutes of 1903, (R. S. 1916, ch. 57, sect. 22) does not require railroads to fence their locations against the intrusion of human beings, whether adults or infants.
Kapernaros v. *B. & M. R. R.*, 467.

Where the plaintiff is a trespasser, the defendant owes the plaintiff no duty save to refrain from wantonly or wilfully injuring him, and the burden of showing the breach of such duty is upon the plaintiff.
Kapernaros v. *B. & M. R. R.*, 470.

RAILROAD CROSSINGS.

When a railroad company maintains a flagman at a highway crossing to warn travelers of approaching trains, to be absent from his post when a train approaches is negligence on the part of the flagman for the consequence of which the company is liable to a traveler misled by the absence of the flagman, if he himself is in the exercise of due care.
Borders v. *B. & M. R. R.*, 207.

If a person is suddenly confronted by an unexpected peril, and must choose on the instant between alternative hazards, it is not necessarily negligence, if he chooses unwisely. A mere error in judgment is not of itself contributory negligence. *Borders* v. *B. & M. R. R. Co.*, 207.

When one in imminent peril is compelled to choose instantly between two hazards, he is not guilty of contributory negligence if he exercises that degree of care that an ordinarily prudent person might exercise under the same circumstances. *Borders* v. *B. & M. R. R.*, 207.

Ordinarily, for one to attempt to cross a railroad track without first looking and listening for a coming train is as a matter of law negligence per se.
Borders v. *B. & M. R. R.*, 207.

But, when the flagman usually stationed at a crossing is absent, the traveler has a right to rely to some extent upon the absence of the flagman. And

REAL ACTIONS.

REASONABLE CARE.

RECEIVERS.

REFEREES.

REPLEVIN.

REPORTED CASES.

RES ADJUDICATA.

RULE AGAINST PERPETUITIES.

RULES OF COURT.

SCHOOL COMMITTEES.

SENTENCE.

SHIPPERS.

SLANDER AND LIBEL.

chap" were susceptible of a libellous meaning, and that the words were susceptible of the meaning that the plaintiff was then and there afflicted with syphilis; not whether the words did mean that, but whether they could mean that. *King* v. *Pillsbury*, 528.

It was proper to allow a witness to testify that the words "damaged goods chap" meant that one was afflicted with syphilis or gonorrhea. The qualification of the witness to so testify was addressed to the discretion of the presiding Justice. *King* v. *Pillsbury*, 528.

Where the words in a particular case are ambiguous and are fairly capable of two meanings, one harmless and the other defamatory, according to the occasion on which they were used or the surrounding circumstances with reference to which they are to be construed, the question as to the meaning of the words and the sense in which they were used is for the jury. *King* v. *Pillsbury*.

Written or printed language alleged to be defamatory, is in law capable of the same sort of modification by explanatory evidence as oral language, and when upon trial the question depends upon evidence to be introduced in connection with the publication, it is properly left to the jury to say whether the language is libellous or not, the same rule prevailing as in similar cases of slander. Whether or not the language used will bear the interpretation given to it by the plaintiff, whether or not it is capable of conveying the meaning which he ascribes to it, is in such a case a question of law for the court. What meaning the words did convey to the readers is in such a case a question of fact for the jury. It is not the intention of the writer, or the understanding of any particular reader that is to determine the question. It is rather the effect which the language complained of was fairly calculated to produce and would naturally produce upon the minds of readers or reasonable understanding, discretion and candor, after it has been examined and considered in connection with all other parts of the writing, and in the light of all the facts and circumstances known to them. *King* v. *Pillsbury*, 531.

It is for the court to determine whether the words are capable of the meaning alleged in the innuendo, it is for the jury to determine whether that meaning was properly attached to them. *King* v. *Pillsbury*, 531.

SOLVENT AND INSOLVENT ESTATES.

The failure to include section 15 of chapter 66, R. S., 1883, in section 53 of c. 64, R. S. 1883, was a clear case of accidental omission or mistake which it is the duty of this court to repair, although the same omission is found

STATE AID ROADS.

STATUTE OF FRAUDS.

STATUTE OF LIMITATIONS.

STATUTES.

A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute, unless it be within the meaning of the makers. *Brackett* v. *Chamberlain*, 336.

STATUTORY NEGLIGENCE.

See *Cote* v. *Jay Manufacturing Co.*, 300.

TAXATION.

It is held that under R. S., chap. 9, sect. 14, the stock of tool bridge corporations must be taxed as personal property to the owners thereof.

That the enactment upon which this section is based is sect. 2, of chap. 187 of the Public Laws of 1846, which provided that no part of the general tax act of 1845 "shall be deemed to authorize or require the taxing of toll bridges as real estate in the towns where the same are situated, but the stock in such bridges shall be taxed as personal property to the several owners in the towns where such owners reside."

That to tax the capital stock to the owners and the property itself to the corporation would be in effect double taxation, which is contrary to legislative policy. *Stevens* v. *Dixfield & Mexico Bridge Co.*, 402.

In an action of debt to recover of nonresidents taxes assessed upon potatoes kept in a storehouse in the plaintiff town by the defendants who were not residents thereof, the burden is upon the plaintiff to establish the fact that the potatoes were employed in trade in the plaintiff town; and where the evidence discloses that two small lots were sold from the storehouse or cars by an employee of the defendants' agent or by a local vender, these transactions being without the knowledge, consent or sanction of the defendants, does not establish the fact that such potatoes were employed in trade in the plaintiff town and subject to taxation herein.

Morton v. *Wilson*, 70.

TENURE OF OFFICE.

Where quo warranto proceedings are prosecuted in behalf of the State to determine by what authority the respondent is holding a public office, it is immaterial that the relator's term of office expired by limitation pending the proceedings. *State* v. *Harmon*, 268.

TERMS OF OFFICE.

TOLL BRIDGE CORPORATIONS.

TRADE NAME.

The test on the question of similarity is the likelihood of deceiving an ordinary purchaser who is exercising ordinary care. In applying the test regard must be had to the nature and physical requirements of the article itself, its cost, the class of persons who purchase it and the circumstances under which it is purchased.

Lapointe Machine Tool Co. v. *J. N. Lapointe Co.*, 473.

Every person has a right to the honest use of his own name in his own business, but he will not be permitted by imitation and unfair devices to mislead the public in regard to the identity of the firm or corporation or the goods manufactured by it. If the use of the name be reasonable, honest and a fair exercise of his right, the user is not rendered liable for the incidental damage caused a rival thereby. The inconvenience or loss is damnum absque injuria. The injury which results from similarity in name alone is not actionable. But the offender cannot resort to any artifice or adopt any methods calculated to deceive the purchasing public. This is settled law.

Lapointe Machine Tool Co. v. *J. N. Lapointe Co.*, 482.

TRESPASS QUARE CLAUSUM.

A defendant sued in trespass for acts done upon another's land sought to justify by showing that she had a prescriptive right of way over the land, and that the acts of illegal trespass were done in making repairs on the way. In a brief statement she set up that she had a right of way, but did not set up that the acts complained of were done in the use or repair of the right of way. *Held:* that evidence of repairs is inadmissible. *Dartnell* v. *Bidwell*, 228.

In an action of quare clausum, the gist of the action is the breaking and entering. The other allegations are simply laid as aggravations of the trespass. It is, therefore, incumbent upon the plaintiff to prove the unlawful entry. *Inh. of Rangeley* v. *Snowman*, 413.

In an action of trespass quare clausum it is not necessary for the plaintiff to describe his close. If the defendant has occasion for a description, he can have it upon filing the proper plea. If he omits to do so, it is presumed that he consents that the plaintiff may prove the act to have been done upon any land in his possession within the limits of the town named in the writ.

The defendant having failed to file a proper plea, in the absence of a statute requiring particular description of the close, the declaration will be adjudged sufficient. *Drummond* v. *Withee*, 522.

TRESPASSER OR LICENSEE.

TRIALS.

TROVER.

TRUST DEEDS.

TRUSTEE ATTACHMENT.

TRUSTS.

ULTRA VIRES.

VACANCIES IN OFFICE.

Held:

That under R. S., chap. 11, sect. 2, P. was elected for a term of four years, and until another should be chosen and qualified, that is for a specific term of four years and a conditional term added thereto.

Grindle v. *Bunker,* 108.

VERDICT.

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.

Garmong v. *Henderson,* 425.

It is not enough to sustain a verdict that there is evidence which, if believed by the jury, would justify them in returning it; that evidence must be so reasonable and so probable that an unprejudiced man, when considering all the evidence and all the circumstances in the case, would be justified in believing it. *Hill* v. *Keezer,* 548.

When the evidence in support of a criminal prosecution is so weak or so defective that a verdict of guilty based upon it cannot be sustained, it is the duty of the presiding Justice to direct a verdict in favor of the respondent. *State* v. *Benson,* 549.

WAGES.

Under the provisions of R. S., chap. 88, sect. 55, subsection VI as amended, the exemption from attachment of the wages of the principal defendant, for his own personal labor earned during a period not exceeding one month prior to the service of process is limited to twenty dollars.

Pike v. *Bannon et als.,* 124.

The exemption of ten dollars in all cases is not additional to the exemption of twenty dollars, but is applicable when wages for the principal defendant's own labor have been earned during a period more than one month prior to the service of process. *Pike* v. *Bannon et als.,* 124.

WAIVER.

WATER DISTRICTS.

WAYS.

WILLS.

WITNESSES.

WORDS AND PHRASES.

WRIT OF ENTRY.

See *Eugley* v. *Sproul*, 463.

WRIT OF REVIEW.

A review may be granted in any case where it appears that through fraud, accident, mistake or misfortune justice has not been done, and that a further hearing would be just and equitable.

Booth Bros. & H. I. G. Co. v. *Smith*, 89.

When a case has been considered and determined by the Law Court, a petition for a review cannot serve the purpose of a rehearing. It will not lie for the purpose of seeking a revision by the court of its considered conclusions, either of fact or or law. *Booth Bros. & H. I. G. Co.* v. *Smith*, 89.

When a case has been considered and determined by the Law Court, a petition for a review will lie only when the court by inadvertence or mistake assumed to be true what the record shows is not true and its decision has been based upon that assumption, or has palpably failed to consider facts and a further hearing would be just and equitable.

Booth Bros. & H. I. G. Co. v. *Smith*, 89.

WRITS.

APPENDIX

STATUTES AND CONSTITUTIONS CITED, EXPOUNDED, ETC.

CONSTITUTION.

STATUTES OF UNITED STATES.

SPECIAL LAWS OF MAINE.

STATUTES OF MAINE.

REVISED STATUTES OF MAINE.

ERRATA.

Stone v. *Curtis*, page 63, line 10 from bottom of page, and page 64, line 11 from bottom of page, strike out "plaintiff" and substitute therefore "defendant."

Hasten v. *Baltimore & Ohio Railroad*, page 206, line 4 from bottom of page, strike out "ommission" and substitute therefor "omission."

Brown v. *Cole*, page 257, second line, strike out "Opoinion" and substitute therefor "Opinion."

Inhabitants of Rangeley v. *Snowman*, page 412, second line, strike out "1910" and substitute therefor "1916."

Brown v. *Cole*, page 262, eighth line from top of page, strike out "defense" and substitute therefor "plaintiff."

Eugley v. *Sproul*, page 465, seventh line from bottom of page, strike out "245" and substitute therefor "425."