MAINE REPORTS

116

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

JANUARY 20, 1917—NOVEMBER 26, 1917

TERENCE B. TOWLE

REPORTER

PORTLAND, MAINE

WILLIAM W. ROBERTS

1918

Entered according to the act of Congress

BY

FRANK W. BALL,

SECRETARY OF STATE FOR THE STATE OF MAINE

B9605

JUSTICES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS

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

*HON. ALBERT R. SAVAGE, died June 14, 1917.
*HON. LESLIE C. CORNISH, appointed Chief Justice June 25, 1917.
*HON. ALBERT M. SPEAR, appointed Associate Justice June 25, 1917.

Justices of the Superior Courts

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

ATTORNEY GENERAL
GUY H. STURGIS

REPORTER OF DECISIONS
TERENCE B. TOWLE

ASSIGNMENT OF JUSTICES

FOR THE YEAR 1917

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: CORNISH, Chief Justice, SPEAR, KING, BIRD, HANSON, MADIGAN, Associate Justices.

AUGUSTA TERM, Second Tuesday of December.

SITTING: CORNISH, Chief Justice, SPEAR, BIRD, HANSON, PHILBROOK, MADIGAN, Associate Justices.

TABLE OF CASES REPORTED

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TABLE OF CASES CITED

BY THE COURT

CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE

SUPREME LODGE, NEW ENGLAND ORDER OF PROTECTION, In Equity

vs.

LAURA E. SYLVESTER AND ALBERT J. LARRABEE.

Knox. Opinion January 20, 1917.

Bills of Interpleader. Fraternal Insurance Associations. General rule as to who are and what constitutes a "dependent" under an insurance policy.

The plaintiff is a fraternal beneficiary society. By its by-laws, and by the laws of Massachusetts under which it was organized, it was provided that death benefits might be made payable to persons dependent on a member. A member procured a benefit certificate which provided that his benefit should be paid to his deceased wife's sister, "related to him as dependent." Upon a bill of interpleader, brought after his death, to determine to whom the benefit should be paid, it is *held:*

1. That no person can be a beneficiary, except those in the classes designated by the statute of Massachusetts and by the laws of the society.
2. That to constitute dependency there must be some duty or obligation, either legal, or equitable, or moral, on the part of the member to furnish support, or to aid in doing so, on account of which the claimant has some reasonable grounds of expectancy of support.
3. That where the claimant, a sister of the deceased wife of a member, lived in his family for mutual convenience, she acting as housekeeper, and where there was no contract or promise on his part to continue the relation, and where either might end the arrangement without the violation of any duty, she was not a dependent, within the meaning of the statute under which the society was organized.
4. That in accordance with the laws of the society, the benefit in this case is payable to the sole heir and next of kin of the member, the other claimant.

Bill of interpleader brought by plaintiff order to have the Court determine to which of two defendants it should pay the benefit fund payable under a certain insurance certificate issued by the plaintiff order on the life of one Horace A. Larrabee. The fund was claimed by Laura E. Sylvester, a sister-in-law of the deceased, who was the beneficiary named in the certificate, and by Albert J. Larrabee, a brother of the deceased, claiming as sole heir at law and next of kin; the brother claiming that said Laura E. Sylvester was not, within the intent and meaning of said benefit certificate and the law relating thereto, a "dependent of or person dependent upon" the said Horace A. Larrabee.

The cause was heard upon bill, answer, replication and proof. The sitting Justice ruled that Laura E. Sylvester was a "dependent" within the meaning of that term as used in the plaintiff's certificate of insurance and that she was thereby legally entitled to said insurance. From which ruling, an appeal was entered. So much of the decree below as awarded the fund to Laura E. Sylvester is overruled. A decree will be entered in accordance with the opinion. So ordered.

Case stated in opinion.

Oakes, Pulsifer & Ludden, for complainant.

Frank B. Miller and A. S. Littlefield, for Laura E. Sylvester.

Frank H. Ingraham, for Albert J. Larrabee.

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

SAVAGE, C. J. This is a bill of interpleader wherein the plaintiff asks that the defendants be required to interplead respecting their claims to the sum of one thousand dollars, which it has in its hands as the amount of the death benefit named in his benefit certificate issued to Horace A. Larrabee, one of its members. The claimants are Laura E. Sylvester and Albert A. Larrabee. The parties have interpleaded.

The cause was heard by a sitting Justice upon bill, answers and proof, and he found that the defendant, Laura E. Sylvester, was entitled to the amount due on the benefit certificate. From his decree, Albert J. Larrabee, the other defendant, appealed.

The plaintiff order was organized under the laws of Massachusetts, which provide that the death benefit may be payable to "persons dependent upon the member named in the benefit certificate." And the constitution of the order also provides that the benefit fund may be paid to "persons dependent upon such member." Mr. Larrabee's benefit certificate in the first instance was made payable to his wife. Upon her decease he procured a new certificate, which is the one now in question and which provided that the benefit should be paid at his death "to Laura E. Sylvester, related to the said Horace A. Larrabee as dependent." And Mrs. Sylvester claims the fund under the certificate. The other claimant, Albert J. Larrabee, was the sole heir and next of kin of the deceased, and as such he claims the fund. He denies that Mrs. Sylvester was a dependent within the meaning of the laws of Massachusetts, under which the society was incorporated. If Mrs. Sylvester was not a dependent, then Mr. Larrabee is entitled to the fund.

What is dependency within the meaning of the statute which authorizes the society to make its death benefits payable to dependents is a question of mixed law and fact. The situation of the parties, their relation in fact to each other, present questions of fact. The interpretation of the statute and the meaning of the word in the statutory sense present questions of law. The findings of the single Justice as to the facts will not lightly be disturbed. Whether these facts, as found by the Justice, constitute dependency as defined by law, that is to say, the legal effect of the facts, is a question of law. The facts in this case are not seriously in dispute.

Mrs. Sylvester was a sister of Mr. Larrabee's deceased wife, who in her lifetime was the beneficiary designated by him. She had been a widow since 1887. During the last years of her sister's life she was a nurse, but when not at work, she made her home at Mr. Larrabee's. She never paid any board, but used to help about the housework, and took care of her sister at times when she was sick. Mrs. Larrabee died in Boston, Sept. 27, 1910. Mrs. Sylvester was then at the Larrabee house and stayed there until Mr. Larrabee died April 5, 1915. After Mrs. Larrabee's death, Mr. Larrabee said to Mrs. Sylvester that he was not going to break up his home and asked her to stay. She stayed. Nothing was said about wages and none ever paid. She says, "I did the housework; I kept the house just the same as my sister did, and I kept it just the same as I would for

my brother." When they went to Boston on a visiting trip to her relatives he bought the tickets. He usually gave her some little change if she was going down the street, for car fares and like that. Mr. Larrabee made his will, in which he gave to Mrs. Sylvester the house and lot where he lived, half of a barn and lot, a double tenement house, a single tenement house, the household furniture and furnishings in the house where he lived and the contents of the barn. He gave to Albert J. Larrabee, his brother, the other claimant, the rest of his estate.

After the will was made, Mr. Larrabee handed it to Mrs. Sylvester, saying "Take care of this. It is yours." Afterwards she read it. She continued to stay as before. Sometime after the will was made, he had his certificate in the plaintiff order changed, and had the new certificate made payable "to Laura E. Sylvester, related to said Horace A. Larrabee, as dependent." He handed the new certificate to her saying "That is made out to you." While she lived with Mr. Larrabee she had no other means of support than that which was furnished by Mr. Larrabee. She was related to Mr. Larrabee only by marriage. She says that she did not expect any wages until after she saw what he had done when he made the will. Mrs. Sylvester had a policy of endowment insurance on her own life, and the last year of his life Mr. Larrabee gave her some money to pay the premiums. She says, "I didn't have the money, and he said he would help me with it." This is Mrs. Sylvester's whole story.

It is, of course, unquestioned that no one can be a beneficiary, except those in the classes designated by statute and by the laws of the society. *Am. Legion of Honor* v. *Perry*, 140 Mass., 580; *Britton* v. *Royal Arcanum*, 46 N. J., Eq., 102. In this case Mrs. Sylvester must fall within the designated class of dependents, or fall outside of the case. And in that event, the benefit, according to the laws of the society, will belong to Albert J. Larrabee, the other claimant.

Who is a dependent? The term is defined in several classes of cases and not always with precisely the same meaning. There are cases where the question arises under homestead statutes, or exemption statutes, or statutes giving remedy to dependents for death by wrongful act, as well as under statutes and by-laws governing fraternal benefit societies. In fraternal benefit society cases, the courts in many instances in determining the question of dependency, have

referred in express terms to the benevolent character and purposes of such societies. These societies exist, and are permitted by the statutes of most States to exist, only to enable men to protect their wives, children and relatives and their dependents to whom they are under some obligation to protect or support. The obligation need not be a legal one. It may be legal, moral or equitable. It must flow from some kind of a duty.

In some of the earlier cases, a dependent is said somewhat loosely to be "a person dependent for support in some way" upon another. *Ballou* v. *Gile*, 50 Wis., 614; *Alexander* v. *Parker*, 144 Ill., 355; *Murphy* v. *Nowak*, 223 Ill., 301.

In many of the later cases, attempts have been made to define the term more clearly, with reference to its meaning in the statutes relating to fraternal societies. In *McCarthy* v. *Supreme Lodge, New England Order of Protection*, 153 Mass., 314, the court said:—"Trivial, casual, or perhaps wholly charitable assistance would not create the relation of dependency within the meaning of the statute or by-laws. Something more is undoubtedly required. The beneficiary must be dependent upon the member in a material degree for support or maintenance or assistance, *and the obligation on the part of the member to furnish it, must, it would seem, rest upon some moral, or legal, or equitable grounds*, and not upon the purely voluntary or charitable impulses or disposition of the member." This language is quoted with approval in several cases, and its substance seems to meet with general acceptance. See *Wilber* v. *Supreme Council, N. E. O. P.*, 192 Mass., 447; *Modern Woodmen* v. *Comeau*, 79 Kan., 493; *Caldwell* v. *Grand Lodge, A. O. U. W.*, 148 Calif., 195. In the latter case, after quoting the foregoing from McCarthy case, the court said:—"Such is the accepted rule, and considering the charitable and benevolent nature of these associations, it is the just rule."

It should be observed that the defendant in the case of *McCarthy* v. *The Supreme Lodge, New England Order of Protection*, supra, is the plaintiff in this case. The court in the McCarthy case interpreted the Massachusetts statute under which this benefit certificate was issued and by its interpretation of the laws of Massachusetts we feel bound.

In some of the cases the rule is stated to be that dependency must rest upon some moral, legal or equitable ground and not on favor, caprice or whim, which may be cast aside without violating any legal

or moral obligation. *Caldwell* v. *Grand Lodge, A. O. U. W.*, 148 Calif., 195; *Palmer* v. *Welch*, 132 Ill., 141; *Morey* v. *Monk*, 145 Ala., 301; *American Legion of Honor* v. *Perry*, 140 Mass., 580; *McCarthy* v. *Supreme Lodge, N. E. O. P.*, 153 Mass., 314; *Lavigne* v. *Ligue Des Patriots*, 178 Mass., 25; *Wilber* v. *Supreme Council, N. E. O. P.*, 192 Mass., 477.

This rule is supported by the general run of authority, although not all cases use the same phraseology. See *Royal League* v. *Shields*, 251 Ill., 250; *Alexander* v. *Parker*, 144 Ill., 355; *Grand Lodge* v. *Gandy*, 63 N. J., Eq., 692; note 36, L. R. A., N. S., 208; *Modern Woodmen* v. *Comeau*, 79 Kan., 493; *Faxon* v. *Grand Lodge*, 87 Ill., App., 262; *Elsey* v. *Odd Fellows' Association*, 142 Mass., 224; *Severa* v. *Baranak*, 138 Wis., 144; *Ownby* v. *K. of H.*, 101 Tenn., 16; *Benevolent Legion* v. *McGinness*, 59 Ohio St., 531.

In some cases moral obligation of the deceased to keep a promise of support which he made to the beneficiary has been deemed sufficient to create the relation of dependency. Such a case was the McCarthy case, already referred to. In that case the woman was engaged to be married. At her intended husband's request she left her employment, which afforded her a comfortable support, for one in which her earnings were insufficient for that purpose and received from him each week a sum sufficient to make up the difference. When he asked her to change her employment, one reason being that he could not see her where she was as often as he wished, he told her that if she would do so he would supply her with such sums as in addition to what she could earn would be sufficient to afford her a comfortable support. The court said that "in view of the relation between them we think she had a right to receive and depend upon his assistance and that he was under moral obligation, after promising it, to continue to furnish it." The court in *Alexander* v. *Parker*, supra, said of the McCarthy case, that "it goes as far in the direction of liberal interpretation of the statute as correct rules of construction will warrant." In *Wilber* v. *Supreme Council, N. E. O. P.*, supra, a case not unlike the McCarthy case, it appears that there were three sisters. The member married one of them, with an express understanding that they should all go to his home and be one family. The wife, as long as she lived, and one of the sisters, did the housework. The member contributed his earnings. The third sister, to whom he made the benefit payable, contributed what she could.

It was held that she was a dependent on the ground of his moral obligation to keep his promise when he married the sister and to make a home for all of them.

We think the correct rule of interpretation of the statutory term, "dependent," in fraternal society cases, is that stated by the Massachusetts court in the McCarthy case. It has seemed to meet with general acceptance. It is a suitable rule to effectuate the purposes of these beneficiary societies. And that rule is that there must be some duty or obligation, either legal, or equitable, or moral, on the part of the member to furnish support, or to aid in doing so, on account of which the claimant has some reasonable grounds of expectancy of support as a basis of legal dependency.

In this case we are unable to find any duty, either legal, equitable or moral, on the part of Mr. Larrabee to support Mrs. Sylvester. There was no contract. He made no promise. They lived together, she as housekeeper, for their mutual convenience. While the arrangement lasted she would do the housework and have a home. But there was nothing that she had a right to depend upon except his good will. He might end it any day, or she might leave any day, without the violation of any duty on the part of either. It was purely voluntary on both sides. If it be suggested that there was a mutual expectation that the relation established would continue during life, it was an expectation that either might disappoint without the violation of any duty.

The will shows their real relation, so far as they had any, though this was made after the arrangement began, and not in pursuance of any agreement he had made. By the will he gave her a large amount of property. She knew it. From that time on she lived in the expectation, not of support of which his death would deprive her, but of the enjoyment of the property which the will gave to her. We think that she was not in any legal sense his dependent within the meaning of the definition in the McCarthy case.

We conclude that Albert J. Larrabee, the sole heir and next of kin, is entitled to the amount due upon this benefit certificate. So much of the decree below as awarded the fund to Laura E. Sylvester must be reversed. A decree will be entered below, in accordance with the opinion.

So ordered.

CHARLES A. PREST

vs.

THE INHABITANTS OF THE TOWN OF FARMINGTON.

Sagadahoc. Opinion January 20, 1917.

Liability of Towns for the Acts of its Selectmen. The Right of one Selectman to Bind the Town or Municipality. Ratification of the Acts of one Selectman.

Action on account annexed. Motion for new trial and exceptions by defendant. Motion not considered. Before any work was ever done for defendants by plaintiff, or ever bargained for, one of the selectmen of the defendant town wrote a letter to a third person, in no way connected with this suit, in which statements were made as to the work to be done and its nature as to difficulty or otherwise. The letter came into the possession of the plaintiff who claimed to have brought it to the attention of this member of the board who wrote it, before the bargain for the work was struck. It was not shown to any other member of the board, nor were its contents made known to them, nor their adoption of its statements proved.

Held: That under these circumstances, the contractual liabilities of the town were not effected by the letter and its admission in evidence was error.

Action on the case with an account annexed to recover for labor and materials furnished for the construction of a sewer in defendant town. Defendant pleaded general issue and also filed a brief statement. Verdict for plaintiff in the sum of $1,814.02. Defendant filed motion for new trial and also filed exceptions to the admissibility of certain evidence and certain rulings of the presiding Justice. During the progress of the trial, the plaintiff offered in evidence a certain letter written and signed by one of the selectmen of the defendant town to a person other than the plaintiff in regard to the nature of the work in building the sewer. The plaintiff claimed that he should be entitled to compensation for extra work, claiming that certain misrepresentations were made, as to the nature of the work required, and the letter was offered and admitted upon this question, to which ruling defendant excepted. This is the only exception that was considered. Exceptions sustained. Motion not considered.

Case stated in opinion.
McGillicuddy & Morey, for plaintiff.
E. E. Richards, for defendant.

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

PHILBROOK, J. This action is based upon an account annexed, the items of which are divided into three groups. Group A contains charges for constructing a sewer at contract price, $3,500.00 extra work on same and percentages on extra work. After deducting credits on this item the plaintiff claims a balance due of $1,434.38. Group B contains charges for constructing a pier point at Center Bridge, so called, at contract price, $500.00, extra work on same and percentages on extra work. After deducting credits on this item the plaintiff claims a balance due of $570.08. Group C contains charges for constructing Fairbanks Bridge, so called, at contract price, $425.00, extra work on same and percentages on extra work. After deducting credits on this item the plaintiff claims a balance due of $237.15. The total amount of these balances is $2,241.00. The jury returned a verdict of $1,814.02 for the plaintiff.

The defendants present exceptions to the rulings of the presiding Justice and a general motion to set aside the verdict on the grounds that it is against law, evidence and the weight of evidence and that the damages are excessive.

Although a number of exceptions were reserved during the trial and were discussed in the printed briefs of both defendant and plaintiff, yet the former, in oral argument, frankly abandoned all these exceptions, save one, which we will now consider.

As throwing light upon this exception it should here be noted that the total of the contract figures is $4,425.00. The defendants claim to have paid the plaintiff, upon all the jobs, the sum of $4,457.20 which is slightly more than the total contract figures. The evidence seems to fairly sustain this claim. The defendants also claim that there should be no charge for extra work and the controversy arises largely out of this contention.

Before any of the work was done by the plaintiff, or even bargained for, W. A. Marble, a member of the Board of Selectmen of the defendant town, using stationery bearing his personal business letter heads

wrote the following letter to one Sanders, of the Sanders Contracting Company, a concern in no way connected with the plaintiff, and not a party to this suit:

"The sewer which we expect to build is about a mile and the digging is good—no ledges—almost all of the way is sandy soil—the pipe to be used is 6 in. to 12 and of porous sewer pipe—no iron to be used. The work has not been surveyed."

The signature was personal, not official. This letter was turned over to the plaintiff by Sanders. It was offered in evidence by the plaintiff and admitted subject to objection. The exception thereto allowed is the one under consideration. The position of the plaintiff as we understand from the record and the argument of counsel, is this: The letter was taken to Farmington by him and shown to Mr. Marble before any negotiations were entered into, and was depended upon by the plaintiff as a true representation of the conditions surrounding the proposed sewer work; that he entered upon that work for a certain consideration relying upon that representation; that the conditions were not as represented in the letter and hence this is one of the reasons why he was entitled to receive pay for extra work, that is, for work not contemplated when the trade was made between them. The plaintiff, at one point testified: "What I talked was $4,000.00 to do the work. I dropped down to $3,700.00 and finally my words to them was, if the digging was such as they represented it, I would do the sewer for $3,500.00." In behalf of the defendants, Mr. Marble, while admitting that he wrote the letter to Sanders, denied that the plaintiff ever showed the letter to him, saying that he had never seen it since he sent it to Sanders. He also testified that while talking with Mr. Prest about the sewer he did not make any representation to him in regard to the character of the soil and never heard any of the selectmen do so, adding "he had been over the ground and knew as much about it as we did." The defendants also claim that if any such representation was made in the letter, it was made by a single member of the board of selectmen, not by a majority and hence had no binding effect upon the rights and liabilities of the town. Repeated and careful examination of the record fails to disclose that the letter was ever seen by Mosher and Titcomb the other members of the board of selectmen, nor does it appear that any of them made any statements to the plaintiff about the ease or difficulty of the job, unless by implication from the testimony of the

plaintiff above quoted when, as he says, they were trying to agree upon the price to be charged and paid for the work. The record seems to establish the fact that the letter, if shown to Marble, was shown some day in July, when no one was present except plaintiff and Marble, and although on the following day the plaintiff met all three members of the board, in the presence of Judge Thompson, there is nothing to show that the letter was then produced and exhibited. It also seems quite clear that if the letter was shown to Marble it was so done some time before the trade was made and in the neighborhood of two weeks before work was commenced. Was the letter admissible? We think not. Even if it were shown to Marble, it does not satisfactorily appear that any other member of the board ever saw it, or knew its contents or ratified the statements therein contained. Hence it could not have affected the contract liabilities of the town for it is well established that without subsequent ratification, either by the town or by a majority of the board of selectmen, the act of one member of the board cannot bind the town. *Richmond* v. *Johnson*, 53 Maine, 437.

Since the letter was so largely depended upon to show the right of the plaintiff to recover for extra work and this was an important element in the plaintiff's action, we feel that its admission was prejudicial to the defendants. It becomes unnecessary to discuss the motion.

Exceptions sustained.

ALFRED G. HILLS *vs.* S. W. PAUL.

Knox. Opinion January 27, 1917.

Action for Alienation of Affections. Rule of practice where motion for new trial is made on ground of newly discovered evidence.

An action on the case for damages for alienation of the affections of the wife of plaintiff, in which the jury found for plaintiff. The defendant filed a general motion for new trial.

Upon this motion the court is of opinion that it is not warranted in concluding that the jury was not justified upon the evidence in reaching a verdict for plaintiff or that in so doing it was actuated by bias or prejudice, or by sympathy or other improper motive.

Where evidence apparently taken out under R. S., (1903) Chap. 84, Sec. 53, and in support of a motion for new trial upon the ground of newly discovered evidence is presented, but no motion for such new trial is before the Law Court, there is no record upon which the Law Court can act.

It cannot be determined in the absence of the motion whether it was in writing as required by Rule XVII or is verified by affidavit, as required by Rule XVI.

Chapter 103 of the Public Laws of 1913 providing for certification of copies of evidence by official court stenographers, does not render unnecessary the certificate of the presiding Justice upon any case reported to the Law Court.

The certificate of the official court stenographer upon a copy of evidence "a correct transcript of the foregoing evidence" is not a compliance with the requirements of Chap. 103, Public Laws, 1913. The words of the statute or their equivalents must be used.

Action on the case for alienation by defendant of the affections of the plaintiff's wife. Defendant filed a plea of general issue. Verdict for plaintiff in the sum of $2,142.33. Motion for new trial filed by defendant. Motion overruled.

Case stated in opinion.

Charles T. Smalley, for plaintiff.

H. C. Buzzell, for defendant.

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

BIRD, J. An action on the case for damages for alienation of the affections of the wife of the plaintiff. The action was tried at the April (1916) term of the Supreme Judicial Court for the County of Knox and resulted in a verdict for the plaintiff in the sum of $2,142.33. At the same term, the defendant filed the usual general motion for new trial.

A careful reading of the record indicates that the evidence was conflicting, involving the credibility of the witnesses. The case is one especially within the province of the jury and the Court is of the opinion that it is not warranted in concluding that the jury was not justified upon the evidence in reaching its verdict for the plaintiff or that in so doing it was actuated by bias or prejudice, or by sympathy or other improper motive.

Subsequent to the April term, but when does not appear, it may be inferred that defendant made a motion for new trial apparently upon the ground of newly discovered evidence. The motion, however is not found in the printed case or record. Whether or not it was in writing (Rule XVII) and, if so, whether or not it was verified by affidavit, as required by Rule XVI, we have, therefore, no means of knowing. A motion for new trial on the ground of newly discovered evidence offers no exception to the latter rule. *Emmett* v. *Perry*, 100 Maine, 139, 141. The lack of verification is a fatal objection to the motion. Id. Evidence, apparently in support of a motion for new trial upon the ground of newly discovered evidence, was taken out at the term following the trial, but the testimony is not reported by the presiding Justice as required by R. S., (1903), Chap. 84, Sec. 53. Nor is the court of the opinion that a certificate of the presiding Justice reporting the case is rendered unnecessary by Chap. 103 of the Public Laws of 1913. And if it were, the certificate of the official court stenographer,—"A correct transcript of the foregoing testimony"—falls far short of that provided for in Chap. 103, Public Laws, 1913, which requires that the certificate shall state "that the report furnished by him is a correct transcript of his stenographic notes of the testimony and proceedings at the trial of the cause." The words of the statute or their equivalents should be used. This provision for certification of the testimony by the stenographer does

not do away with the necessity for a certificate of the presiding Justice reporting the case to the Law Court. It simply relieves him from certifying to the correctness of the transcript of the evidence.

Considering, however, the evidence submitted as newly discovered, as well as may be done in the absence of a motion, it appears doubtful, if it can be deemed newly discovered, while it indicates a lack of due diligence on the part of defendant.

Motion overruled.

EUGENE A. SIMPSON

vs.

FRED L. EMMONS, et al., and
SACO IMPROVEMENT COMPANY,
FIRST NATIONAL BANK of Biddeford,
and
YORK COUNTY SAVINGS BANK, Trustees.

York. Opinion January 27, 1917.

Breach of Contract. Damages Recoverable. Necessary Proof of Damages. Rescinding of Contract. Acceptance of Offer as Constituting a Contract. Necessary Proof where Party Claims Contract has been Rescinded.

Action to recover damages for a breach of contract. The plaintiff submitted to the defendants a written offer to furnish them the iron work for a Shoe Factory. The defendants accepted the offer. Thereupon, the plaintiff wrote the defendants (October 23rd 1915) as follows: "When you were in my office to get an estimate on the Shoe Factory job you told me about some references. I have forgotten who they are. Will you kindly give me their names again? Upon referring to Dun's Commercial Agency, they advised me that they have not had any statement from you; therefore I should like to have you advise me as regarding the same. I have no doubt but that you would be willing to give me security in connection with this order, for, as you have no credit rating, it would not warrant my taking on such a large order as this for credit. Awaiting your favor I remain."

On receipt of that letter the defendants sent the plaintiff the following night lettergram. "When in your office I referred you to the First National Bank Biddeford. Did not ask credit under the circumstances you had better cancel the order and return the plans shall be in Boston Thursday and call at your office." Subsequently the defendants took the plans from the plaintiff's office and wholly refused to accept any of the material from him.

Held:

1. That the unqualified acceptance by the defendants of the plaintiff's definite offer constituted a contract between the parties.
2. That one party to a contract cannot rescind it without the assent of the other party, in the absence of fraud or breach of warranty.
3. That the refusal by one party to a contract to be bound by it, which will authorize the other party to rescind it, need not be an express refusal. It may be shown by acts and conduct, but such acts and conduct must clearly evince an intent to be no longer bound by the contract.
4. That the plaintiff's letter of October 23rd did not evince such a clear intention on his part not to be bound by the contract as would authorize the defendants to rescind it.
5. That the contract between the parties was not rescinded, and the evidence clearly shows a breach of it by the defendants.
6. That the damages are to be assessed in this case on the footing of what the plaintiff's profits would have been if the contract had not been broken by defendants; and the plaintiff is to be made whole for what he has lost by their breach.
7. That $375 is a fair and reasonable assessment of the net profits the plaintiff would have received from his contract with the defendants if they had not committed a breach of it.
8. That the plaintiff has failed to furnish sufficient data to enable the Court to determine with reasonable certainty the amount of any liability which he may have incurred for materials ordered by him of other parties to fill his contract with the defendants.

Action on the case to recover damages for breach of contract. The plaintiff claimed that he had agreed and contracted with defendant to furnish certain iron work and the defendants refused to accept same. Defendants pleaded general issue and also filed brief statement. At close of testimony, case was reported to Law Court for determination upon so much of the evidence as legally admissible. Judgment for plaintiff in the sum of three hundred and seventy-five dollars, with interest from the date of the writ.

Case stated in opinion.

Stone & Stone, and Henry B. Roberts, of Boston, for plaintiff.

Robert B. Seidel, for defendants.

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

KING, J. Action to recover damages for a breach of contract. The case comes up on report. The facts are not materially in dispute. Briefly stated they are as follows: October 14, 1915, the plaintiff, whose place of business was in Boston, submitted to the defendants a written offer to furnish them the iron work for a Shoe Factory at Saco, Maine, for $1,504.00. No question is raised as to the sufficiency of the offer. It was specific and definite.

On Friday, October 22, 1915, the defendants wrote the plaintiff as follows: "I accept your bid for iron work for Saco Improvement Association except that I deduct $8.00 iron roof ladder, as it will not be used. This is in accordance with your letter of October 14, 1915. I have shipped you plans under separate cover. Rush the irons for the first floor and send as soon as possible. Kindly send me schedule so as I may be able to check upon their arrival."

Saturday the 23rd, after receipt of the acceptance, the plaintiff wrote the defendants: "When you were in my office to get an estimate on the Shoe Factory job you told me about some references. I have forgotten who they are. Will you kindly give me their names again? Upon referring to Dun's Commercial Agency, they advised me that they have not had any statement from you; therefore I should like to have you advise me regarding the same. I have no doubt but that you would be willing to give me security in connection with this order, for, as you have no credit rating, it would not warrant my taking on such a large order as this for credit. Awaiting your favor I remain."

The defendants received that letter Monday night, the 25th, and then sent to the plaintiff the following night lettergram. "When in your office I referred you to the first National Bank Biddeford. Did not ask for credit under the circumstances you had better cancel the order and return the plans shall be in Boston Thursday and call at your office."

On Tuesday, the 26th, the plaintiff replied to that lettergram: "I beg to acknowledge receipt of your telegram of this date and would state that I did not hold up on your order, and did not mean any offense by asking you for your financial rating. This is customary, you understand, as a business precaution, and is one of the essential

things we have to look after. This material has all been ordered and is about half out at the present time; therefore I cannot cancel your order; and I do not think that there will be any trouble in our getting together under pleasant business relations. I hope that these conditions will be satisfactory to you."

Again on Wednesday the 27th the plaintiff wrote the defendants, that he had been informed that they had telephoned his office in regard to the order; that it was impossible to make cancellation on the material, because the greater part of it "is all made and will be shipped according to the order;" that the defendants will have to be responsible for the same; and that he had wired the factory to hold the material, if it had not already been shipped.

The defendant, Fred L. Emmons, called at the plaintiff's office in Boston, either on Wednesday the 27th or on Thursday the 28th, probably on Wednesday, and told the plaintiff's clerk, according to the latter's testimony, "that he considered the order cancelled, and had made other arrangements for the material, and that he would not accept any material that we would ship. . . . I told him that the order was underway, and that I could not accept his cancellation; I would have to leave the matter to Mr. Simpson." At that time Mr. Emmons took the plans away with him from the plaintiff's office. He claims that he had not then received the plaintiff's letters of October 26 and 27.

November 5th 1915, the plaintiff wrote the defendants that they had not replied to his letter of October 27th in regard to the material, that it was all ready for shipment, was special material which he could not use on other work, and that they must make some arrangement to take care of it, otherwise he should hold them responsible.

It appears that on Saturday, October 23, 1915, having received the defendants' acceptance of his offer, the plaintiff wrote the Duplex Hanger Co., Cleveland, Ohio, inclosing schedule of material and asking for a lump price on same by wire; and that on Monday the 25th, having received such price by wire, he sent his order to the Duplex Company for the material with request "to hasten shipment of the bases and caps for the first story." October 27, the Duplex Company wrote the plaintiff acknowledging receipt of his order and stating that "shipment of the first items of post caps and bases, as well as the hangers for the first floor, will be made to-day, and the balance of the order will go forward in a few days, as we have to make these

caps up. Tracer will be placed after this shipment so as to avoid any possible delay en route." On the same day, October 27, the plaintiff wired the Duplex Company, "Cancel Biddeford order. Letter in mail." And on the same day the Duplex Company wrote the plaintiff acknowledging receipt of his telegram and saying: "Practically all the post caps on this order have been sheared, and we expected to make shipment to-day of all the ten inch caps, as well as the bases. We are holding everything awaiting your letter. We hope, however, you will be able to induce them to take this material, as you realize that the caps were made special for this work."

Liability of defendants.

It is suggested in behalf of the defendants that inasmuch as they requested the plaintiff in their letter of acceptance of his offer to "rush the irons for the first floor and send as soon as possible," there was a variance between the acceptance and the offer, and, therefore, that there was not such a meeting of the minds of the parties as to all the terms of the contract as was essential to its consummation. We think there is no merit in the suggestion. That request of the plaintiff to rush the delivery of a part of the materials cannot be regarded as intended by the defendants as a condition affixed to their acceptance of the plaintiff's offer. The offer was accepted substantially as made, and without qualification or condition. And as nothing was stipulated in the offer as to time and manner of payment, the law implied that payment was to be made when the materials were delivered. It must be conceded, therefore, in accordance with well settled principles of law, that the unqualified acceptance by the defendants of the plaintiff's definite offer constituted a contract between the parties.

Nor can it be questioned that the defendants refused to perform that contract. They claim, however, that the contract was rescinded. To sustain that claim in the absence of fraud or breach of warranty on the part of the plaintiff, they must show that such rescission was expressly or impliedly assented to by the plaintiff, for it is obvious that one party to a contract cannot rescind it without the assent of the other. *Listman Mill Company* v. *Dufresne*, 111 Maine, 104. If one party to a contract in the absence of fraud or breach of warranty refuses to abide by it, that refusal undoubtedly will authorize the other party to renounce it and refuse longer to be bound by it. The refusal by one party to be bound by a contract, which will

authorize the other to rescind it, need not be an express refusal. It may be shown by acts and conduct, but such acts and conduct must evince an intention no longer to be bound by the contract. Lord Coleridge in *Freeth* v. *Burr*, L. R., 9 C. P., 208, states the rule thus: "In cases of this sort, where the question is whether the one party is set free by the action of the other, the real matter for consideration is whether the action or conduct of the one do or do not amount to an intention to abandon and altogether refuse performance of the contract. I say this in order to explain the ground upon which I think the decision in these cases must rest. There has been some conflict among them. But I think it may be taken that the fair result of them is as I have stated, viz, that the true question is whether the acts and conduct of the party evinces an intention no longer to be bound by the contract." And in 6 R. C. L., page 930, it is said: "It is the party's conduct evincing an intent to be no longer bound by the contract that is equivalent to consent to a rescission. Refusal to fulfil a contract must be absolute to be tantamount to an assent to its dissolution, and to authorize the other party to rescind it; such refusal must be in no way qualified, and should substantially amount to an avowed determination of the party not to abide by the contract."

The defendants contend that the plaintiff's letter to them of October 23rd was equivalent to a consent to a rescission of the contract which their acceptance of the plaintiff's offer had consummated, and that thereupon they rescinded it. In construing the letter the true question is whether the statements made therein evince an intention of the plaintiff to altogether refuse performance of the contract, and to be no longer bound by it.

The letter asks the defendants to again name the references they mentioned at the time the offer was made, and it reminds them that Dun's Commercial Agency had no statement of their financial standing, and asks to be advised regarding the same. It then states: "I have no doubt but that you would be willing to give me security in connection with this order, for, as you have no credit rating, it would not warrant my taking on such a large order as this for credit." We do not think that sentence can be properly construed as a request for security from the defendants without the giving of which the plaintiff would not perform the contract. It seems to us to be only a suggestion as to security followed by a reason in justification of the

suggestion. It was not we think equivalent to a demand for security without the giving of which the plaintiff would not perform his contract. And, therefore, we are of opinion that the letter did not authorize the defendants to rescind the contract.

But if it should be assumed that the defendants were justified in construing the plaintiff's letter of October 23rd as a refusal on his part to perform the contract unless they gave him security, and, therefore, that they were thereby authorized to rescind the contract, did they do so? Was their reply to the plaintiff's letter a refusal to abide by the contract? We think not. In it they named the reference previously given, stated that they did not ask for credit, and then said: "Under the circumstances you had better cancel the order and return the plans shall be in Boston Thursday and call at your office." It does not seem to us that the plaintiff was bound to understand from the defendant's lettergram that they claimed the right to rescind the contract and did therein actually rescind it; but, rather, that they were offended at his suggestion of security and then felt that it would be better under the circumstances to have the order cancelled, and accordingly gave him permission to cancel it.

Plainly the defendants were not authorized to rescind the contract later, at the time Mr. Emmons called at the plaintiff's office in Boston and repudiated it and took the plans away, for certainly they then had no reason to think that the plaintiff did not intend to perform the contract, on the contrary they were then informed that he was actually performing it.

Our conclusion, therefore, is that the contract between the parties was not rescinded, and that the defendants refused to perform it on their part.

Damages.

The damages are to be assessed in this case, we think, on the footing of what the plaintiff's profits would have been if the contract had been carried out by the defendants according to its terms, and the plaintiff is to be made whole for what he has lost by the defendants breach.

The plaintiff's business is contracting for iron and steel for structural work. He has no factory and apparently keeps no stock on hand, but fills the orders he secures by purchasing the materials of other concerns on the best terms obtainable. He introduced evidence tending to show that the difference between the contract price

for the defendants' order and the amount he would have been required to pay other concerns for furnishing him all the materials fitted to fill that order, is $425.30, and he claims that sum as the profit he would have made on his contract with the defendants. But that sum appears to represent the gross rather than the net profits of the contract, for it seems reasonable that the plaintiff would have incurred some expenses in fully performing the contract, which he did not incur in connection with it. And our conclusion is that $375 is a fair and reasonable assessment of the net profits the plaintiff would have received from his contract with the defendants if they had not committed a breach of it.

The plaintiff further claims that he incurred a liability to the Duplex Company for certain material which he ordered to fill his contract with the defendants, and that his damages recoverable in this action should include that liability. That claim is well founded in law, but after a painstaking study of all the evidence in the case the court is of opinion that the amount of any such liability of the plaintiff to the Duplex Company is not established.

The plaintiff himself did not undertake to specify the amount of that liability, but referred it to his clerk who testified that he determined it by assuming that the Duplex Company had fitted all the caps and bases ordered of it, and by estimating the cost of the same, less their value as scrap iron, to be "something like $389." But it appears, as already noted, that the plaintiff's order to the Duplex Company was received by it October 27, and that on the same day it acknowledged by letter his telegram to cancel it. And the only evidence in the case tending to show what the Duplex Company did in pursuance of the order is its statement in that letter that "Practically all the post caps have been sheared," and "that the caps were made special for this work." As to the use on other work of such of the caps and bases as were in fact fitted for this job, the plaintiff's clerk testified: "At least half of the caps are such that the girder is smaller than the post, and it might be some time before we could get a chance to use them again. Q. But it is possible. It is possible: but we haven't had occasion to since." Up to the time of the trial no bill or statement had been sent the plaintiff by the Duplex Company showing the amount of any liability from him to it in the premises. It is plain that the evidence does not show how many of the caps and bases were fitted by the Duplex Company. Nor does it

satisfactorily appear, we think, that such of the caps and bases as were fitted have no value other than for scrap iron.

The plaintiff apparently did incur some liability to the Duplex Company in his effort to fill the defendants' order, but we are constrained to the conclusion that he has not proved the amount of that liability.

Judgment for the plaintiff for $375 with interest from the date of the writ.

MAURICE B. DUNSMORE *vs.* H. S. PRATT.

Androscoggin. Opinion January 27, 1917.

Proof necessary to justify arrest on writ issued under Chap. 114, Sec. 2, R. S., 1903. Rule of law as to what is meant and intended by the words "means of his own." Rule where debtor may have property in some other State. Necessary knowledge on part of person making the oath required under Revised Statutes, Chap. 114, Sec. 2.

This is an action for abuse of process and false imprisonment growing out of the plaintiff's arrest on mesne process in an action on a contract. The plaintiff recovered a verdict for $250, and the case is before the Law Court on a general motion and on exceptions filed by the defendant.

Held:

1. Being a drastic remedy for the collection of debt, all of the provisions of Sec. 2, Chap. 114, R. S., 1903, under which this process was authorized must have been complied with strictly, and the oath required to be taken by the creditor, his agent, or attorney must be practically perfect in its essential details, and must be based on good faith.
2. The knowledge in the defendant's possession did not justify an oath that he believed and had reason to believe, the plaintiff was about to take with him out of the State means of his own more than sufficient for his immediate support. Such belief should be based on information sufficient in itself to justify a man of ordinary prudence and caution, when calm and not swerved by self-interest from realms of reason and common sense, in believing the truth of the statement to which he makes oath.

3. As used in the statute "means" is portable assets or property. The ownership of land in another State, did not justify plaintiff's arrest, as such property was not "means" that he could take with him out of the State.
4. Defendant's exceptions being to the exclusion of evidence irrelevant and immaterial are overruled.
5. For the humiliation and mental distress caused by illegal and unjustifiable arrest and imprisonment in jail over night, the damages awarded are not excessive.

Action on the case to recover damages for abuse of process and false arrest and imprisonment. Writ was issued under R. S., 1903, Chap. 114, Sec. 2, and is what is commonly known as a "special writ," commanding the officer to arrest a person about to leave the State. Defendant filed a plea of general issue and also brief statement. Verdict for plaintiff in the sum of two hundred and fifty dollars. Defendant filed a motion for new trial and exceptions also were filed to certain rulings of the presiding Justice on the admissibility of certain evidence. Motion and exceptions overruled.

Case stated in opinion.

McGillicuddy & Morey, for plaintiff.

Thomas Austin, for defendant.

SITTING: CORNISH, KING, BIRD, HALEY, PHILBROOK, MADIGAN, JJ.

MADIGAN, J. This is an action for abuse of process and false imprisonment growing out of the plaintiff's arrest on mesne process in an action on a contract, and is before the court on motion and exceptions, the plaintiff having received a verdict for $250.

To justify such an arrest all of the provisions of Sec. 2, Chap. 114, R. S., must be strictly complied with. The oath required of the creditor, his agent or attorney, must be administered by a justice of the peace of the State. *Bramhall* v. *Seavey,* 28 Maine, 45; the oath must state that debtor is about to establish a residence outside of the State, in affiant's belief, and a defective oath cannot be supplied by supplemental oath. *Whiting* v. *Trafton,* 16 Maine, 398, "oath that debtor is about to change his residence and abscond insufficient," *Mason* v. *Hutchins,* 20 Maine, 77, oath must aver that affiant not only believes, but has reason to believe, that debtor is about to take

property with him out of the State, *Sargent* v. *Roberts*, 52 Maine, 590; "must state that property or means exceed amount required for debtor's immediate support," *Sawtelle* v. *Jewell*, 34 Maine, 543; "omission of pronoun 'his' or analogous expression to qualify 'support' fatal," *Proctor* v. *Lathrop*, 68 Maine, 256.

The process is a drastic remedy for the collection of debt, and the oath must be not only practically perfect in form, but it must be based on good faith. Creditors, their agents and attorneys, solemnly swear that they believe and have reason to believe the truth of all statements required by the statute. Such belief should be derived from facts and evidence sufficient in themselves to justify a man of ordinary prudence and caution, when calm and not swerved by self-interest from the realms of reason and common sense, in believing the truth of the statements to which he makes oath.

The evidence in this case discloses no justification for that portion of the oath in which the affiant swore that he believed, and had reason to believe, that the debtor would take with him means of his own, more than sufficient for his immediate support. Both parties lived in a small community, and the creditor, being the debtor's family physician for a considerable time, must have been fairly well informed as to the latter's circumstances and assets. The plaintiff was a carpenter by trade, earning, when employed, $2.50 per day, on which he was maintaining himself, a wife and a step-son. When arrested he had forty cents, and was without other property or means of any kind or description in the State. The argument that having announced his intention of going to Cincinnati the oath was justified, is without merit. Much of life consists of unrealized expectations; and friends or future earnings might make the trip possible. The oath clearly means that at the time it is made the debtor has within the State, property, tangible or intangible, which he is about to take with him outside of the State. Neither can it be claimed, that because the debtor owned real estate in Cincinnati he would by his departure remove from this State "means". As used in the statute, "means" is not method, but portable assets, tangible or intangible. Real estate outside of this State must be reached by and through the laws of the State or Country where situated. It was not something that the debtor could carry with him. The verdict was correct.

Nor can we say that under all of the circumstances the damages are excessive. The humiliation and mental distress suffered by the plaintiff because of an illegal and unjustifiable arrest and detention in jail over night could be best estimated by the jury.

Defendant's exceptions, being to the exclusion of evidence clearly irrelevant and immaterial, are overruled.

Motion and exceptions overruled.
Verdict to stand for full amount.

ADELARD LEVESQUE *vs.* JUSTINE DUMONT, et al.

Androscoggin. Opinion January 30, 1917.

Negligence of Children. Rule as to reasonable care on part of Children.

Plaintiff's intestate, a boy of nine years and two months, was struck by the defendant's automobile sustaining injuries that rendered him unconscious, in which condition he remained until his death. The jury returned a verdict in favor of the plaintiff for $500 and the case is before the Court on motion and exceptions filed by the defendant.

As defendant's automobile was going down on the right hand side of Lisbon Street in Lewiston, on the fifth day of November, at about five o'clock in the afternoon, it had occasion to pass between a team standing by the curb and a large covered wagon coming up street on the car tracks. The injured boy, in response to a call from a playmate, started to cross from the left to the right hand sidewalk. Street lights and the machine lights were lighted and the automobile was going about eight miles per hour. When the front of the automobile was nearly abreast of the rear of the covered wagon the boy appeared suddenly about four feet ahead of the automobile, coming from behind the covered wagon. Despite the efforts of the driver of the machine, the boy was struck by the car.

Held:

1. At the time of the accident the plaintiff's intestate was not in the exercise of such care as ordinarily prudent boys of his age and intelligence are accustomed to exercise under like circumstances and by reason of such negligence the plaintiff is not entitled to recover, there being no opportunity for the driver of the car to avoid the accident after the deceased came in sight.

Action on the case to recover damages for death of the plaintiff's intestate on account of alleged negligence on part of defendants. Action brought under R. S., 1903, Chap. 89, Secs. 9 and 10. Defendants pleaded general issue and also filed brief statement. Verdict for plaintiff in the sum of five hundred dollars. Defendant filed motion for new trial and also exceptions to certain rulings of presiding Justice. Motion sustained. New trial granted. Exceptions not considered.

Case stated in opinion.

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

McGillicuddy & Morey, for defendants.

SITTING: CORNISH, KING, BIRD, HALEY, PHILBROOK, MADIGAN, JJ.

MADIGAN, J. Plaintiff's intestate, a child of nine years and two months, was struck by the defendant's automobile, a Ford truck, sustaining injuries that rendered him unconscious, in which condition he remained until his death.

The accident happened on the fifth day of November on Lisbon street in the city of Lewiston. Standing at the curb on the right hand side of the street was a team, and coming up the street on the car tracks of the street railroad was a large covered truck wagon. From curb to curb the street was about forty-five feet wide. Going down the street the automobile came to the teams when they were about opposite each other and passed between them. There were no other automobiles or teams on this portion of the street at the time. Street lights and the automobile lights were lighted. It had been raining and the street was wet. The driver sounded his horn at the crossing next above, and was going at about eight miles an hour as he came to the team and the covered wagon. Deceased was on the left side of the street, when one of his mates called for him to come over and play. When the automobile had reached the tail of the covered wagon the deceased came from behind the covered wagon directly in front of the automobile and about four feet ahead of it. Some witnesses say he was "running," some "most running." He hesitated and started to turn back, surprised and confused. Despite the driver's efforts to avoid hitting the boy he was struck by the right mud guard or wheel. This is substantially the story as told by the disinterested witnesses in the best position to see.

Under these circumstances it does not seem negligence for the driver of the car not to sound his horn in passing the wagon. The automobile was plainly visible for a good distance before reaching the teams and there were few people on the street. The police regulations of all municipalities not only discourage, but prohibit, unnecessary noises by automobiles, and the driver would not be led to suspect the appearance of a pedestrian directly in front of his machine.

We are satisfied from a careful examination of the evidence that plaintiff's intestate at the time of the accident was not in the exercise of such care as ordinarily careful boys of his age and intelligence are accustomed to exercise under like circumstances. He started to cross a public city street frequented by teams and automobiles. Had he looked up the street he must have seen the car approaching and had he been attentive he must have seen the lights projecting their rays by the rear of the team in season to have avoided his peril. Heedlessly he passed right in the path of the car, so near to it that the accident could not be avoided.

In *Moran* v. *Smith*, 114 Maine, 55, the court says of a child younger than the deceased in this case. "Children even of the age of eight are held to the exercise of some care. They cannot be absolutely careless, and then hold others responsible to them for the results to which their carelessness contributed."

In *Colomb* v. *Portland & Brunswick Street Railway*, 100 Maine, 418, a child ten years and seven months old was run over by a street car while attempting to cross the track, the court held "either she did not look to see if a car was approaching or that if she looked she must have seen the car, and her act would hardly be regarded otherwise than a result of a sudden unthinking impulse, or of reckless daring, and that she clearly failed to use that care which a child of her intelligence should use, and consequently her contributory negligence was a bar to her recovery.

To the same general effect is a long line of cases from other States.

Therefore, we hold, that the action of the deceased in heedlessly running in front of the automobile is a bar to recovery.

Under this view of the case it is unnecessary to pass upon the defendant's exceptions.

Motion for new trial sustained.

LIMERICK NATIONAL BANK *vs.* BENJAMIN M. JENNESS.

LIMERICK NATIONAL BANK *vs.* HARRY HEATON.

LIMERICK NATIONAL BANK *vs.* FIRTH MARSHALL.

York. Opinion February 3, 1917.

Actions on promissory notes. Amending declaration by adding count on a guaranty when suit was originally brought against defendant as maker. General rule as to allowing amendments to writs where the amendment makes or offers a new cause of action.

1. An amendment to a declaration which sets up a cause of action growing out of a transaction other than that upon which the original declaration was based, or depending upon a contract separate and distinct from the one originally declared on is not allowable.
2. In case of a declaration charging the defendant as maker of a promissory note which he had not signed as maker, an amendment charging him as guarantor of the note upon a guaranty written on the back of the note, and signed by him is not allowable.
3. A promissory note and a guaranty of its payment written on its back are separate and independent contracts.

Action on the case to recover the amount due on a certain promissory note payable to plaintiff bank. The defendants were sued as makers of the note. The plaintiff filed motion to amend the writ by adding an additional count, in which the plaintiff sought to amend his writ by adding a count against the several defendants as guarantors. This amendment was allowed, to which defendant filed exceptions. Defendant filed a plea of general issue and also brief statement, setting out, with other matters, that he had signed the note declared upon as an accommodation surety, or guarantor, and not as a co-maker. At the close of the testimony, case was reported to the Law Court for determination upon so much of the evidence as is legally admissible. Secondly, whether or not the amendment to the declaration offered by the plaintiff in each case is legally admissible. Thirdly, that all exceptions taken and noted at the trial, either to

evidence or to the amendments, shall be considered by the court as fully as though a particular bill of exceptions was filed and allowed. Judgment for defendant.

Case stated in opinion.

J. Merrill Lord, and Emery & Waterhouse, for plaintiff.

Allen & Willard, for defendants.

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

SAVAGE, C. J. These several suits are brought to enforce payment of a note described as follows:—

"$3000 LIMERICK ME. JULY 6, 1909.

On demand, after date I promise to pay to the order of the Limerick National Bank, at the Limerick National Bank, Limerick, Maine, three thousand dollars, Value received, with interest.

Due on demand.

SPRINGVALE SPINNING CO.
By GEO. W. HANSON, Pres.
BENJ. M. JENNESS, Treas."

At the time of making the note, the following guaranty was written on its back, and signed by the several defendants and others:—

"For value received, I guarantee payment of the within note and waive demand and protest on same, when due."

The note was discounted by the plaintiff bank and has never been paid. But for six years the interest was paid by the maker semi-annually in advance. These suits were commenced just before the expiration of six years from the date of the note. In the original declarations the defendants were declared against as makers of the note. When the cases came on for trial, the plaintiff asked leave to amend in each case by adding a new count declaring on the written guaranty on the back of the note. The amendment was allowed, against the objection of the defendants, who noted exceptions. The cases come before this court on report, with the stipulation that "all exceptions taken and noted at the trial shall be considered by the court as fully as though a particular bill of exceptions was filed and allowed."

The defendants claim several defenses on the merits. But we need to consider only their contention that the amendment was not allowable for the reason that it introduced a new cause of action.

While the greatest liberality in the matter of amendments is allowed, in furtherance of justice, it is well settled law, that no new cause of action can be introduced against the objection of the defendant. *Flanders* v. *Cobb*, 88 Maine, 488; *Anderson* v. *Wetter*, 103 Maine, 257. The clause in Rule V, that "no new count nor amendment of a declaration will be allowed, unless it be consistent with the original declaration and for the same cause of action," is only a restatement of the common law rule. And an amendment which sets up a cause of action growing out of a transaction other than that upon which the original declaration was based, or depending upon a contract separate and distinct from the one originally declared on, is not allowable. On the other hand, new counts are not to be regarded as for a new cause of action, when the plaintiff in all the counts attempts to assert rights and enforce claims growing out of the same transaction, act, agreement or contract, however great may be the difference in the form of liability, as contained in the new counts, from that stated in the original counts. *Smith* v. *Palmer*, 6 Cush., 513.

In actions ex contractu, so long as the plaintiff adheres to the original instrument or contract on which the suit is founded, an amendment is not objectionable as introducing a new cause of action, where it merely alters the grounds of recovery on that instrument or contract, or the modes in which the defendant has violated it; or where it merely enlarges and states more fully and accurately the facts with reference to the instrument or contract set forth in the original pleading; or changes the time and manner of performance; or corrects errors in the writ, like misdescriptions. So long as the matter for which the action was truly and substantially brought is not forsaken, but is adhered to and relied on for recovery, the introduction by way of amendment of a different contract in form is not regarded as introducing a new cause of action. But it is uniformly held that an amendment introducing as a ground of action an instrument or contract other than that set forth in the original declaration is objectionable as introducing a new and distinct cause of action. See cases cited, 31 Cyc., 414.

Tested by these rules we think the amendment in this case was not allowable. Here were two contracts, two transactions. The

guaranty was a separate and independent contract, involving duties and imposing responsibilities very different from those created by the contract set forth in the original declaration. The fact that the guaranty was written on the back of the note does not affect their separate nature. 12 Ruling Case Law, 1054.

This court has always been liberal in the allowance of amendments, but no case has gone so far as we are asked to go now. The cases cited by the plaintiff's counsel, and chiefly relied upon, do not sustain their contention. In *McVicker* v. *Beedy*, 31 Maine, 314, suit was brought upon a judgment of the court of another State against a defendant of whose person that court had no jurisdiction. It was held that the judgment was invalid as against the defendant personally, and that an action could not be maintained upon it in this State. The plaintiff was permitted to amend by introducing counts on the original cause of action. The original action was for the recovery of payment for work and labor done. The court said that the action upon the judgment was to recover for the same, though in a different form. That case bears no relation to the one at bar. In *Wilson* v. *Widenham*, 51 Maine, 566, which was an action for breach of covenant in a deed, the plaintiff alleged at first a breach of the covenant of seizin only. He was allowed to amend by introducing a count for the breach of the covenant of warranty. This was merely an enlargement or alteration of the grounds of recovery upon the same instrument, and such an alteration is, as we have said, permissible. *Rand* v. *Webber*, 64 Maine, 191, is cited as illustrative of the extent to which the court has gone in allowing amendments changing the form and nature of actions, in that case, as is claimed, converting an action of assumpsit into one for deceit. But in *Flanders* v. *Cobb*, supra, in an opinion concurred in by the writer of the opinion in *Rand* v. *Webber*, the court said:—"The case of *Rand* v. *Webber*, 64 Maine, 191, was never intended to authorize amendments to the extent of allowing the form or nature of the action to be changed. Upon examination of the facts in that case, it will be found that the amendment there was but the correction of an error in the writ, the correction of an amendment (improperly made) to the original declaration, so as to restore the declaration as originally framed, and prevent a change in the nature of the action from what seemed to be its form as originally drawn and to escape the statute of limitations that might be pleaded to another suit. The original count was more

in the nature of deceit than assumpsit, and the last amendment was but a restoration to its former self,—the spirit taking on form,—in the furtherance of justice." And it was held that a change from assumpsit to deceit is not allowable.

Counsel for plaintiff cites *Tenney* v. *Prince*, 4 Pick., 385, and *Bickford* v. *Gibbs*, 8 Cush., 154. But in each of these cases there was only one contract. In the first the plaintiff declared as on an original promise, when it was in fact collateral. In the second the plaintiff declared on the money counts when he should have declared specially on a contract of guaranty. These mistakes in pleading were properly allowed to be cured by amendment. *Smith* v. *Palmer*, 6 Cush., 513, is a similar case.

In the case before us there were two contracts. The plaintiff declared upon one on which the defendants were never liable. It seeks now to recover upon the other contract. It is clear that the amendment which was allowed and which would permit it so to recover introduced a new cause of action. The amendment, therefore, was allowed erroneously.

Since the defendants are not liable under the original declaration, the certificate in each case will be,

Judgment for the defendant.

ARMOUR FERTILIZER WORKS *vs.* ELLIS LOGAN.

Aroostook. Opinion February 3, 1917.

General rule as to admissibility of certain testimony relating to crops and failure of same where fertilizer is sold on a guaranty basis only, or where it has been sold under a guaranty of suitability of results of fitness for the soil. R. S., 1916, Chap. 36, interpreted.

1. The printed statement required by statute, R. S., (1916) Chap. 36, to be affixed before sale to lots or packages of commercial fertilizer, giving a chemical analysis stating the minimum percentage of nitrogen or its equivalent of ammonia in available form, of potash soluble in water, of phosphoric acid in available form, soluble and reverted and of total phosphoric acid, is a guaranty of the percentages of those ingredients as printed in the statement, but it is not a guaranty of suitableness, nor of results.
2. When, in an action to recover the price of commercial fertilizer sold, the defense set up is a breach of the guaranty as to percentages of nitrogen, potash and phosphoric acid stated in the printed statement affixed to the packages as required by R. S., (1916), Chap. 36, evidence of crop failure following the use of the fertilizer is not admissible for the purpose of showing that the percentages were less than those stated in the guaranty.
3. Upon the evidence, the court finds that there was no breach of the guaranty of the commercial fertilizer sold by the plaintiff to the defendant.

Action of assumpsit upon a promissory note given by defendant in payment of certain amount of fertilizer sold to defendant by plaintiff Company. Defendant pleaded general issue and also filed brief statement, setting forth in substance that the consideration named in the note declared upon had failed; that the consideration for said note was fertilizer bought of the plaintiff corporation by the defendant, with a warranty that the same was of a certain grade and quality; that the warranty was not true and that the defendant thereby was greatly damaged and in the action claims to set off his damages against the said note. At close of testimony, by agreement of parties, case was reported to the Law Court to be determined by the court

upon all the legally admissible testimony and such judgment to be rendered as the legal rights of the parties require. Judgment for plaintiff.

Case stated in opinion.

Pierce & Madigan, Powers & Guild, and W. S. Lewin, for plaintiff.

R. W. Shaw, and Hersey & Barnes, for defendant.

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

SAVAGE, C. J. Assumpsit upon a promissory note given in payment for fifteen tons of commercial fertilizer prepared and sold by the plaintiff. The fertilizer was delivered to the defendant from the plaintiff's storehouse in Houlton, in the Spring of 1914. It was of the brand known as Armour's "Blood, bone and potash, 5-8-7." It was prepared in Chrome, New Jersey, and was shipped in bulk by barge from Chrome to Bucksport, Maine, in October, 1913, and in barrels by rail from Bucksport to Houlton in November. It was then placed in the storehouse and remained there until sold and delivered to the defendant the following Spring.

The defendant pleaded the general issue; and by way of brief statement alleged that the consideration for the note failed; that the fertilizer to pay for which the note was given was warranted to be of a certain grade and quality; that the warranty was not kept; and that thereby the defendant was damaged. The case comes before this court on report.

The defendant claims that the fertilizer was guaranteed to contain certain definite percentages of nitrogen, available phosphoric acid, and potash soluble in water, and that the fertilizer sold and delivered was deficient in all three of these particulars. Thereupon the defendant contends that the sale was made in the violation of statute, and that, for that reason, the plaintiff cannot recover. He also contends that he is, in any event, entitled to recoup in damages.

The contention of the defendant will be understood better if we refer to the statute regulating the sale of commercial fertilizers. R. S., (1916) Chap. 36, (which prior to the last revision was Chap. 119, of the laws of 1911). Section 1 provides that,—"No person shall, within this State, manufacture, sell . . . . commercial fertili-

zer . . . . which is adulterated or misbranded within the meaning of this chapter." By Section 6 it is provided that,—"Every lot or package of commercial fertilizer which is . . . . sold . . . . in the State shall have affixed in a conspicuous place on the outside thereof a plainly printed statement clearly and truly giving the number of net pounds in the package, . . . and a chemical analysis stating the minimum percentage of nitrogen, or its equivalent of ammonia in available form, of potash soluble in water, of phosphoric acid in available form, soluble and reverted, and of total phosphoric acid." Section 8 requires the dealer before any sale is made, to file with the commissioner of agriculture, for each brand, a certified copy of the statement mentioned in Section 6. Section 12 declares that commercial fertilizer shall be deemed to be "adulterated," "if its weight, composition, quality, strength or purity do not conform in each particular to the claims made upon the affixed guaranty." By Section 13 the term "misbranded" is made to apply to commercial fertilizer, "the package or label of which shall bear any statement, design or device regarding such article or the ingredients or substances contained therein which shall be false or misleading in any particular." Sections 15 and 16 provide for the analysis of fertilizers, either as determined by the commissioner of agriculture, or at the request of any person within the State. By Section 21 sales in violation of any provision of the Chapter are made punishable by fine.

It is admitted that a printed statement was actually affixed to the barrels bought by the defendant, as required by statute. A corresponding statement was certified by the plaintiff to the Maine Agricultural Experiment Station. The "blood bone and potash" fertilizer was certified to contain not less than 4.11% of nitrogen, or its equivalent, 5% in ammonia, 8% of available soluble and reverted phosphoric acid, total phosphoric acid 8.50%, and 7% of potash soluble in water. From these figures comes the legend "5-8-7." This printed statement affixed to each barrel was the guaranty for breach of which the defendant claims the right to recoup. And because of his claim that the fertilizer contained less than the percentages named in the statement or guaranty, the defendant insists that the fertilizer was adulterated within the meaning of the statute, that the plaintiff was forbidden to sell adulterated fertilizer and

that it or its agent is punishable by fine for selling it; and hence that the transaction was unlawful, and that the plaintiff cannot recover.

The crucial question is one of fact; it is, whether the percentage of one or more of the three ingredients referred to was lower than that guaranteed. The defendant, presented evidence of three classes:— First, that his own potato crop in 1914 which had been fertilized with the "5-8-7" which he bought yielded only 40 barrels to the acre, and that less than half of these were marketable; next, that some of his neighbors whose lands were near, or contiguous to his own, and some of them similarly situated, used substantially like amounts per acre of the same brand of fertilizer, taken from the same barge load, and experienced the like unsatisfactory result of a small crop; and lastly that he caused to be analyzed in February, 1915, a sample made by mixing some of the contents of two of his own barrels, two of Mr. Moore's, and one of Mr. Parks, both near neighbors, and that the analyses of the composite sample showed the nitrogen to be only 3.41%, the available phosphoric acid, 6.57%, the total phosphoric acid, 7.77%, and the potash 6.09%, all lower than the guaranty.

All this evidence must be viewed with reference to a single point, namely the percentages of nitrogen, phosphoric acid and potash, because nothing else was guaranteed, and no other guaranty is pleaded or relied upon. There was no guaranty of suitableness, nor of results from the use of the fertilizer. *Philbrick* v. *Kendall,* 111 Maine, 198. It is not questioned that the analysis of the fertilizer was competent evidence upon the precise issue involved. Of that we will speak later. But the plaintiff contends that neither of the other classes of evidence is admissible upon this issue. It objected to the evidence when offered, and although the case was reported after the evidence was taken out, it was reported with the stipulation that it was to be determined "upon all of the admissible testimony." By this we are bound to consider only so much of the testimony as would be admissible in a trial before a jury.

The objection to the first class, the defendant's own experience, is that the proof is too uncertain, and too speculative or conjectural, to throw any real light upon the percentages of the ingredients of the fertilizer. The plaintiff claims, and truly, that the growth of a crop of potatoes depends upon many factors, the knowledge and ability of the grower himself, the previous preparation of the land, its culti-

vation during the growth of the crop, the selection of seed, and whether it had been properly stored, the presence or absence of insect pests, the means taken to destroy them, the physical structure of the land, the suitableness of the soil, the previous rotation of crops, the weather, and the fertilizer. The plaintiff says that until all other factors have been determined, a crop failure cannot properly be attributed to a deficiency in the guaranteed percentages of the ingredients of the fertilizer, and that it is not evidence from which percentages can be determined. And it has been held that such evidence is inadmissible when the fertilizer was sold on a guaranteed analysis basis only. *Walker* v. *Pue*, 57 Md., 155; *Germofert Mfg. Co.* v. *Cathcart*, 104 S. C., 125: 88 S. E., 535.

With this view we agree. Had there been a guaranty of suitableness, or of results, the evidence would undoubtedly be admissible to be considered with the other factors. But how could a jury say, or how can we say, or what basis is there for saying, that because there was a poor crop, it is proof that there was less than 4.11% of nitrogen, or 5% of ammonia? And so of the other ingredients. It might, under some conditions, demonstrate that the fertilizer was not fit for that land, but it does not prove or disprove percentages. We might as reasonably say that it is proof that 4.11% nitrogen was not enough for the defendant's land. In reality it is proof of neither. It is not proof. It is a guess. It is an assumption based upon a hypothesis. The hypothesis is that fertilizer containing the guaranteed percentages would have produced a good crop. The assumption is that, because the crop was poor, therefore the percentages were under those guaranteed. See *Scott & Company* v. *McDonald*, 83 Ga., 28.

The second class of evidence, the poor crops of the plaintiff's neighbors, must fall with the first, and for the same reason. And if this were not enough, it is objectionable for the reason that it leads to too many collateral issues. Not only would all the factors of plant growth in each instance become subjects of inquiry, but the plaintiff would have the right to show instances where good crops had resulted, and then all their factors would become subjects of like inquiries. There might be as many issues as there are factors in all of the instances. And they would be issues, too, of which the other party had no notice, and could not be prepared to rebut. 1 Greenl. on Ev.,

Sec. 52; *Moulton* v. *Scruton*, 39 Maine, 288; *Parker* v. *Portland Pub. Co.*, 69 Maine, 173; *Branch* v. *Libbey*, 78 Maine, 321; *Lincoln* v. *Taunton Copper Mfg. Co.*, 9 All., 181.

The purchaser of fertilizer, however, is not without the means of testing and proving satisfactorily the percentages of the essential ingredients in the fertilizer he buys. A chemical analysis is the most satisfactory test. The statute provides that he may have an official analysis made under the direction of the commissioner of agriculture. R. S., (1916), Chap. 36, Sec. 16. And it provides further in Section 18, that "if the actual analysis shall differ materially from the guaranteed analysis" the analysis fee shall be returned to him. Such an analysis the defendant caused to be made, and it was introduced in evidence in this case, as already stated.

On the other hand, the plaintiff showed the process of the manufacture of the barge load from which the fertilizer in question was taken. It appears that in the process certain materials were used, like dried blood, sulphate of ammonia, packing house tankage, phosphate residue, manure salts, muriate of ammonia and others. These materials supplied the nitrogen, phosphoric acid and potash. They were mixed according to formulas. And the formulas called for sufficient materials of the various classes to produce the guaranteed percentages, and sand enough was put in to make the required weight. The fertilizer was mixed, a ton at a time. After the mixing means were taken to get a fair average sample of the mass. And this was analyzed. The evidence of the plaintiff tends to show theoretically that the fertilizer when shipped was up to the guaranty.

But we do not place entire reliance upon this species of proof. There were opportunities for error. It was admitted that in some instances the plaintiff made no analysis of the raw material on its own account, but assumed that the analysis made by the party selling to it was correct. Besides, there was opportunity for mistakes, or worse, by some of the many men that were employed in the process. If they were faithful, and if the purchase analysis was correct, the product should have corresponded with the formula; otherwise it might not.

The plaintiff, however, relies confidently upon six analyses made by the chemist of the Maine Agricultural Experiment Station of samples which came out of the same barge load as the defendant's did. They were all taken by official inspectors. The first is an

analysis of a sample taken from ten barrels in the storehouse at Houlton in March, 1914, which was about the time the defendant bought his fertilizer; the second, of a sample taken in the Spring of 1915, from Mr. Carr's barrel, one of the five which made up the defendant's sample already referred to; the third, of a sample taken May 1, 1915 from one barrel in Amity (Estabrook); the fourth, of a sample taken May 18, 1915, from five barrels in Fort Fairfield (Hopkins); the fifth, of a sample taken May, 1915, from five barrels in Hodgdon (Varney); and the sixth, of a sample taken May, 1915, from two barrels in Ludlow (Dobbins). In all of these analyses, except the first, the moisture content is stated. The moisture content is important in making comparisons. The case shows that the normal moisture content of this fertilizer is about 9%. If the percentage of moisture is increased, necessarily the percentages of the other ingredients in a ton's weight will be lessened proportionally.

We give in tabulated form the various analyses, including the defendant's.

No.	Nitrogen	Phosphoric acid (available)	Potash	Moisture
1	4.10%	9.20%	7.34%	
2	3.86%	8.14%	6.34%	16.52%
3	3.91%	7.55%	6.98%	12.83%
4	3.96%	7.49%	7.03%	13.85%
5	3.74%	7.71%	6.92%	15.7 %
6	4.08%	7.14%	6.95%	11.94%
Defendant's	3.41%	6.57%	6.09%	16.30%

The evidence leaves no doubt that the fertilizer absorbed moisture after it was brought into the State. And the analysis of the fertilizer in the storehouse in April, 1914, indicates that most if not all of the increase in the moisture content occurred after that time. As the fertilizer was then in barrels and was sold by weight in the condition it then was, the subsequent increase in moisture did not affect in any way the qualities of the other ingredients, and should not be considered as affecting other percentages. In other words the computations of actual percentages must be made with reference to the

moisture content when this particular fertilizer was sold. The storehouse analysis, No. 1, indicates that the moisture percentage was then normal. We think it should be regarded as 9%. Computing the various analyses upon a 9% moisture basis we have the following results:—

No.	Nitrogen	Phosphoric acid (available)	Phosphoric acid (total)	Potash
1	4.10%	8.03%	9.20%	7.34%
2	4.02%	8.70%		6.91%
3	4.08%	7.88%		7.03%
4	4.18%	7.91%		7.41%
5	4. %	8.31%		7.46%
6	4.20%	7.36%		7.18%
Average	4.09%	8.03%		7.22%
Defendant's	3.70%	7.14%	7.77%	6.62%

The figures in these tabulations are gathered from the testimony of Dr. Bartlett, chemist at the Maine Agricultural Experiment Station, who made all the analyses, and who was called as a witness for the defendant. But Dr. Bartlett says that a margin must be allowed for experimental error, that no laboratory can be sure of getting a correct result within two-tenths of one percent, and that his analyses should come within one-tenth for nitrogen, three-tenths for available phosphoric acid, two-tenths for total phosphoric acid, and two-tenths for potash. We think this allowance should be made by us for experimental error. Making this allowance, all of the analyses except the defendant's are up to the guaranty with the exception of the phosphoric acid in No. 6. And the same would be true if the percentages were computed on the basis of 10% moisture.

It is impossible to disregard the probative effect of these analyses. They were official. The samples were collected by the department of agriculture. They all came from the same barge load. When taken by the inspectors they were scattered over a large section of territory. We cannot avoid the conclusion that they fairly represent the mass from which they came.

What, then, was the matter with the defendant's sample? Why did it differ so much from the others? We do not know and it is

idle to speculate. Shortly after this sample was analyzed, the commissioner of agriculture sent an inspector to obtain samples from each of the five barrels from which the defendant's sample was taken, namely, two of his own, two, belonging to Mr. Moore, and one, to Mr. Carr. The defendant refused to permit a sample to be taken from his own barrels, and Mr. Moore's fertilizer had been mixed with ashes. The inspector took a sample from the remaining barrel, Mr. Carr's, which is No. 2 in the tabulation. We do not say that the defendant acted in bad faith. But we say that his action, unfortunately perhaps for him, made it impossible to find out what was the matter with his fertilizer as to percentages.

We conclude that the plaintiff is entitled to recover on the note.

Judgment for the plaintiff.

STATE OF MAINE *vs.* MOSE LAFLAMME.

Oxford. Opinion February 8, 1917.

Indictments. General rule for the form of same. Rule where the meaning of the indictment is clear but there are inaccuracies or errors which may be explained. Self-correcting errors.

1. The object of an indictment is to apprise the accused of the definite offense with which he is charged, set forth with such necessary allegations as to time and place that he may be enabled to properly prepare and present his defense.
2. An indictment must be so drawn that in case any other proceedings should be brought against the respondent for the same offense he could plead the former acquittal or conviction in bar.
3. But if the meaning of an indictment is clear so that the accused is thereby informed of the precise charge which he is called upon to meet, verbal inaccuracies, grammatical, clerical, typographical or orthographical errors which are explained and corrected by necessary intendment from other parts of the indictment are not fatal.

4. The typewritten caption of the indictment for maintaining a liquor nuisance alleges that it was found at a term of the Supreme Judicial Court "begun and holden at Paris within and for the County of Oxford on the second Tuesday of October in the year of our Lord one thousand nine hundred and fieteen." After conviction the respondent filed a motion in arrest of judgment on the ground that the indictment was fatally defective, having the word "fieteen" instead of "fifteen," which motion was overruled by the presiding Justice.

Held: That the error was purely typographical, the substitution of an "e" for an "f" by mistake. As the correction is furnished by the context and the intendment from other parts of the indictment is clear, the indictment is valid.

Defendant was found guilty on an indictment for maintaining a liquor nuisance. After verdict, respondent filed a motion in arrest of judgment. Motion overruled. Exceptions were filed by respondent. Exceptions overruled. Judgment for the State.

Case stated in opinion.

Albert Beliveau, County Attorney, for the State.

Bisbee & Parker, for respondent.

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

CORNISH, J. Indictment for maintaining a liquor nuisance at Rumford in the County of Oxford. The respondent was tried at the May term, 1916, and convicted. After verdict he filed a motion in arrest of judgment which was overruled by the presiding Justice. The case is before this court on exceptions to that ruling.

The typewritten caption of the indictment alleges that it was found at a term of the Supreme Judicial Court "begun and holden at Paris within and for the County of Oxford on the second Tuesday of October in the year of our Lord one thousand nine hundred and fieteen." It is contended by the respondent that although it was undoubtedly the intention of the scrivener to typewrite the word "fifteen," he did not do so, and we must take the indictment as we find it; that the word "fieteen" is meaningless and must be rejected as surplusage, and that the caption must therefore be held by this court to allege the time of finding as "on the second Tuesday of October one thousand nine hundred." If this is so then the indictment is fatally defective because it alleges the offense to have been committed on the fifteenth day of August in the year of our Lord one thousand nine hundred and

fifteen and on divers other days and times between that day and the finding of the indictment. So construed the indictment appears to have been found sixteen years before the continuing offense was committed.

But neither reason nor authority compels such a conclusion, and it would be a reproach to the law if they did. The major premise in the argument is fallacious. The word "fieteen" taken in connection with the context is not meaningless, and should not be rejected as surplusage. To the ordinary reader it means "fifteen," because it is at once apparent that a typographical error has converted "fifteen" into "fieteen," the letter "e" on the typewriter having been struck by chance instead of "f". The nature of the error is as palpable as the error itself, and the intendment of the word is clear from the context.

The object of an indictment is to apprise the accused of the definite offense with which he is charged, set forth with such necessary allegations as to time and place that he may be enabled to properly prepare and present his defense. It must be so drawn that in case any other proceedings should be brought against him for the same offense, he could plead the former acquittal or conviction in bar. This is the general rule and reason has made the rule.

But another rule, entirely consistent with the one just stated, and likewise based upon reason, is equally well established. That rule is this, that if the meaning of an indictment is clear so that the accused is thereby informed of the precise charge which he is called upon to meet, verbal inaccuracies, grammatical, clerical or orthographical errors, which are explained and corrected by necessary intendment from other parts of the indictment, are not fatal. In other words, an indictment is not vitiated by a clerical or typographical slip the correction of which is furnished by the context. Such errors have been held harmless with practical unanimity. The books contain many illustrations. Let us state a few where errors of this sort have been considered and the indictments held valid. "Tebruary" for "February," *Witten* v. *State*, 4 Tex. App., 70; "Eiget" for "eight," *Somerville* v. *State*, 6 Tex. App., 433. In the latter case the court say: "In the printed part of the indictment a typographical error occurs in the alleged date of the offense, making 'eight' read 'eiget.' It is believed that as the allegation stands in the indictment it admits of but one construction and the intention of the pleader is unmistakable. It is certain and intelligible, the 'h' being substituted for the

'e' by intendment. It certainly could not have misled the defendant as to what he was called on to answer and the conviction would bar a subsequent prosecution." Again, "eigh" for "eight," *State* v. *Coleman*, 8 S. C., 237; "Janury" for "January" in *Hutto* v. *State*, 7 Tex. App., 44, where the language of the opinion is: "We think 'Janury' is idem sonans with 'January,' and, if not so, that it is intelligible and no one could well have been misled by it." Other instances are "stael" for "steal," *State* v. *Lockwood*, 58 Vt., 378; "stal" for "steal," *Willis* v. *State*, 4 Blackf. (Ind.) 457; "larger," beer for "lager" beer, *State* v. *Colly*, 69 Mo. App., 444; "assalt" or "assatt" for "assault," *State* v. *Crane*, 4 Wis., 417, where the court characterizes the objection as a "gossamer obstacle" which should not be permitted to stay the due administration of justice; "Frunk" for "drunk," *Kincaide* v. *State*, 14 Ga. App., 544, 81 So., 910. "The clearly inadvertent substitution," says the court, "of the letter 'f' for 'd' in the word 'drunk' is so palpably a clerical error that it is unnecessary to deal in extenso with the objection." "Di" for "did," *Holland* v. *State*, 11 Ala. App., 134, 66 So., 126; "inten" for "intent," *Stinson* v. *State*, (Tex. Ct. App.), 173 S. W., 1039; "effect" for "affect," *Smith* v. *Territory*, 14 Okl., 162; 77 Pac., 187; Same mistake in *State* v. *Cabodi* (New Mexico, 1914), 128 Pac., 262; "monet," for "money," *Wright* v. *State*, (Tex. Ct. App.), 156 S. W., 624; "clerk" for "Court," *Hogan* v. *U. S.*, 192 Fed., 918; "on" for "one," *Will* v. *State*, Ala., (1912), 59 So., 715. The rule has been well stated by the Alabama Court in these words: "Before an objection, because of false grammar, incorrect spelling or mere clerical errors, is established, the court should be satisfied of the tendency of the error to mislead or to leave in doubt as to the meaning, a person of common understanding, reading not for the purpose of finding defects but to ascertain what is intended to be charged." *Grant* v. *State*, 55 Ala., 201. In other words there is no reason why the judicial eye should be blind to what the personal eye sees with distinctness.

Our court has enforced the same rule in *State* v. *Carville*, 11 At., 601, (Maine, 1887), a case not found in our reports because only a rescript was filed. That was an indictment for incest, and the statutory word "incestuous" was spelled "incestous," the letter "u" being omitted by chance. This court held that this was not a fatal omission and that as no one could mistake its meaning in its connection in that indictment, the indictment was held valid.

The case at bar is but another illustration of the same wise rule. The error was purely typographical, the substitution of an "e" for an "f," the correction of which is furnished by the context. The intendment from other parts of indictment is clear. The year is there stated. The body of the indictment alleges that the respondent on the fifteenth day of August, one thousand nine hundred and fifteen and on divers other days and times between that day and the day of the finding of this indictment committed the offense charged. This court takes judicial notice of the dates of its terms, *State* v. *Peloquin*, 106 Maine, 358, 361. The month of the finding is correctly alleged in the caption as October. This case was tried at the May term, 1916. When therefore the respondent was arraigned and tried in May, 1916, on an indictment found in the month of October on an offense which began on August 15, 1915, and continued to the second Tuesday of October, it must of necessity be October of the year 1915, because it was the only October that intervened between August, 1915, and May, 1916.

Whether we look at the word "fieteen" itself or examine it in connection with the rest of the indictment the meaning is obvious. The error was what some of the courts have termed as self-correcting. It is so trivial that it evidently escaped the attention of the County Attorney who signed the indictment and of the Clerk of Court who undoubtedly read it aloud when the respondent was arraigned. The caption constitutes no part of the finding of the grand jury, *State* v. *Conley*, 39 Maine, 78, and had the error been detected at that time it could have been corrected from other records of the court. *Commonwealth* v. *Wood*, 4 Gray, 11; *State* v. *Peloquin*, 106 Maine, 358.

However, as the indictment stands it is valid under the well settled rules of criminal pleading. The intendment is plain. The respondent could have had no doubt as to the offense with which he was charged, nor as to the time when it was alleged to have been committed. He has not been misled and his conviction here is a bar to any subsequent prosecution for the same offense.

The entry must therefore be,

Exceptions overruled.
Judgment for the State.

GEORGE A. RIVARD *vs.* CONTINENTAL CASUALTY COMPANY.

Androscoggin. Opinion February 12, 1917.

Insurance policy lapsing by reason of non-payment of premiums. Policy of insurance delivered upon approval. Admissibility of oral evidence as showing that policy was delivered upon "conditions of approval and acceptance." Effect of Company accepting premiums on an insurance policy after time of approval had expired. Liability of Company for acts of its agents in delivering policy "for approval."

1. The rule excluding parol evidence to contradict a written instrument is not infringed by the admission of evidence to show that the instrument was not delivered as a completed contract.
2. A policy of insurance delivered on approval does not become a completed contract until approved or accepted as such.
3. An insurance company is bound by the agreement of its agent, whereby a policy was delivered on approval merely.
4. Where a policy of insurance on which the premiums were payable monthly in advance was delivered September 4, on approval, and where there is no evidence that the policy was approved or accepted until October 4, when the premiums for two months were paid, it is *held*, that the payment should be applied to the premiums for October and November and that the policy did not lapse for non-payment of the premium for November.

Action on the case to recover certain amount due under a casualty policy of insurance. Defendant pleaded general issue and also brief statement alleging, among other things, that said policy had lapsed and had become void and of no effect on the thirty-first day of October, A. D. 1915. At the close of the testimony, the case was reported to Law Court for determination upon so much of the evidence and original exhibits as were legally admissible. Judgment for plaintiff for $42.50 and interest from the date of the writ.

Case stated in opinion.

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

Newell & Woodside, for defendant.

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

SAVAGE, C. J. This is an action upon a policy of casualty insurance, to recover indemnity for personal injuries sustained by the plaintiff, who was the policy holder. The defense is, first, that the policy, if ever valid, had lapsed prior to the time the injuries were received, by reason of non-payment of premiums, and, secondly, that the policy was issued and received in violation of the statute, Laws of 1913, Chap. 84; now R. S., 1916, Chap. 53, Sec. 136. This statute makes it unlawful for an insurance company to give, or the insured to receive, rebates of premiums, in whole or in part.

At the close of the plaintiff's evidence, the defendant offering none, the case was reported to this court for determination upon the admissible evidence. And it is agreed that if the plaintiff is entitled to recover, the damages are to be assessed at $42.50.

The evidence, summarized, and without regard to admissibility, shows that on August 31, 1915, the plaintiff was solicited by an agent of the defendant to take a policy of health and accident insurance, The plaintiff said:—"I don't want to buy a cat out of a bag. If you will send me a sample policy, I will look it over, and if it is agreeable, I will keep it." The agent replied,—"I haven't a sample policy; but suppose I give you thirty days approval on a policy?" To this proposition the plaintiff assented, and the plaintiff thereupon signed an application which contained the following agreement:—"I agree to pay to the company, in advance and without notice, a monthly premium of $3.00 for my said policy. If paymaster's order is given by me to provide for the payment of this premuim, I agree to pay it as therein provided. If no paymaster's order is given I agree to pay said premium as follows:—one monthly premium on or before the first day of October, 1915, and one monthly premium on or before the first day of each month hereafter."

On or about September 4, the policy in suit was mailed to and received by the plaintiff. There is no evidence that he approved or accepted the policy as a completed contract during September. But on October 4, he paid two months' premiums, six dollars, and received a policy holder's receipt book. He received the injury, indemnity for which he now sues to recover, on November 14, following.

The decisive question is whether the six dollars paid premiums for September and October, as the defendant claims, or for October and November, as the plaintiff claims. If the former, the policy by its terms lapsed and was not in force in November, and the plaintiff cannot recover. If the latter, the policy, if valid, was in force, and he may recover. According to the terms of the policy, it took effect, as to liability for accidents, upon its delivery, and premiums were payable monthly in advance, as provided in the application, which was made a part of the policy.

The defendant contends that the policy took effect upon delivery, September 4, and either that the six dollars paid for premiums paid only for September and October, or if they were intended to apply to October and November, that it amounted to a rebate of the September premium, in violation of the statute. On the other hand, the plaintiff contends that the policy was delivered on thirty days' approval, and not as a completed contract. In other words he says that the delivery was conditional, that the policy was not in effect until approved and accepted, that it was not accepted until after October 1, and therefore, that the six dollars paid the premiums for October and November.

The evidence to prove the plaintiff's contention is sufficient, but it is oral, and it is objected that it is not admissible, because it tends to vary the terms of the written contract, the policy. We think the objection cannot be sustained. The policy was not in effect until it was delivered as a completed contract. If delivered on approval, the policy was a mere proposal. It was not in effect until approved or accepted. Such approval and notice thereof to the company completed the contract. The rule excluding parol evidence to contradict a written instrument is not infringed by the admission of evidence to show that the instrument was not delivered as a completed contract. 4 Wigmore on Ev., Sec. 2408; *Walkins* v. *Bowers*, 119 Mass., 383; *Morris* v. *Brightman*, 143 Mass., 149. The oral evidence did not vary the contract. It only showed that the policy was not a contract during the month of September. It showed that it became a completed contract for the first time on October 4, when the plaintiff manifested his acceptance by paying premiums for two months. The time limited for approval had expired, but the company received the premiums, and thereby waived objections on that ground. It

follows that the six dollars paid the premiums for October and November, and that the policy was in force when the plaintiff was injured.

It is suggested that the agent had no authority to change the policy or waive the provision that it should take effect upon delivery. However this may be, the company was bound by the approval agreement made by the agent. *LeBlanc* v. *Standard Insurance Co.*, 114 Maine, 6.

The conclusion we have reached renders it unnecessary to consider the statute forbidding rebates. There was no rebate for September. The policy was not in force during the month.

Judgment for the plaintiff for $42.50 and interest from the date of the writ.

CORNELIA G. FESSENDEN and MARY F. HOLLIS, In Equity,

vs.

MADELINE E. COOMBS and LAURA IRENE COOMBS, and LILLIAN E. TOBEY, Guardian of said MADELINE B. COOMBS and LAURA IRENE COOMBS.

Androscoggin. Opinion February 15, 1917.

Construction of Wills. General rule to be adopted. Meaning of word "also."

1. After a careful study of the evidence and considering the bill, answer, and will, in view of the added words, the character of the property comprehended by such words, the uses to which the property could be put, its former use and association, we conclude that the words interlined were intended to modify and change the character of the first sentence, and not the second, and that the word 'also' as found in the clause means 'in addition to.'"
2. It is evident that the testator used the word 'also' in that sense in the first instance and there has been no reason advanced, nor can we find any reason for holding, that the testator had any other intention in relation to the last sentence. The fee to the real estate described in said last sentence passed to William C. Coombs.

Bill in equity asking for the construction of the will of Marcia G. Coombs, and especially paragraph six of said will. The cause was heard upon bill, answer and proof. Questions of law of sufficient importance to justify the same having arisen, the case, by agreement of the parties, is reported to the Law Court, to be determined upon the bill, answer, will, and so much of the admitted facts and evidence as is legally admissible. *Held*, that the fee to the real estate described in the second and last sentence of paragraph six passed to William C. Coombs. Decree accordingly.

Case is stated in opinion.

Ralph W. Crockett, for plaintiffs.

Oakes, Pulsifer & Ludden, for defendant.

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

HANSON, J. Bill in equity asking for the construction of the will of Marcia G. Coombs, late of Lisbon Falls. On report.

Clause six is the only one involved in the question presented. As originally written it was as follows:

"Sixth:—I give and devise to my son William C. Coombs the homestead on the Easterly side of Main Street occupied by me and the lot. Also the lot on the Easterly side of Main Street, in Lisbon Falls between the land of Lisbon Falls Realty Company and the land of Paul J. Risska with the barber shop thereon subject however to the payment to Cornelia G. Fessenden and Mary F. Hollis of Lisbon each the sum of $2.50 per month so long as said shop is used as a barber shop."

Before the will was executed there was interlined between the first and second sentences, the words, "and furniture during his natural life then to Cornelia G. Fessenden and Mary F. Hollis," making the clause thus changed to read as follows:—

"Sixth:—I give and devise to my son William C. Coombs, the homestead on the Easterly side of Main street occupied by me and the lot, and furniture during his natural life then to Cornelia G. Fessenden and Mary F. Hollis. Also the lot on the Easterly side of Main Street, in Lisbon Falls between land of Lisbon Falls Realty Company and land of Paul J. Risska with the barber shop thereon

subject however to the payment to Cornelia G. Fessenden and Mary F. Hollis of Lisbon each the sum of $2.50 per month so long as said shop is used as a barber shop."

The parties are in agreement as to the effect of the interlineation upon the first sentence of the clause,—that the interest of William C. Coombs was changed from a fee to a life estate, but are not in agreement as to its effect upon the second sentence of that clause.

The plaintiffs contend that the interlineation affected both sentences alike, and urge that giving to the word "also" its intended meaning, that is, to hold that it means "in like manner," that the entire clause would be affected by the addition, and that William C. Coombs would have but a life interest in any of the property.

The defendants' counsel takes the opposite view and we think his position is well sustained. Before the interlining there could have been no question raised as to the meaning of the testator. That the addition changed the first sentence is not questioned. Did it change the second and last sentence of the clause?

After a careful study of the evidence, and considering the bill, answer, and will, in view of the added words, the character of the property comprehended by such words, the uses to which the property could be put, its former use and association, we conclude that the words interlined were intended to modify and change the character of the first sentence, and not the second, and that the word "also" as found in the clause, means "in addition to."

It is evident that the testator used the word "also" in that sense in the first instance, and there has been no reason advanced, nor can we find any reason for holding, that the testator had any other intention in relation to the last sentence. The fee to the real estate described in said last sentence passed to William C. Coombs. *Loring* v. *Hayes*, 86 Maine, 351.

Decree accordingly.

WALTER E. ROSE *vs.* ROY W. PARKER.

Androscoggin. Opinion February 15, 1917.

Bills of exceptions. Distinction between suits brought upon judgments of another State and domestic judgments. Right to attack foreign judgments collaterally. Rule as to collateral attack of domestic judgments. Right to attack by parol evidence the authority of an attorney at law to appear and suffer judgment

1. Bills of exceptions must set out with particularity the rulings by which the party presenting such bills claims to have been aggrieved. Otherwise, they cannot be considered.
2. The record of judgment of another State is prima facie evidence only of matters recited therein and may be attacked collaterally while that of a domestic judgment is conclusive evidence of all matters recited or shown and is subject to direct attack only.
3. The absence of authority of an attorney at law to appear for a defendant cannot be shown by parol and the judgment obtained against defendant attacked collaterally.
4. The court may judicially notice the fact that a person has been admitted to practice in the courts of the State and was, at a certain time, entitled to practice as such.

Action of debt to recover amount due on a judgment rendered against the defendant in favor of the plaintiff on July 15, 1898, in the Municipal Court of the city of Auburn, Maine. Defendant pleaded general issue and filed brief statement of special matter of defense, setting forth that the defendant was never served with process in the suit mentioned and described in the plaintiff's writ, nor did he appear in person, nor did he authorize any attorney to appear in his behalf, and that said pretended judgment was, by reason of the aforesaid, void and of no effect. At the close of the evidence, the presiding Justice directed a verdict for plaintiff; to which ruling, defendant filed exceptions. Exceptions overruled.

Case stated in opinion.

Newell & Woodside, for plaintiff.

McGillicuddy & Morey, for defendant.

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

BIRD, J. This is an action of debt brought by plaintiff against defendant on a judgment which he alleged he obtained against the latter in the Municipal Court of the City of Auburn on the fifth day of July, 1898. The writ in this action is dated June 23, 1916 and was returnable at the September Term of the Supreme Judicial Court of the County of Androscoggin. The defendant pleaded nil debet with a brief statement that he was never served with process in the suit in which the judgment was rendered, made no appearance in person, authorized no attorney to appear in his behalf and that the judgment was void. Upon trial of the case, a verdict for plaintiff was directed and the case is here upon exception to such direction.

It appeared from the record produced in evidence that no service was made upon defendant in the suit in which was rendered the judgment on which this suit is brought, although service was made upon sundry alleged trustees of the defendant. Appearance upon the docket for defendant was entered by one Joel Bean, Jr., and later the case was defaulted as to the principal defendant, judgment entered and execution issued.

The defendant denied any knowledge of the judgment until he received notice of the pending suit but this testimony was, by order of court, stricken from the record. The defendant offered his own testimony to show that he never employed Joel Bean, Jr., that he never knew any action was pending or that he had entered any appearance. The evidence was excluded. To this exclusion, exceptions were noted at the time and are now argued.

The bill of exceptions, omitting formal parts, is as follows:

"At the close of the evidence the presiding Justice directed a verdict for the plaintiff.

"The writ, the plea and all evidence is made a part of these exceptions.

"To all which rulings excepts and prays that his exceptions may be allowed."

We must hold that under the bill of exceptions, questions regarding the admission or exclusion of evidence are not open to defendant. *Richardson* v. *Wood*, 113 Maine, 328, 330, 331; *Borders* v. *B. & M. R. R.*, 115 Maine, 207. The only question before us is involved in the exception to the order of the court directing a verdict for defendant.

Upon the evidence we conclude that the order was justified. This is not the case of suit brought upon the judgment of another State nor even of a judgment of this State against a non resident of this State. During the course of the trial defendant's counsel, replying to a citation of an authority by plaintiff, said "In that case there were non residents of the State. Here was a man that was within the jurisdiction and they made no service upon him. This was entirely different because he was here." It is fairly to be inferred that defendant was a resident of this State.

Although there are many authorities to the contrary our own court has held, in harmony with the decisions of many of the States, that there is a marked distinction between cases brought upon the judgment of another State and those brought upon domestic judgments. *Granger* v. *Clark*, 22 Maine, 128, 130; *Penobscot R. R. Co.* v. *Weeks*, 52 Maine, 456, 463; See also *Blaisdell* v. *Pray*, 68 Maine, 269, 272, 274. See *Ferguson* v. *Crawford*, 70 N. Y., 253, 26 Am. Reps., 589; *Bunton* v. *Lyford*, 37 N. H., 512, 75 Am. Dec., 144 and note; *Robb* v. *Vos*, 155 U. S., 13.

The former are prima facie evidence only of matters recited and may be attacked collaterally; the latter are conclusive evidence of all matters recited or shown by the record and subject to direct attack only, unless want of jurisdiction either of the subject matter of the cause or of the parties is apparent upon the face of the record; *Bissell* v. *Briggs*, 9 Mass., 462; *Granger* v. *Clark*, supra. *Toothaker* v. *Greer*, 92 Maine, 546; *Simmons* v. *Jacobs*, 52 Maine, 147, 155, 156; *Finneran* v. *Leonard*, 7 Allen, 54, 56; *Young* v. *Watson*, 155 Mass., 77, 78.

It is not questioned that the court rendering the judgment sued upon had jurisdiction of the subject matter of the suit. In the case of a domestic judgment, the absence of authority of an attorney at law to appear for a defendant cannot be shown by parol, and the judgment attacked collaterally. *McNamara* v. *Carr*, 84 Maine, 299, 303.

Nor do we think that there was any lack of proof that the person who entered the appearance for defendant had been duly admitted and was then entitled to practice as an attorney-at-law in this State. The court voluntarily ruled, without objection, that it would take judicial notice of the fact that a person had been duly admitted to practice in the courts. *Ferris* v. *National Commercial Bank*, 158

Ill., 237; *Fry* v. *Estes*, 52 Mo. App., 1; *State* v. *Sanders*, 62 Id., 33; *Cothren* v. *Connaughton*, 24 Wis., 134; *Ex parte Hore*, 3 Dowl.

The court failed to rule expressly that it so found, as it would undoubtedly have done if it had had occasion to charge the jury. It, however, directed a verdict which it could not have done unless it was prepared to take judicial notice of the admission to practice of the person who entered the appearance and of his status as such at the time of the entry.

The exceptions must be overruled and it is so ordered.

MARIE LEMIEUX *vs.* LAURA S. HEATH.

Androscoggin. Opinion February 21, 1917.

Negligence. Verdict. Automobiles.

Upon the evidence, the court is of opinion that the verdict for the plaintiff cannot be sustained. The plaintiff's contentions are so overwhelmed not only by the spoken words of witnesses, but by the mute, but convincing, evidence of the cars which were in collision, that no other reasonable conclusion can be reached than that the verdict was erroneous.

Action on the case in which the plaintiff seeks to recover damages from the defendant for the negligence of the defendant's servant in operating an automobile. Defendant filed plea of general issue and also brief statement, setting forth (1). That the automobile in which the plaintiff was riding, at the time and place alleged in her said writ and declaration, was not registered as required by law. (2). That the driver of the automobile in which the plaintiff was riding, at the time and place alleged in her said writ and declaration, was not licensed as required by law. (3). That the driver of the automobile in which the plaintiff was riding, at the time and place

alleged in her said writ and declaration, was not riding with or accompanied by a licensed operator for the purpose of becoming familiar with the use and handling of said automobile, preparatory to taking out a license for driving. (4). That at the time and place of the accident alleged in the plaintiff's declaration, the defendant's automobile was driven and operated by the defendant's son Herbert M. Heath, who was then and there a duly licensed operator of motor vehicles, and was operating said automobile in a careful and prudent manner on his own business, and was not acting as the servant and agent of the defendant. (5). That at the time and place of the injury alleged in the plaintiff's declaration, the defendant's said car was also occupied by her said other son, Gardner K. Heath, who was then and there a duly licensed operator of motor vehicles, but that he was not acting as the servant or agent of the defendant. (6). That at the time and place alleged in the plaintiff's declaration, neither the said Herbert M. Heath or Gardner K. Heath were acting within the scope of their employment as the servant or agent of the defendant. (7). That at the time and place alleged in the plaintiff's declaration, the plaintiff's injuries were not received by reason of any want of due care on the part of the defendant or of the said Herbert M. Heath or Gardner K. Heath, but that the plaintiff's injuries were received solely through the want of care of one Bishop, who was then and there operating the automobile in which the plaintiff was riding at the time of receiving said injuries. Verdict for plaintiff in the sum of $575.61. Defendant filed motion for new trial and also exceptions to certain rulings of presiding Justice. Motion sustained.

Case stated in opinion.

Joseph G. Chabot, and Frank A. Morey, for plaintiff.

G. W. Gower, for defendant.

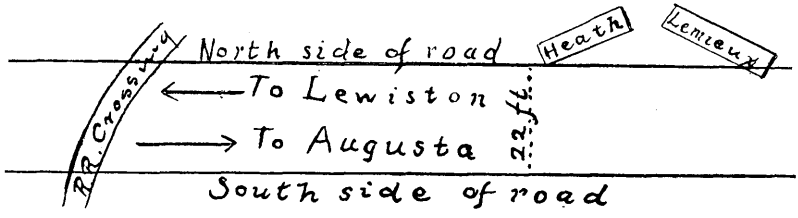
SITTING: SAVAGE, C. J., CORNISH, BIRD, HANSON, MADIGAN, JJ.

SAVAGE, C. J. Action on the case to recover for injuries sustained by the plaintiff in a collision between an automobile in which she was riding as a passenger, and an automobile owned by the defendant in which her two sons were riding, one of them driving the car. The plaintiff recovered a verdict, and the case comes before us on the defendant's motion and exceptions.

The story of the plaintiff and her witnesses is this. She with her husband, her son, a child of twelve years, one Bouchard, and a driver, five in all, were traveling from Lewiston to Augusta in a Chalmers car weighing about 4800 pounds. At a place called "Morang's crossing," where the electric railroad from Augusta to Winthrop crosses the highway, they saw the defendant's car, two hundred feet away, approaching them from Augusta at a very high rate of speed, estimated at 50 miles an hour. The car in which the plaintiff was riding, which we will call the Lemieux car, was then admittedly on its right hand side of the road, the south side. The plaintiff claims that the Heath car was on the same side of the road as it approached. The traveled part of the road was 22 feet wide. It was macadamized, with narrow strips of gravel at the shoulders. Seeing that there was danger of a collision, the driver of the Lemieux car slowed down to a speed of 8 or 9 miles an hour. What happened then is more fully described by the plaintiff's husband than by any other of her witnesses. Mr. Lemieux, illustrating at the blackboard, testified:— "They were coming right here; I was coming on the same side, and when they came pretty snug to us they see us and they swung right around to clear us and they got hold of this left hind wheel and swung end for end and we tipped in the ditch. They landed about 50 or 55 feet right in the ditch, or in the field there." The ditch referred to by the witness is the one on the north side of the road. Mr. Bouchard says that the Heath car struck the forward left wheel of the Lemieux car. The plaintiff was thrown from the car and struck in the north ditch. The little boy landed in the field some feet beyond. Mr. Lemieux, when he recovered consciousness, found himself in the middle of the road. A spot of blood located Mr. Bouchard's landing place at a point in the road about 50 feet easterly from the Lemieux car as it rested finally, and 3 or 4 feet from the north edge of the road. The driver does not appear to have been hurt. The plaintiff and her other witnesses say that they felt no jolt at the crossing.

After the collision, both cars were in the north ditch, or substantially so. The Heath car was lying diagonally to the road, right side up, and fronting westerly. The Lemieux car was also lying diagonally to the road, but bottom side up, and turned end for end, fronting westerly towards Lewiston. The front end of the Lemieux car and the rear end of the Heath car were five and one half feet apart. From

the Heath car to the railroad track was about 70 feet. The following sketch gives the situation approximately, as shown by photographs taken before the cars were removed.



On the other hand, the sons of the defendant testify that they were traveling on their right hand side of the road at an estimated speed of 10 or 12 miles an hour. They had a Buick car, which Mr. Lemieux testified weighed 3800 pounds. They say they saw the Lemieux car approaching on its own side of the road at a very rapid speed, that when it crossed the railroad track which is on a curve, the outer rail being $4\frac{5}{8}$ inches higher than the inner one, the car bounced so that the occupants of the tonneau were thrown somewhat into the air, that the car then veered a little to the right for a few feet at first, and then turned sharply to the left across the road till it struck the left mud guard or left forward wheel of the Heath car and grazed along its left side, pushing it into the ditch, and being itself overturned, and turned end for end. The defendant's theory, based upon the description of the affair given by her sons, and upon some testimony to be noticed later, concerning the apparent direction of the wheel tracks, is that when the Lemieux car got a jolt crossing the railroad track the driver temporarily lost control of the car and that the collision occurred before he could get control again; or that in the emergency an unfortunate handling of the wheel by the driver turned it towards the Heath car. It all took place in a very few seconds.

It is evident that practically the correct decision of the case will depend upon whether the jury were warranted in finding, as they must have done, that the collision occurred upon the south side of the road where the Lemieux car had a right to be. If the Heath car was on its own side of the road, the defendant clearly is not liable. But if the Heath car was on the south side of the road, as the plaintiff claims, the verdict is sustainable.

The plaintiff, her husband, and Bouchard all say that the Heath car was on its left hand side of the road, the south side. The two Heaths say that they were on their right hand side of the road, the north side. Two apparently disinterested witnesses who say that they were two or three hundred feet away testify that they heard the crash of the collision, and looking almost instantly saw the cars then on the north side of the road. One says the Lemieux car was then tipping over endways into the ditch.

The condition of the cars after the collision may throw a little light on the question of the relative positions of the cars when they collided. Mr. Lemieux says that his left front wheel, tire and windshield were broken, the radiator bent and broken, the left front spring broken, and the right bent. A witness called by the plaintiff says that the front end of the Lemieux car, the radiator and axle were damaged, that the radiator and engine were crushed in on the left hand side, that the left front wheel was off, the left mud guard ripped, and the left side of the car torn up. As to the Heath car, the testimony is that the windshield was not broken, nor were the headlights. The radiator was in perfect shape. The left front tire was off and the demountable rim bent, but the wheel was not damaged. Both axles on the left were bent back. The left mud guard was crushed, the left running board gone, the steering wheel broken and column bent, and the gasoline tank punctured. And the left hand frame of the car was bent in. From all this it is evident that, on whichever side of the road they were, the left hand front end of the Lemieux car came in contact first with the mud guard or left front wheel of the Heath car, clear of the windshield, headlights and radiator, and scraped along the entire left side of the car. This is consistent with the defendant's contention in regard to the manner of the collision. It is not entirely inconsistent with Mr. Lemieux's testimony that the Heath car had turned from the south side of the road towards the middle to avoid a collision. In either case, one car was crossing the road while the other was proceeding straight along.

But more important than any of the evidence so far referred to in this connection is the movement of the cars from the point of collision to their resting places in the ditch. According to the testimony for the plaintiff the Lemieux car was proceeding on the south side of the road at a moderate speed, 8 or 9 miles an hour. The car with its occupants weighed probably 5400 or 5500 pounds. In this situation

it was met and struck on the left front wheel of the Heath car weighing with its occupants about 4100 pounds proceeding as the plaintiff claims at a very high rate of speed, estimated at 50 miles an hour. Of course, all the figures relating to speed are estimates and may be considered as minimized in the one case, or exaggerated in the other. But the contention is that the Lemieux car was going at a moderate or slow speed for an automobile, and the Heath car very fast. The effect of the impact of the lighter and more rapidly traveling car upon the heavier slow one was not to stop the latter, nor to crowd it towards its own side of the road, nor to turn it about in the road. The momentum of the Lemieux car was such that it kept on, cleared the Heath car, for it fell beyond it, and after turning end for end, and bottom side up in its movements it landed in the ditch on the opposite side of the road from where it started. In the meantime the Heath car had been pushed or thrown from south of the middle of the road into the north ditch, where it lay right side up, and headed in the same direction in which it had been going.

The movements of the Lemieux car speak more unerringly than can the lips of any witness. The tremendous momentum of the car shows beyond all question that it was traveling at a high rate of speed. And even so, if as is claimed the car was traveling straight forward on the south side of the road, and was struck on the left front wheel by the lighter Heath car crossing diagonally in front, it is difficult even to imagine how it could have been propelled to the opposite side of the road, and in its passage turned end for end and upside down. It savors of the impossible. It is so improbable as to be almost or quite incredible.

But this is not all. Several reputable and disinterested witnesses who visited the scene of the collision within about an hour after it occurred say in substance that they saw an automobile wheel track on the south side of the road a short distance west of the electric railroad crossing, that for a few feet easterly of the crossing it disappeared, began again a well defined indented track, proceeded along nearly upon the line between the grass and gravel, and then turned sharply to the left across the gravel at the side in the direction of the cars as they stopped, until it was lost on the macadam surface towards the middle. Another witness who seems to have arrived there within twenty minutes says that at that time the track was discernable

across the macadam. To a reasoning mind, the evidence can leave little or no doubt that the track seen by the witness was made by the Lemieux car. If this was so, it corroborates in a most material manner the defendant's sons who declare that the collision occurred on the north side of the road, and that they were run into by the Lemieux car.

There are some minor features which point in the same direction, but we need not recount them. Upon the whole, we are of opinion that the verdict is plainly contrary to the evidence. The plaintiff's contentions are so overwhelmed not only by the spoken words of witnesses, but by the mute, but convincing, evidence of the cars themselves, that no other reasonable conclusion can be reached than that the verdict was erroneous.

Motion sustained.

CLARA J. EMERSON

vs.

LEWISTON, AUGUSTA & WATERVILLE STREET RAILWAY.

Androscoggin. Opinion February 24, 1917.

Principal of res adjudicata. "Causes of action" defined. Judgment between same parties or their privies as a final bar to any other suit for the same cause of action. Rule as to such judgment being final as to all matters which were tried, as well as to all matters which might have been tried.

The plaintiff having received an injury while alighting from a car of the defendant on which she was a passenger, brought suit claiming that the car was negligently and carelessly started, thereby throwing her to the ground. That action was tried and resulted in a judgment for the defendant. This suit was then brought to recover for the same injury, the writ alleging that the defendant had dug a trench near the rail and left the same open, unguarded and unlighted, so that the plaintiff in stepping from the car to the street fell into the trench. The presiding Justice ruled that the prior judgment was not a bar to the present suit, and the jury returned a verdict in favor of the plaintiff. The case comes up on an exception to this ruling, and on a general motion.

Held:

1. In both writs the plaintiff is charged with a violation of its ultimate duty to the defendant, which was to afford her safe egress from the car to the street. Negligently starting the car as she was alighting and negligently allowing her to step from the car into an open trench dug by the defendant and by it allowed to remain open, unguarded and unlighted are both violations of one and the same duty. The defendant was therefore guilty of but one tort and there was but one cause of action and the judgment upon the merits in the prior action is a complete bar to the maintenance of the present action, being conclusive not only as to all matters that were tried, but as to all that might have been tried.
2. The doctrine of res judicata is a rule of rest. It is not based wholly upon the narrow ground of technical estoppel, nor upon the presumption that the former judgment was right and just, but on the broad ground of public policy that requires a limit to litigation.

Action on the case to recover damages on account of the alleged negligence of defendant Company. Defendant filed a plea of general issue and for brief statement set out: That at the April term, 1914, of the Supreme Judicial Court for the County of Androscoggin and State of Maine, an action was entered in which the plaintiff, defendant and the cause of action were the same as in the present action; that on the ninth day of September term, 1914, said action was tried before a jury, and after the introduction of evidence by the plaintiff and defendant a verdict was returned by the jury for the defendant; that thereafter, to wit, at the September term, 1914, the plaintiff in said cause of action, filed a motion for a new trial, which said motion was overruled for want of prosecution, and thereafter judgment for the defendant was rendered on said verdict; and the defendant claims that by reason of the judgment rendered in said prior action, the plaintiff is estopped from recovering judgment in the present action, said prior judgment being that the plaintiff should take nothing by her writ in respect of the said cause of action therein set forth as by the record of the said court fully appears, and which said judgment is still in full force. Verdict for plaintiff in sum of $4850. Defendant filed motion for new trial and exceptions to ruling of court. Exceptions sustained. New trial granted.

Case stated in opinion.

McGillicuddy & Morey, for plaintiff.

Newell & Woodside, for defendant.

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

MADIGAN, J. The plaintiff having received an injury while alighting from a car of the defendant, on which she was a passenger, brought suit claiming that the car was started suddenly and carelessly, thereby throwing her to the ground. That action was tried and resulted in a verdict in favor of the defendant. This suit was then brought to recover for the same injury, the writ alleging that the defendant had dug a trench near the rail and left the same open, unguarded, and unlighted, so that the plaintiff in stepping from the car to the street fell into the trench. The presiding Justice, having ruled that the prior judgment was not a bar to the present suit, the jury returned a verdict in favor of the plaintiff. The case comes up on an exception to the ruling and on a general motion.

The general principles of "res judicata" have been repeatedly stated, the difficulty being in their application to the varying facts; all agreeing that a judgment on the merits is a bar to an action between the same parties for the same cause of action. Our own court in *Corey* v. *Independent Ice Co.*, 106 Maine, 485, says "Conceding jurisdiction, absence of fraud, and regularity in proceedings, we think it will not be challenged as a general rule, that a judgment between the same parties, or their privies, 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 in the first action, but as to all matters which might have been tried." *Anderson* v. *Wetter*, 103 Maine, 257, defines cause of action as "neither the circumstances that occasioned the suit nor the remedy employed, but a legal right of action. The primary right belonging to the plaintiff, and the corresponding duty belonging to the defendant, and the delict or wrong done by the defendant, consisting in a breach of such primary right or duty, constitute a cause of action. "All damages acruing from a single wrong though at different times, make but one cause of action." *Bendernagle* v. *Cocks*, 19 Wend., 206.

"Where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to bring forward the whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of a certain matter, which might have been brought forward, as a part of the subject in contest but which

was not brought forward, only because they have from negligence, inadvertence, or even accident, omitted a part of the case. The plea of "res judicata" applies, except in special cases, not only to the points upon which the court was required to form and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time.'" *Beloit* v. *Morgan*, 7 Wallace, 623.

A case analogous to the one under consideration is *M'Knight* v. *Minneapolis Street Railway Co.*, 127 Minn., 207, 149 N. W., 131, L. R. A., 1916 D., page 1164, where the plaintiff was injured while alighting from a street car. In the first suit it was alleged that the defendant suddenly and negligently closed the gate and started a car from which the plaintiff was alighting. This suit resulted in favor of the defendant, and to a second suit alleging that the plaintiff caught her foot on a defective step on the car, the defendant pleaded the prior judgment. In sustaining the defendant's contention, the court remarked:

"In suits based upon negligence, the cause of action is the violation of the ultimate duty to exercise due care that another may not suffer injury. In the instant case the plaintiff was a passenger upon defendant's street car, and it was the duty of defendant to afford her safe egress therefrom. Her claim for damages is grounded upon the charge that the defendant violated such duty. The violation of duty constitutes her cause of action. In the first suit she charges that the defendant violated this duty, by suddenly starting the car, while she was in the act of alighting. In the present suit she charges that defendant violated this duty by providing a defective step, for her use in descending from the car. Both suits are based upon the violation of the ultimate duty to afford safe egress from the car. The second suit 'presents no new cause of action, but only new grounds for relief upon the same cause of action,' and under the authorities cited is barred by the judgment in the former suit. It follows that the decision of the trial court was correct, and must be affirmed."

In *Columb* v. *Webster Manufacturing Co.*, 84 Fed. Rep., 592, 43 L. R. A., 195, the rule is thus stated. "Judgment upon the merits in an action for negligence is a bar to another action for the same injury grounded on the defendant's fault, or negligence, in respect to

the same occurrence, although other elements of negligence are alleged. Justice Aldrich in delivering the opinion of the court suggests: "Is there any safe or reasonable ground upon which a cause of action based upon the supposed negligence of an employer can be treated as divisible? Is there any reason for a rule which would permit a plaintiff by varying his description of negligence, to have a second trial if he fails to succeed upon his first description and proofs, but deny him a second trial, if he does succeed. If the plaintiff recovered in his first suit, could he by varying his description of the negligence and alleging additional negligence bring a second suit and recover? If it be conceded that a second recovery could not be had because the full right of recovery was involved in the description of the defendant's negligence, which the plaintiff employed in the first suit and therefore merged in the judgment favorable to the plaintiff, upon what logic can it be urged that the full right of recovery is not merged in a judgment unfavorable to the plaintiff, based on the same allegations, the same trial, and the same proof."

In *Armstrong* v. *Chicago*, 45 Minn., 85, 47 N. W., 459, the plaintiff sued for injury to an animal while in defendant's custody and inserted two counts in the writ, one charging negligence, while the animal was in defendant's possession as a common carrier, and another charging negligence after the arrival of the animal, at its destination, and while in its custody as a warehouseman. It was held that both suits were for the same cause of action.

In *McCain* v. *Louisville & R. Co.*, 97 Ky., 804, 22 S. W., 325. An action for damages caused by blowing the whistle, after plaintiff had crossed the track, and frightening the plaintiff's horse, was held to be barred by a judgment against the plaintiff in a former action wherein it was alleged that the horse was frightened because the train approached the crossing at a dangerous rate of speed, without giving the usual notice of its approach, whereby the plaintiff was decoyed so near the crossing that his horse became frightened, etc.

Limatainen v. *St. Louis River Dam & Improvement Co.*, 137 N. W., 1099. Where the plaintiff, in an action for damages resulting from an overflow caused by the backing up of the water from the defendant's dam, so framed his complaint that he was restricted to proof of certain specific acts as having caused such backing up and overflow, the cause of action was nevertheless predicated upon the defendant's

violation of his ultimate duty to so conduct and maintain its dam as not to violate the rights of the plaintiff, whose lands lay further up the river; and hence a judgment in favor of the defendant in such action was a bar to a subsequent action between the same parties for the same relief sought in the former action, though the allegations of the complaint in the second action were sufficiently broad to admit proof of any and all specific acts or omissions of the defendant in violation of its ultimate obligation to the plaintiff with respect to the maintenance of the dam.

In *Wildman* v. *Wildman*, 70 Conn., 700, plaintiff asked to have deeds set aside. In the first he claimed they had been executed and delivered but cancelled, in the second suit they had been forged. *Held* there was but one cause of action.

In *Cotter* v. *Boston & Northern Street Railway Co.*, 109 Mass., 302, an action for personal injury to a child, was decided in favor of the defendant, on the ground that the plaintiff was not exercising the care of a prudent adult, and that there was no evidence of due care on the part of the parents, in a second action declaration alleged wilful negligence of defendant, and wanton and reckless conduct on the part of its servants, which would make defendant liable, regardless of contributory negligence of plaintiff, or her parents. The court held that the judgment in the first action was an absolute bar to the second one.

A single tort gives rise to a single cause of action, and a plaintiff cannot be permitted to split up a cause of action, and bring more than one suit thereon, the penalty imposed for the violation of this rule being the application of the doctrine of "res judicata." This doctrine is based on the legal maxims that, "A man should not be twice vexed for the same cause" and that "It is for the public good that there should be an end of litigation." *Limatainen* v. *St. Louis River, etc.*, supra.

"The rule of res judicata does not rest wholly on the narrow ground of a technical estoppel. Nor on the presumption that the former judgment was right and just; but on the broad ground of public policy, that requires a limit to litigation, a curb to the litigousness of the obstinate litigant. Like the statute of limitations, it is a rule of rest. *Sargent & Co.* v. *New Hampshire Steamboat Co.*, 65 Conn., 126.

In the case at bar we have a clear instance of "res judicata." The essence of the charges in both writs is that the defendant negligently and carelessly discharged its ultimate duty to the plaintiff, which was to afford her safe egress to the street. Negligently starting the car as she was alighting, and negligently allowing her to step from the car into an open trench, dug by the defendant and by it allowed to remain open, unguarded, and unlighted, are both violations of one and the same duty. Defendant was guilty of but one tort, and there was but one cause of action, and there having been a judgment on the merits in the prior action, it is a bar, not only to the issues that were tried, but also as to all that might have been tried.

Exception sustained, new trial granted.

DIAMOND CORK COMPANY

vs.

MAINE JOBBING COMPANY

and

LUKE DAVIS and RALPH STICKNEY, Trustee.

Knox. Opinion February 24, 1917.

Delivery of personal property as evidence of passing title. General rule as to trustee process being an equitable form of action. Equitable remedies where writings indicate that the parties intended thereby to transfer the right to a particular property or fund.

October 28, 1913, the principal defendant, the Jobbing Company and the alleged trustees, Davis and Stickney, entered into a written executory contract of sale of personal property wherein the Jobbing Company agreed to sell, at a fixed price, to Davis and Stickney its bottling establishment on condition, however,

that the vendor should be able to turn over to the vendees "its contract with the Coca Cola Company." Possession of the property was turned over to Davis and Stickney at the time the executory contract of sale was made. Thereafter, December 20, 1913 and before the Jobbing Company was able to turn over to Davis and Stickney its contract with the Coca Cola Company, it mortgaged the same property to one Isidor Gordon. That mortgage was made subject to the contract for the sale of the property to Davis and Stickney, and it provided that if that sale was carried out the purchase money was to go to the mortgagee "as part or entire payment for the indebtedness secured by this mortgage." The mortgage was duly recorded. Thereafter the Coca Cola Company made a satisfactory contract with Davis and Stickney direct, and at the time this trustee process was served upon them they had in their hands a balance of $551.46 of the purchase price of said property. Isidor Gordon appears as claimant of that fund by virtue of his mortgage.

Held:

1. That the evidence justifies the finding of the presiding Justice that the claimant's mortgage was given to secure a bona fide debt and was not fraudulent.
2. That, where at the time of the execution of an executory contract of sale of personal property, the possession of the property is delivered to the vendee, the question whether the title to the property then passed to the vendee depends upon whether it was the intention of the parties that the title should pass at that time.
3. That, looking at the contract of October 28, 1913 and considering all facts and circumstances disclosed, it seems apparent to the Court that it was not contemplated by the parties that the title to the property mentioned in the contract was to pass then to Davis and Stickney, or before the Coca Cola contract could be turned over to them.
4. That the title to the property had not absolutely passed to Davis and Stickney at the time the mortgage was given to the claimant, and that the Jobbing Company then had an interest therein which passed by its mortgage to the claimant as security.
5. That the trustee process, though in form an action at law, is in substance an equitable proceeding to determine the ownership of a fund in dispute, especially where a claimant has appeared and become a party to the suit. And as between the plaintiff in such an action and the claimant of the fund equitable considerations must prevail as far as the nature of the process will permit,
6. That if there could be any doubt as to the claimant's right to the fund, determining his right according to strict legal principles, there can be no doubt as to his right to the fund when equitable principles are applied. The mortgage was intended by the parties thereto to be effective to give the mortgagee, as security, the mortgagor's entire interest at the time in the property, that is, the property itself if the executory contract of sale was not carried out, and the proceeds of the sale if it was carried out. In equity the mortgage will be regarded as an assignment of the fund, if that be necessary to effectuate the manifest purpose of the parties, for equity disregards mere form.

Action of assumpsit brought by plaintiff to recover a certain sum of money on an account annexed with trustee process. The principal defendant admitted liability and the question involved related principally to the liability of the trustees; the principal defendant having given a mortgage on its property and the mortgagee was called into court, claiming the fund in the hands of the trustee. The presiding Justice ruled that the money disclosed was not held on trustee process, but was held under and by virtue of the mortgage and belongs to the claimant as mortgagee. To this ruling, plaintiff filed exceptions. Exceptions overruled.

Case stated in opinion.

A. S. Littlefield, for plaintiff.

M. A. Johnson, for defendant.

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

KING, J. Action of assumpsit on an account annexed. The principal defendant admitted its liability. The trustees disclosed a balance of $551.46, claimed by one Isidor Gordon who appeared as claimant of the fund. The presiding Justice found and ruled that the claimant is entitled to the fund and that the trustees should be discharged. The case comes before this court on plaintiff's exceptions.

The material facts are not in dispute. October 28, 1913, the Maine Jobbing Company, owning and operating a bottling establishment wherein, under a contract with the Coca Cola Company, it bottled and sold coca cola only, made a written contract with the alleged trustees, Davis and Stickney, to sell to them its bottling establishment with all the machinery and appliances connected with the same, also all its stock and fixtures thereto belonging, reserving its book accounts, at prices specified. The agreement, signed by both parties thereto, contained the following conditions and provisions:

"This contract is made, however, subject to the party of the first part being able to turn over to the party of the second part its contract with the Coca Cola Company.

"The party of the first part agrees to turn over everything it has in its possession to the party of the second part at once, and hereby acknowledges that it has received to bind the above contract $100.00 (one hundred dollars). Should, however, the contract fail for the reason that the party of the first part cannot turn over its contract

with the Coca Cola Co., the party of the first part shall not be liable to the party of the second part for any loss of time or expense of the party of the second part, but shall return to the party of the second part the sum of $100. in full settlement of all claims and damages on the part of the party of the second part.

. . . . . .

"The party of the second part agrees to the above terms and further agrees that if the party of the first part is able to turn over its contract with the Coca Cola Co. to the party of the second part and the party of the second part do not keep their part of the above contract, they, the party of the second part shall forfeit $100.00."

Davis and Stickney took immediate possession of the property as provided for in the contract. Soon after the contract was executed the treasurer of the Jobbing Company and Mr. Stickney went to Boston and saw the New England Agent of the Coca Cola Company for the purpose of getting the assent of that Company that the Jobbing Company might turn over to Davis and Stickney its contract with the Coca Cola Company. The assent was not given, but Davis and Stickney were permitted by the agent to continue the business of bottling coca cola in the establishment until the Coca Cola Company should determine what action it would take in the premises. Under that permission Davis and Stickney carried on the business until the early part of January, 1914, when they received a new contract, dated January 1, 1914, made by the Coca Cola Company with them direct. This trustee process was served on Davis and Stickney January 13, 1914.

December 20, 1913, the Maine Jobbing Company executed and delivered to the claimant a mortgage of its said bottling establishment, stock and fixtures, and all other property belonging to the grantor and pertaining to said business. It contained the following provision.

"Subject, however, to the contract made by the grantor with Luke Davis and Ralph Stickney on the twenty-eighth day of October, 1913, said Davis and Stickney having the full right to carry out said contract, as per the terms of contract, but in so doing, it shall be credited by said Gordon on the indebtedness secured by this mortgage,

and all money paid by said Stickney and Davis on said contract shall be given credit to this grantor as part or entire payment for the indebtedness secured by this mortgage."

The mortgage was given to secure $600 payable in two years, and it was duly recorded December 22, 1913.

1. At the hearing an issue was raised by the plaintiff that the claimant's mortgage was not given to secure a bona fide debt, but was fraudulent. The presiding Justice found otherwise, and we think the evidence justifies that finding.

2. But it is further claimed by the plaintiff that the mortgage is of no validity because the title to the property had passed to the trustees, and the Maine Jobbing Company had nothing to which the mortgage could attach. We think that claim is not sustainable under the facts and circumstances disclosed. It is true that the property was turned over to Davis and Stickney at the time the contract of sale was executed, as therein provided for. And it is doubtless true that the delivery of possession of personal property to the vendee, under an executory contract of sale, is an important fact to be considered in determining whether the title has passed to the vendee. If the delivery is absolute, it furnishes strong evidence that the parties intended to pass the title, in the absence of anything evincing a contrary intention. And, as in all such cases, the question here raised, whether title to the property passed to Davis and Stickney at the time they took possession of it under the terms of the contract of sale, depends upon whether it was the intention of the parties that the title to the property should pass at that time. Looking at the contract of October 28, 1913, it is, we think, apparent that it was not contemplated by the parties that the title to the property mentioned in the contract was to pass then to Davis and Stickney. Plainly they did not intend to purchase the bottling establishment at the specified price of $6000, and the stock on hand at cost prices, *unless* they could have the right to bottle coca cola therein which the Jobbing Company had under its contract with the Coca Cola Company. Without that right, or an equivalent right, the property would be of little value.

That both parties to the contract of October 28, 1913 understood that it was to remain executory, and that the title to the property was not to pass to Davis and Stickney until the Jobbing Company should be able to turn over to them the contract with the Coca Cola Com-

pany, is clearly shown by the contract itself. For it is therein expressly provided, that should the contract fail for the reason that the Jobbing Company could not turn over its contract with the Coca Cola Company it was not to be liable to Davis and Stickney for any damages, but should only return to them the $100 which it had received from them, the same to be "in full settlement of all claims and damages" on their part. Indeed the contract shows that Davis and Stickney were not bound thereby to purchase the property in any event, even if the Jobbing Company was able to turn over to them its contract with the Coca Cola Company. They could then refuse to take the property and be wholly free of the contract, except that they would then forfeit the $100 which they had paid. Considering these provisions of the contract of October 28, 1913, and all the other facts and circumstances disclosed, it seems clear to us that the title to the property had not absolutely passed to Davis and Stickney at the time the mortgage was given by the Jobbing Company to the claimant, December 20, 1913, and that the Jobbing Company then had an interest therein which passed by its mortgage to the claimant as security.

Moreover, the trustee process, though in form an action at law, is in substance an equitable proceeding to determine the ownership of a fund in dispute, especially where a claimant has appeared and become a party to the suit. And as between the plaintiff in such an action and the claimant of the fund equitable considerations must prevail as far as the nature of the process will permit. *Harlow* v. *Bangor*, 96 Maine, 294, 296. The mortgage to the claimant was intended by the parties thereto to be effective to convey the property which the Jobbing Company had previously agreed to sell to the trustees, subject, however, to that agreement. It was intended that the mortgage should give the mortgagee, as security, the mortgagor's entire interest in that property,—the property itself if the executory contract of sale was not carried out, and the proceeds of the sale if it was consummated. The mortgage secured a bona fide debt. It was duly and seasonably recorded prior to the beginning of this action. And if there could be any doubt (and it seems to us there cannot be) as to the claimant's right to the fund disclosed, determining the effect of his mortgage according to strict legal principles, certainly there could be no doubt as to his right to the fund when equitable principles are applied. In equity his mortgage will be regarded as an assign-

ment of the fund, for equity disregards mere form. Any writing plainly indicating that the parties intended thereby to transfer the right to a particular property or fund will be treated in equity as a transfer or assignment of the property or fund as may be necessary to effectuate the manifest purpose of the parties.

Exceptions overruled.

STEVENS MILLS PAPER COMPANY, In Equity

vs.

JAMES E. MYERS, JR.

Androscoggin. Opinion March 2, 1917.

Execution Sales. Right of Redemption. Time of tender in order to redeem. General rule of law where tender is made impossible on account of conditions caused by person to whom tender must be made.

In a bill in equity brought under R. S., 1903, Chap. 92, Sec. 16, to redeem from an execution sale of the debtor's rights in real estate, it appeared that the plaintiff, on the day the right of redemption expired and for two days prior thereto, was desirious of redeeming from the execution sale and was prepared so to do. But the defendant, for the express purpose of avoiding a tender of the amount due and thereby of preventing a redemption, left the city where both parties resided, and the State, two days before the right of redemption expired, and remained until the second day after the right expired.

Held:

1. That in these proceedings, the plaintiff must prove a prior tender or payment or such facts as show that the defendant upon demand has unreasonably refused or neglected to render in writing a true account of the sum due upon the mortgage, or has in some other way by his default prevented the plaintiff from performing or tendering performance of the condition of the mortgage.
2. That when a party designedly absents himself from home for the fraudulent purpose of avoiding a tender, he cannot successfully object that no tender was made.

Bill in equity to redeem from execution sale of interest in real estate. The cause was heard before single Justice on bill, answer and proof. Sitting Justice ruled that the plaintiff was entitled to redeem; from this ruling, defendant appealed. Appeal dismissed. Bill sustained with costs. Decree of sitting Justice affirmed.

Case stated in opinion.

Donald D. Garcelon, for plaintiff.

Oakes, Pulsifer & Ludden, for defendant.

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

CORNISH, J. On appeal. Bill in equity to redeem from an execution sale of rights in real estate. The sale was made on April 8, 1915. The statutory year of redemption expired on April 8, 1916. This bill was brought under R. S. (1903) Chap. 92, Sec. 16, which reads: "When the amount due on a mortgage has been paid or tendered to the mortgagee or person claiming under him, by the mortgagor or the person claiming under him within the time so limited, he may have a bill in equity for the redemption of the mortgaged premises &c." Such bill, founded on a tender, must be brought within one year after the tender. R. S., Chap. 95, Sec. 20. The rights of debtor and purchaser under an execution sale are the same as between mortgagor and mortgagee, R. S., Chap. 81, Sec. 41.

The defendant contends that this bill cannot be maintained because no tender was actually made within the year.

The decision of the sitting Justice contains this finding of fact:

"I find that the plaintiff corporation on the day the right of redemption referred to in the bill expired, and for two days before, was desirous of redeeming from the execution sale referred to and was prepared to do so. I find that the defendant, for the express purpose of avoiding a tender of the amount due and thereby of preventing a redemption, left the city and the State two days before the right of redemption expired and remained until the second day after the right expired, so that he could not be found by the plaintiff's officers." This finding is based on the unqualified admission of the defendant in his testimony and is not attacked here. The sitting Justice then ruled that under these circumstances the defendant cannot now be heard to say that the tender made on the day of his return was not seasonably made, and he ruled that the plaintiff now has a right to

redeem. This conclusion of law is attacked by the defendant; but it is in accord with sound and well established principles governing the doctrine of tender. This court has laid down the general rule as to preliminary tender in a bill to redeem in these words: "The plaintiff must allege and prove either a prior tender or payment, or such facts as show that the defendant upon demand has unreasonably refused or neglected to render in writing a true account of the sum due upon the mortgage or has in some other way by his default prevented the plaintiff from performing or tendering performance of the condition of the mortgage." *Munro* v. *Barton*, 95 Maine, 262, 264. The last clause applies here. The defendant designedly prevented the plaintiff from tendering performance of the condition of the mortgage by rendering it impossible for him to do so, and a court of equity will not now listen to his plea that the tender was not seasonably made. To do so would be to permit him to take advantage of his own wrong and to defeat the debtor's rights by fraud. Where the debtor has shown a readiness and a reasonable effort on his part to perform the legal duty required of him, and the failure to accomplish it is due to no fault of his own, but to the act of the other party putting it beyond his power, a forfeiture will not be permitted by the court.

To require a tender that has been waived is to require the useless. *Milliken* v. *Skillings*, 89 Maine, 180; *Bowden* v. *Dugan*, 91 Maine, 141; *Pitcher* v. *Webber*, 103 Maine, 101. To require a tender that has been designedly prevented is to insist upon the impossible. *Gilmore* v. *Holt*, 4 Pick., 257; *Southworth* v. *Smith*, 7 Cush., 391; *Noyes* v. *Clark*, 7 Paige Ch., 179; *Schaeffer* v. *Colden*, 237 Pa., 77. Lex non cogit ad vana seu impossibilia.

Appeal dismissed.
Bill sustained with costs.
Decree of sitting Justice affirmed.

ELDEN O. BORNEMAN, et als. *vs.* H. A. G. MILLIKEN, et als.

Lincoln. Opinion March 2, 1917.

Trespass quare clausum. Rule of law as to adverse possession where person occupying land makes no claim to land not included in his deed, even though his occupation of same has been for requisite period of time sufficient to give adverse possession.

Action trespass quare clausum. The case involved the location of plaintiff's westerly line which, in turn, involved the location of their easterly line, since the defendant's land extended easterly and westerly one mile. The latter line is the true town line between the towns of Warren and Waldoboro, and the location of this latter line was the real issue.

Held:

1. That the true easterly line is the one which makes the easterly shore of Little Pond, so-called, a portion of the line, and thus places Little Pond in the town of Waldoboro; not that line claimed to be run in 1812 which was wholly westerly of Little Pond and placed that pond in the town of Warren.
2. Adverse possession, claimed by plaintiffs, is ineffectual since the plaintiff's predecessor testified emphatically that whatever his occupancy might have been he had no intention of claiming any land not included in his deed. Such occupancy does not work title by adverse possession.

Action of trespass quare clausum. Defendant filed a plea of general issue and brief statement. Verdict of not guilty for defendant, Scott, by order of court. Verdict for plaintiff as against other defendants in the sum of $553.25. Defendants filed a motion for new trial. Motion sustained. New trial granted.

Case stated in opinion.

M. A. Johnson, for plaintiff.

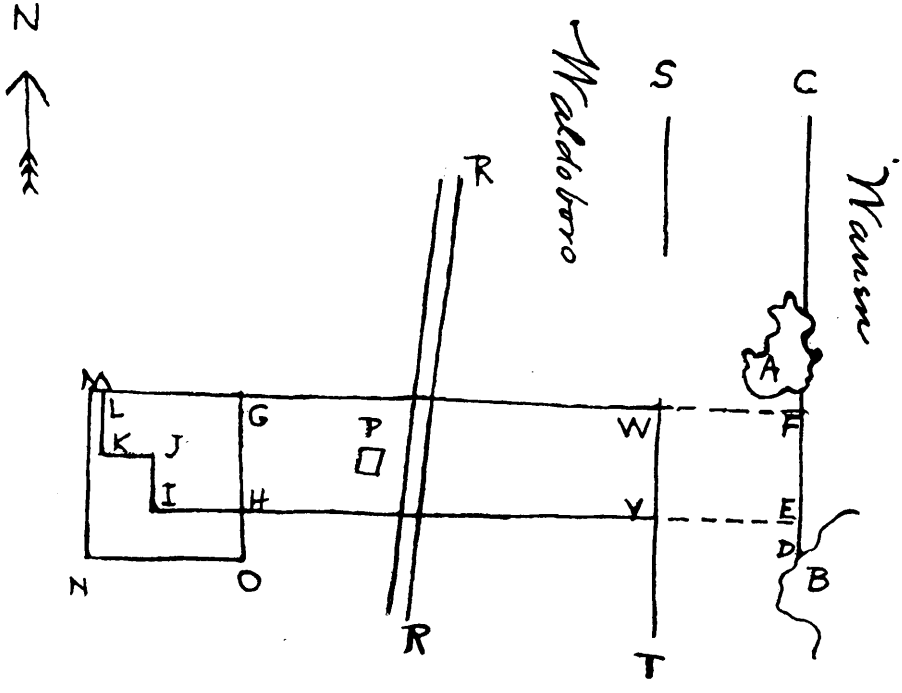
A. S. Littlefield, for defendants.

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

PHILBROOK, J. On April 8, 1914, Fred W. Scott, one of the defendants, conveyed to H. A. G. and B. F. Milliken, the other two defendants, all the wood and lumber standing on a certain lot of land situated in the town of Waldoboro. The Millikens began a lumbering

operation on the premises. The plaintiffs claim that, while operating on a portion of what they allege to be the lot, the defendants committed trespass on their land. At the trial below verdict was directed in favor of the defendant Scott, but the jury returned a verdict against the Millikens. The case is before us on a motion to have that verdict set aside and a new trial granted.

From a study of the evidence and plans introduced we use the following illustrative sketch.



A.....Little Pond, so-called.
B.....Part of Southerly Pond, so-called.
C D .....Town line between Warren and Waldoboro as claimed by defendant.
S T.....Town line as claimed by plaintiff.
E F G H .....Plaintiff's land as claimed by defendant.
V W L K J I.....Plaintiffs' land as claimed by plaintiff.
R R .....Road from Warren to South Waldoboro.
P.....Farm buildings of plaintiffs.

The trespass was west of the line G H, and as the defendants claim that to be the west line of plaintiff's land, they say they did not trespass on the land of the latter. The plaintiff's, claiming L K J I to be their west line say that the trespass was on their land. The parties are therefore at variance as to what constitutes the west line of the plaintiffs' land but, as we shall see, the real issue relates to the true location of the town line which forms the east boundary of the plaintiffs' land.

The plaintiffs' land is a portion of the same land which Waterman Thomas conveyed to Godfrey Hofses by deed dated December 30, 1779, acknowledged September 14, 1793, and recorded on the latter date. In that deed the land was bounded on the east by the Waldoboro town line and extended westerly one mile. If the true town line, at the date of the above conveyance, were D C, as claimed by the defendant, the one mile dimension toward the west would be reached at the line G H. If that town line were farther west, at S T, as claimed by the plaintiff, the one mile dimension toward the west would be reached on the north side of the land, at the point L.

After the death of Godfrey Hofses commissioners were appointed Jan. 10, 1811, to divide his real estate, and the land, of which the land in controversy is a portion, was divided into seven narrow strips running from the easterly to the westerly bounds thereof. The widest strip was set off to the widow, Mary Hofses, and the six remaining strips were set off to children of Godfrey, each of the strips being described as "extending from one end of said lot to the other." The width of the strip set off to the widow, Mary Hofses, was $33\frac{1}{4}$ rods, that to Betsy Hofses a daughter, $13\frac{1}{2}$ rods, that to William Hofses, a son, $10\frac{1}{4}$ rods, that to Andrew Hofses, a son 10 rods, that to Mary Howard, a daughter, who in a deed given later is spoken of as Polly Howard, 12 rods, that to Peggy Hofses, a daughter, 12 rods, that to Barbary Achorn, a daughter, 13 rods. The total of the widths is 104 rods. Based upon the above division a plan was made and filed in the Probate Office by the same Waterman Thomas who conveyed the land to Godfrey Hofses, and who was also a surveyor, which plan shows the width of 104 rods and refers to the east bound of the land as being the "Warren line." It seems to be established beyond controversy, then, that the homestead farm which Hofses bought of Thomas by deed dated in 1779, but not acknowledged and recorded until 1793, and which in 1811 was divided among his heirs, was

bounded on the east by the town line between Warren and Waldoboro, as the line was then understood to be located, and extended one mile toward the west.

It appears that in the year 1812 one James Malcom undertook to run the line between the two towns, but the record does not disclose the reason nor the authority for his so doing. His line is shown upon an ancient plan introduced by the defendant, but it bears the legend "Erroneous line run in 1812 by James Malcom." The Malcom line is not only wholly west of Little Pond, but does not touch any part of that pond, thus leaving that pond in the town of Warren. On the same ancient plan is another line bearing the legend "Original Town Line" which is east of Little Pond, uses a part of the east shore of the pond as part of the line, and thus places that pond in the town of Waldoboro. The "Malcom line" is the line S T on the sketch and is the true town line as claimed by the plaintiffs.

In the year 1836 commissioners were appointed by authority of the Supreme Judicial Court "to establish the line between the towns of Waldoboro and Warren." They attended to their duty and their report establishes the line as being east of Little Pond, using a portion of its easterly shore as a portion of the line, and necessarily placing the pond in Waldoboro as claimed by defendants, and not in Warren as claimed by plaintiffs. In the year 1896 the municipal officers of the towns of Waldoboro and Warren employed a surveyor to run the line between the towns. That surveyor established the line to be east of Little Pond. He also found on that line two old trees both having marks 1828 and 1836 in figures and the letter "W".

The town of Waldoboro was incorporated by the General Court of Massachusetts in the year 1773, and in describing its easterly boundary we find one of the courses to be, "thence to run south, fifteen degrees east, three hundred and twenty rods to a stake standing on the bank of Little Pond, so-called, thence easterly by the shore of said pond, to the easterly point thereof, thence south fifteen degrees east, to a stake standing on the bank of the Southerly pond, so-called". This course would necessarily place Little Pond in the town of Waldoboro and not in the town of Warren.

The surveyor employed by the plaintiff determined the town line to be the line S T, which is apparently the Malcom line, and found what he regarded as evidential monuments thereon. The surveyor employed by the defendants determined the town line to be the line

C D. In his survey he found a monument marked "1896," which was the year in which the municipal officers of Waldoboro and Warren run the line, as we have seen, and also other indications that his line was the same as that run in the year to which reference has just been made.

After giving due consideration to the elaborate and exhaustive argument of the plaintiffs' counsel in support of the opposite view we are convinced that the line C D was the original line, and the true line, between the two towns; that it was the easterly boundary of the Hofses property; and as that property extended westerly one mile, and no more, that the westerly line of plaintiffs' property is the line G H.

As the claim of title by adverse possession is effectually disposed of by the testimony of plaintiffs' predecessor, Studley, who says that, whatever his occupancy might have been, he had no intention of claiming any land not included in his deed, the argument of rights under such a claim is answered. *Preble* v. *M. C. R. R. Co.*, 85 Maine, 260, and cases cited at page 264. Although this doctrine has been questioned in other jurisdictions it has been the settled law of this State since the year 1824, and we here re-affirm it.

We have not overlooked the claim of plaintiffs' counsel as to the effect of certain litigation between Studley, a predecessor in title of the defendant Scott, and one Simmons, but as that does not to our minds effectually apply to the question at issue, we are obliged to dismiss it.

It is our conclusion therefore that the jury manifestly erred and the mandate must be,

Motion sustained.
New trial granted.

IDA J. HIGHT,
Widow of Herbert E. Hight, Applicant,

vs.

YORK MANUFACTURING COMPANY, et al.

York. Opinion March 2, 1916.

Rule of practice in appeals from findings of Industrial Accident Commission. Meaning of words "average weekly wages" and how the same shall be computed.

The Workmen's Compensation Act, Public Laws, 1915, Chap. 295, fixes the method of computing the average weekly wages of an employee as follows: "If the injured employee has worked in the same employment in which he was working at the time of the accident, whether for the same employer or not, during substantially the whole of the year immediately preceding the injury, his 'average weekly wages' shall be three hundred times the average daily wages, earnings or salary which he has earned in such employment during the days when so employed and working the number of hours constituting a full working day in such employment divided by fifty-two."

The deceased employee had been engaged in the same employment for the York Manufacturing Company for more than a year preceding the injury. He had received fourteen dollars and fifty cents per week for his labor. Fifty-eight hours constituted a week's work and the time was so arranged that the employees worked ten and one-half hours a day for five days in the week and five and one-half hours or practically one-half day on Saturday.

Held:

1. That the varying hours in no way affected the earning capacity or the actual earnings of the employee. He received the same amount as if the hours were equally divided among the six days, and his average daily wages are unaffected thereby.
2. That to ascertain the average daily wages the total amount earned for the week, or fourteen dollars and fifty cents, must be divided by six, the number of working days, which gives $2.416 as the average daily wages, instead of dividing by five and one-half which gives $2.636 as the average daily wages.
3. The weekly number of hours being limited to fifty-eight, the division must be made by six however the hours may be divided among the days. The legislature did not intend that the average weekly wages should be reckoned as more than the highest weekly wages the employee ever earned in his employment.

Appeal from the findings of the Industrial Accident Commission of the State of Maine relative to the meaning of the term or words "Average Weekly Wages" and how the same shall be interpreted and computed as found in Workmen's Compensation Act, R. S., 1916, Chap. 50. Appeal sustained.

Case stated in opinion.

Emery & Waterhouse, for respondents.

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

CORNISH, J. The Workmen's Compensation Act, P. L. 1915, Chap. 295, R. S., 1916, Chap. 50, Secs. 1-49, provides in section 34 for an appeal to the Law Court upon questions of law by following the method therein prescribed. The procedure is briefly this: The findings of the Commission upon questions of fact are final in the absence of fraud. After a decision has been filed by the Commission, any party in interest may present certified copies of the same or of any order of the Commission or of its Chairman, or of any memorandum of agreements approved by the Commission, together with all papers in connection therewith to the Clerk of Courts for the County in which the injury occurred. The case is then entered on the equity docket in that County. A single Justice shall thereupon without hearing or independent investigation or determination render a decree in accordance with the decision of the Commission. The duties of the Justice are in their nature ministerial rather than judicial. He does not pass upon the rights of the parties, but signs a decree in conformity with the decision of the Commission. All interested parties are then notified of this decree, and an appeal therefrom to the Law Court may be had as in equity except that there shall be no appeal upon questions of fact found by the Commission or its chairman nor where the decree is based upon a memorandum of agreement approved by the Commission.

This case is the first that has been brought to this court under that Act, and all the statutory steps have been taken to perfect the appeal. It involves a construction of the statute itself which is a question of law, and therefore is properly here. *Rakiec* v. *D. L. & W. R. R. Co.*, 88 At., 953, (N. J. 1913).

Herbert E. Hight, an employee of the York Manufacturing Company, died on April 16, 1916, from an injury received on February 28,

1916. Section 12 of the Act fixes the amount of compensation where death results from an injury as "a weekly payment equal to one-half his average weekly wages, earnings or salary but not more than ten dollars nor less than four dollars a week for a period of three hundred weeks from the date of the injury." The precise question at issue here is the amount of the "average weekly wages" of Mr. Hight, and that depends upon the correct method to be adopted in computing his average daily wages.

Section 1, paragraph IX reads: "Average weekly wages, earnings or salary of an injured employee shall be computed as follows:

(a) If the injured employee has worked in the same employment in which he was working at the time of the accident, whether for the same employer or not, during substantially the whole of the year immediately preceding his injury, his 'average weekly wages' shall be three hundred times the average daily wages, earnings or salary which he has earned in such employment during the days when so employed and working the number of hours constituting a full working day in such employment divided by fifty-two."

It is not disputed that Mr. Hight had been engaged in the same employment for the York Manufacturing Company for more than a year preceding the injury; that he had received fourteen dollars and fifty cents per week for his labor, that fifty-eight hours constituted a week's work, and that the time was so arranged that the employees worked ten and one-half hours a day for five days in the week, and five and one-half hours or practically one-half day on Saturday. To ascertain the average daily wages the Commission divided fourteen dollars and fifty cents by five and one-half, which gives an average daily wage of two dollars sixty-three cents and six mills ($2.636). Multiplying that amount by three hundred and dividing by fifty-two in accordance with the directions of the statute, the average weekly wages were ascertained to be fifteen dollars and twenty cents, and one-half the same seven dollars and sixty cents. That sum was fixed in the decree, from which an appeal was taken.

The defendant contends that the fourteen dollars and fifty cents should be divided by six, the number of working days, which gives two dollars forty-one cents and six mills ($2.416) as the average daily wages. Multiplying that amount by three hundred and dividing by fifty-two makes the average weekly wages thirteen dollars and

ninety-two cents ($13.92) one-half of which is six dollars and ninety-six cents ($6.96).

Which method of computation is prescribed by the statute? Shall the divisor be five and one-half or six? This is the only issue involved in this case, and while the amount involved is not large, the decision must serve as a precedent in future cases and is therefore important. In our opinion, under the admitted facts, the divisor should be six in accordance with the contention of the defendant. The words of the statute are: "The average daily wages, earnings or salary, which he has earned in such employment, during the days when so employed and working the number of hours constituting a full working day in such employment."

The situation is this. Mr. Hight received a week's wages for a week's work, and he did a week's work for a week's wages. Fifty-eight hours constituted a week's work in that employment and he could and did work no longer than that in any one week. Had the hours been apportioned equally among the six working days, each day would have had nine and two-thirds working hours. That is in reality "the number of hours constituting a full working day in that employment." Had this been the custom no one would question that the total amount of the week's wages should be divided by six in order to ascertain the average daily wages. The fact that for the sake of mutual convenience or for any other reason the hours were so apportioned that for five days the employee worked more than nine and two-thirds hours, to wit, ten and one-half hours, and on the sixth day worked less, to wit, five and one-half hours, should not change the rule. The number might vary every day in the week, but if the total was fifty-eight the average, which is the mean between extremes, should be calculated by dividing by six. The varying hours in no way affect the earning capacity or the actual earnings of the employee. He receives the same amount as if the hours were equally divided and his average daily wages are unaffected thereby. If he remains idle on Saturday afternoon after having crowded the required weekly labor into less than six days, his weekly wages will be no less, and if he works at some other employment during that half day and receives extra pay therefor, that cannot be considered in this computation, and his weekly wages in this employment would be no more. The weekly number of hours being limited to fifty-eight, the division must be made by six, however the hours may be arranged.

Dividing by five and one-half is not in compliance with the statute because the number of hours in those days, ten and one-half, exceeds "the number constituting a full working day in that employment," nine and two-thirds, and the result is that the injured employee is given compensation on the basis of six days of ten and one-half hours each or sixty-three hours per week, five hours more than he actually worked. Before the injury his average daily wages were computed and paid on the basis of a fifty-eight hour a week service, after the injury on the basis of a sixty-three hour a week service. The purpose of the statute is to have the same basis for both. The legislature never intended that the average weekly wages should be reckoned as more than the highest weekly wage the employee ever earned in his employment. Such a method of computation is self destructive.

The illustration put by the counsel for the defendant is apt. Suppose a locomotive engineer, whose weekly wages are twenty-four dollars per week, or four dollars per day, has his work so assigned that his actual labor is crowded within four long-houred days. The other two days he rests. His compensation as computed by the method of the Commission would be ascertained by dividing twenty-four by four, making six dollars instead of four as the average daily pay. Multiplying that sum by three hundred and dividing by fifty-two would fix thirty-four dollars and forty-two cents as his average weekly wage on which to base his future compensation, an excess of more than ten dollars per week over actual earnings. Such a result is within neither the letter nor the spirit of the statute.

The object sought by the Workmen's Compensation Act is the ascertainment of the earning capacity of the workman as shown by his constant employment in the past, in order that the remuneration after shall have relation to the remuneration before the injury. The method of computation prescribed in this opinion accomplishes that result.

Our conclusion therefore is that the appeal should be sustained and the decree of the sitting Justice modified by substituting six dollars and ninety-six cents for seven dollars and sixty cents as the weekly compensation to be paid to the dependent widow for a period of three hundred weeks from the sixteenth day of April, 1916, this compensation to be exclusive of the compensation received for disability prior to the death of Herbert E. Hight.

So ordered.

E. S. WOODWARD *vs.* LIVERMORE FALLS WATER DISTRICT.

Androscoggin. Opinion March 6, 1917.

Water districts. "Corporate and Governmental duties" of Municipalities defined. Rule as to whether a Municipality engaged in the business of supplying water to its inhabitants is an undertaking of a private nature. Rule of law as to liability when a Municipality is engaged in a corporate exercise of functions as distinguished from a governmental exercise. Contractural rights and liabilities as between a private user of water and the Municipality furnishing same.

The defendant is a public municipal corporation chartered for the purpose of furnishing a public water supply. The plaintiff is a resident of the district and a customer of the company. The supply of water to the defendant was insufficient by reason of the fault of the company. When the plaintiff refused to pay full rates for such insufficient service the company shut off the water entirely. Mandamus proceedings having compelled the company to restore the service, the plaintiff brings this action to recover damages sustained on account of the insufficient service before shutting off the water, and for those sustained on account of the total shutting off of the same.

Held:

1. The defendant is a public municipal corporation and its powers, duties, and liabilities must be measured by the same standards used in determining the powers, duties and liabilities of other municipal corporations when exercising the same functions, under the same circumstances.
2. In the absence of any special rights conferred, or liabilities imposed, by legislative charter, municipal corporations act in a dual capacity, the one corporate, the other governmental. To the former belongs the performance of acts done in what may be called their private character, in the management of property or rights held voluntarily for their own immediate profit and advantage as a corporation, although ultimately insuring to the benefit of the public.
3. The power of a municipal corporation to construct water works is not a political or governmental power, but a private and corporate one, granted and exercised not to enable it to control its people but to authorize it to furnish, to itself and to its inhabitants, water for their private advantage.
4. The rules of liability applicable to private corporations are applicable to municipal corporations also when they are engaged in the exercise of a corporate or private function.

5. In the case at bar we are concerned with contractual liabilities because the plaintiff's writ declares "that by reason of the contractual relations between them, and the payment by the plaintiff to the defendant of the rates demanded by it, it became the legal duty of the defendant to give him, barring emergencies, a regular and full supply of water.
6. Although a water company may enter into written contracts with its customers upon certain terms yet a contract is also implied where the company furnishes water and the customer uses it and pays for it, without written agreement, the one party being bound in such case to continue the service and the other to pay for it at the established rates.

Action on the case brought by plaintiff against defendant based upon defendant's alleged negligent failure to supply plaintiff with a regular and full supply of water. Plaintiff refused to pay to defendant the regular rates and the defendant shut off the water supply. Mandamus proceedings were brought against defendant to compel the restoration of the water service, and after hearing, the sitting Justice ruled that the shutting off of the water was not justifiable. This action is to recover damages for the failure to furnish a suitable supply of water, as well as damages occasioned by the unjustifiable shutting off of the water. The case was referred to Chief Justice SAVAGE as referee; his findings were accepted by the Justice at nisi prius, to which ruling exceptions were filed by defendant. Exceptions overruled. Judgment for plaintiff in the sum of forty dollars damages, together with the taxable costs of court according to stipulation in report of referee.

Case stated in opinion.

George S. McCarty, for plaintiff.

George C. Wing, George C. Wing, Jr., and I. B. Clary, for defendant.

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

PHILBROOK, J. The defendant is declared by its charter, found in Chapter 390 of the Private and Special Laws of 1907, to be a public municipal corporation. The territorial limits of the district comprise only a portion of the town of East Livermore. The purpose for which the corporation was formed is "supplying the inhabitants of said district and of the towns of Livermore and Jay, and such municipalities, together with the town of East Livermore, with pure water for domestic, sanitary and municipal purposes." The charter

authorizes the corporation to fix and collect rates for water furnished to individuals, firms and corporations; which rates are to be so established as to provide revenue to pay the current expenses of operation, provide for payment of interest on all indebtedness created or assumed by the district, provide a sinking fund, and if any surplus remains at the end of any year it may be paid to the town of East Livermore. The plaintiff is an inhabitant of the district and brings this action to recover damages for the failure of the defendant to furnish him with a sufficient and regular supply of water.

The case was heard before a referee. From the report of his findings we learn that during the summer of 1913, by reason of lack of pressure, the supply of water which came to the plaintiff's house was insufficient at certain hours of the day, both for his own family use and for the use of his tenant in the upper part of the house. The shortage of water occurred during the hours when the defendant was engaged in pumping water through its street mains into its reservoir. This pumping reduced the pressure and thus caused the shortage of supply. Because of this insufficient service the plaintiff refused to pay the regular and usual rates, but offered to pay for what water he had received. The defendant refused this offer and shut off the water from the plaintiff's house for non-payment of rates. Through mandamus proceedings the defendant was ordered to restore service upon payment by the plaintiff of a certain sum of money, found to be due by the Justice who heard the case, but less than the regular rates.

This suit was then instituted as we have said, to recover damages sustained by reason of insufficient service before shutting off the water, and for those caused by shutting off the water entirely. The referee found as matters of fact that the water service rendered to the plaintiff had been insufficient, and not a fair and reasonable performance of its duty; that the insufficiency was caused by the defendant's own conduct; that when the plaintiff refused to pay full charges and, as a consequence thereof, the defendant shut off the water, such conduct on the part of the latter was not justifiable. In order to afford the parties an opportunity to test the legal questions necessarily involved the following finding was made subject to the opinion of the court.

"If the court is of opinion that the defendant is liable for want of sufficient service before it shut off the water entirely, and as well for damages occasioned by unjustifiable shutting off of water, judgment

is to be rendered for the plaintiff for the sum of forty dollars damage. If the defendant is liable for damages occasioned by the shutting off of water, but not for want of sufficient service before that time, judgment is to be rendered for the sum of twenty-one dollars damage. If the defendant is not liable either for the want of sufficient service before, or for shutting off the water, judgment is to be rendered for the defendant."

At the hearing in the court below, upon motion to accept the report, it was ordered that the report be accepted and judgment rendered in favor of the plaintiff for forty dollars damages. Exceptions to these rulings bring the case before us.

In this State, as well as in many others, there has arisen a somewhat general legislative practice of creating sub-divisions of territory and people which are denominated districts, and which are empowered to perform some public function more commonly performed by cities or towns.

"It is beyond question that the state in the exercise of its governmental powers, may create subdivisions of its territory and people, and impose upon the subdivisions the performance of public duties for the good and welfare of the people. Such subdivisions are merely the instrumentalities or agencies appointed by the State to fulfill some part of its own functions, within a limited territory. They are public instrumentalities, or agencies, both because they are doing the state's proper work, and because they are concerned with public uses for the general public benefit. . . . . These territorial subdivisions may be conterminous with city or town limits, or they may embrace more or less than the territory of a city or town. The character of a subdivision depends not upon the limits of its territory, but upon the nature of its public duties, whether municipal or not. For the term municipal relates not only to a town or city, as a territorial entity, but it also pertains to local self government in general, and in a broader sense to the internal government of a state." The same opinion holds that "a body politic and corporate, created for the sole purpose of performing one or more municipal functions, is a quasi municipal corporation and, as we have said, in common interpretation is deemed a municipal corporation." *Augusta* v. *Augusta Water District*, 101 Maine, 148.

This defendant is one of those territorial subdivisions and, as such have been declared to be municipal corporations, its powers, duties,

and liabilities, must be measured by the same standards used in determining the powers, duties and liabilities of other municipal corporations when exercising the same functions, under the same circumstances.

"In the absence of any special rights conferred, or liabilities imposed, by legislative charter, towns and cities act in a dual capacity, the one corporate, the other governmental. To the former belongs the performance of acts done in what may be called their private character, in the management of property or rights held voluntarily for their own immediate profit and advantage as a corporation, although ultimately inuring to the benefit of the public, such as the ownership and management of real estate, the making of contracts and the right to sue and be sued; to the latter belongs the discharge of duties imposed upon them by the Legislature for the public benefit, such as the support of the poor, the maintenance of schools, the construction and maintenance of highways and bridges, and the assessment and collection of taxes." *Libby* v. *Portland,* 105 Maine, 370.

Since this district claims, as a full legal defense to this action, that it is performing only a governmental function for the nonuser or misuser of which it is not liable in a suit at law, we must again call attention to the fact that its only function is that of furnishing a public water supply for itself and its inhabitants, for the contiguous town of Jay and its inhabitants, and for the towns of Livermore and East Livermore. Moreover, by the very terms of its charter, the assumption and performance of this function is entirely voluntary since the acceptance of the creative act depended upon the affirmative will of the voters of East Livermore, the town out of which the district is carved.

The Federal courts have universally held that the power of a city to construct water works is not a political or governmental power, but a private and corporate one, granted and exercised not to enable it to control its people but to authorize it to furnish, to itself and to its inhabitants, water for their private advantage. *Illinois Trust & Savings Bank* v. *Arkansas City,* 76 Fed. Rep., 271; *Pike's Peak Power Co.* v. *City of Colorado Springs,* 105 Fed. Rep., 1; *Omaha Water Co.* v. *City of Omaha,* 147 Fed. Rep., 1.

By what we regard the better reasoning and consequently the greater weight of authority a large majority of the State courts follow the rule laid down in the federal jurisdiction, namely, that a

municipal corporation engaged in the business of supplying water to its inhabitants is engaged in an undertaking of a private nature. *Piper* v. *Madison*, 140 Wis., 311; 122 N. W., 730; *People* v. *Detroit*, 28 Mich., 229; 15 Am. Rep., 202; *Aldrich* v. *Tripp*, 11 R. I., 141; 23 Am. Rep., 434; *Judson* v. *Winsted*, 80 Conn., 384; 68 Atl., 999; *Wagner* v. *Rock Island*, 146 Ill., 139; 34 N. E., 545; *Esberg Cigar Co.* v. *Portland*, 34 Ore., 282; 55 Pac., 961; *Brown* v. *Salt Lake City*, 33 Utah, 222; 93 Pac., 540; *Hourigan* v. *Norwich*, 77 Conn., 358; 59 Atl., 487; *Lynch* v. *Springfield*, 174 Mass., 430; 54 N. E., 871; *Philadelphia* v. *Gilmartin*, 71 Pa. St., 140; *Asher* v. *Hutchinson Water Co.*, 66 Kan., 496; 71 Pac., 813. *Keever* v. *Mankato*, 113 Minn., 55; 129 N. W., 158; *Oakes Manfg. Co.* v. *New York*, 206 N. Y., 221; 99 N. E., 540; 42 L. R. A. New series, 286. We desire to call particular attention to the last cited authority because of its peculiar applicability and because defendant places considerable emphasis and reliance on *Springfield F. & M. Ins. Co.* v. *Keeseville*, 148 N. Y., 46. In the Oakes Manufacturing Company case the same court which rendered the opinion in the Keeseville case noted the differences between the two, saying that the opinion and decision are to be read in the light of the facts which were involved. Having pointed out that in the Keeseville case the defendant was acting in a governmental capacity, and hence not liable, it added "But in the present case, when, in accordance with the powers conferred on it, the city undertook to maintain a municipal water system and to supply water to private consumers at a fixed compensation, it was not acting in such capacity as above stated. (governmental). It entered on an enterprise which involved the ordinary incidents of a business wherein was sold that which people desired to buy, and which might become a source of profit, and under these circumstances it became liable for breach of contract or for negligence, as the proprietor of a private business might become."

In many of the cases above cited questions of negligence were under discussion but they illustrate the dual nature of municipal functions. They are also in harmony with the opinion of this court in *Libby* v. *Portland*, supra.

As to the liability of municipal corporations when engaged in a corporate, as distinguished from a governmental exercise of functions, we must hold that the rules of liability applicable to private corporations are applicable to municipal ones also. Their application in

cases arising from acts of negligence is so clearly discussed and well applied in *Libby* v. *Portland,* supra, that no further discussion is now necessary. In the case at bar we are more concerned with contractual liabilities because the plaintiff's writ declares "that by reason of the contractual relations between them, and the payment by the plaintiff to the defendant of the rates demanded by it, it became the legal duty of the defendant to give him, barring emergencies, a regular and full supply of water." The plaintiff also declared upon a failure of that duty and the referee found as fact, conclusive here as such, that the alleged failure existed by fault of the defendant.

We are therefore confronted with the inquiry as to whether the relations between the parties constituted an implied contract and, if so, whether this defendant is liable in damages for a breach thereof. Would these same relations between the plaintiff and a confessedly private water company raise an implied contract. We think the question must be answered in the affirmative. It is held in 40 Cyc., 793, upon the authority of cases there cited, that although a water company may enter into written contracts with its customers upon certain terms yet "a contract is also implied where the company furnishes water and the customer uses it and pays for it, without written agreement, the one party being bound in such case to continue the service and the other to pay for it at the established rates." The highest court in our country has said that rents imposed for water actually used have been held valid on the ground of an implied contract to pay them. *Provident Institution, etc.,* v. *Mayor, etc., of Jersey City.* 113 U. S., 506; 28 L Ed. 1102. This case was cited with approval in *City of East Grand Forks* v. *Luck,* 97 Minn., 373; 107 N. W., 393; 6 L. R. A. N. S., 198.

A case particularly applicable to the one at bar is found in *McEntee* v. *Kingston Water Co.,* 165 N. Y., 27; 58 N. E., 785. In that case, as in this, the supply of water to the plaintiff lessened in quantity and pressure, and at times wholly failed. Upon the refusal to pay water rates the company shut off the water. The defendant, when injunction proceedings were instituted to restrain the company from shutting off the water, pleaded that no privity of contract existed between it and the plaintiff. The court pointed out the facts that the defendant was charged with the duty of supplying the city of Kingston and its inhabitants with water for domestic and manufacturing purposes; that it had failed to perform this duty in the plaintiff's

case; that the defendant was a quasi public corporation, owing certain duties to the general public; and when it connected the plaintiff's house with its street mains, and furnished him water with more or less regularity for a period of years, an implied contract existed to the effect that if the defendant performed, the plaintiff would pay its rates. The court also held that the duties imposed upon the corporation raised an implied promise of performance; and finally said "The law supposes that the corporation promises or undertakes to do its duty, and subjects it to answer in a proper action for its defaults, whether of nonfeasance or misfeasance." In *Powell* v. *City of Duluth*, 97 N. W., 450, it was held, in distinguishing between taxes and water rates, that in the case of the latter the relation of the city furnishing water to the customer is that of contract. The liability of a water company in damages for breach of a special contract is fully discussed in *Milford* v. *B. R. & E. Co.*, 104 Maine, 233; and we held that the general principles therein discussed are applicable to the case at bar.

To summarize therefore, we hold that the defendant is not acting in a purely governmental capacity but in a private and corporate one; that its powers, duties and liabilities must be measured by the standards used in determining the powers, duties and liabilities of private corporations doing the same business; that an implied contract existed between it and the plaintiff for the breach of which, through its own fault, the defendant is liable.

Exceptions overruled
Judgment for plaintiff in the sum of forty dollars damages, together with taxable costs of court as per stipulation in report of referee.

HERBERT E. ROWE *vs.* J. FRANK GREEN

AND

JAMES F. COLLINS *vs.* J. FRANK GREEN.

Penobscot. Opinion March 14, 1917.

Mortgages of personal property. Consent for sale of mortgaged personal property. R. S., 1916, Chap. 96, Sec. 2, interpreted. Inadmissibility of oral evidence to show consent for sale of mortgaged personal property. Right of mortgagee of personal property to its possession after mortgagee has sold same.

The defendant sold S. many horses during the seasons of 1913 and 1914, in each instance taking back a note secured by a mortgage upon the horses, the instrument being in the nature of a Holmes note which was duly recorded.

S. sold the horses in due course of business to various parties among other purchasers being the plaintiffs here, each of whom bought a pair. Green under his mortgage subsequently took the pair of horses from Rowe, and he received three hundred and seventy-five dollars from Collins in settlement of his security upon the pair Collins had bought.

In an action of deceipt brought by Rowe,

Held:

1. That the mortgage was a valid and subsisting incumbrance, the note secured thereby never having been paid.
2. That evidence was inadmissible to show that there was an oral understanding between Green and S. that the latter could sell and dispose of the horses in any way he saw fit, and that the security was given simply to prevent attachment of the property by other parties with whom S. might be dealing.
3. That R. S., (1916), Chap. 96, Sec. 2, providing that "No consent given by the mortgagee of personal property to the mortgagor . . . . for the sale or exchange of the mortgaged property shall be valid or be used in evidence in civil process unless in writing and signed by the mortgagee or his assigns," is conclusive of the rights of the parties here.
4. That there was no deceit on the part of the defendant, but the representations made by him were in accord with the truth.

In an action for money had and received by Collins to recover the money paid to defendant to release his security, it is *Held:*

That for the reasons given above the incumbrance was valid and there is no legal ground on which, under the facts disclosed, the money paid to release it can be recovered back.

Two actions which are based on substantially the same facts. In the first action, the plaintiff claims tort in the nature of deceit, and also a count for trover. In the other, claim is made in the nature of assumpsit for money claimed as due plaintiff. Defendant filed a plea of general issue in each action. At close of testimony, cases were reported to Law Court with a stipulation as to damages if the findings should be for the plaintiff. Judgment for defendant in each case.

Case stated in opinion.

L. B. Waldron, for both plaintiffs, Rowe and Collins.

B. W. Blanchard, for defendant.

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

CORNISH, J. These two actions, although different in form, are based upon substantially the same facts, which are these. The defendant, Green, was a wholesale dealer in horses and lived in Bangor. One Herbert H. Stubbs lived at Newport and during the seasons of 1913 and 1914 bought many horses from Green and resold them to parties living in his vicinity.

On March 21, 1913, Green sold to Stubbs seven horses, Stubbs giving his note therefor in the sum of $1387, due in two months, secured by a mortgage upon the horses. The instrument was in the nature of a Holmes note and was duly recorded in the town clerk's office at Newport, on March 24, 1913. Among these horses was a pair of greys which in March, 1914, Stubbs sold to the plaintiff Rowe for six hundred and thirty-five dollars cash. Rowe took possession of the horses when bought and kept them until the last of October, 1914, when they were taken by Green.

On May 21, 1914, Green sold Stubbs four other horses, Stubbs giving his note therefor in the sum of four hundred and fifty dollars due in three months and secured, as before, by a mortgage on the horses, which was duly recorded on May 24, 1914. One pair of these horses Stubbs exchanged with the plaintiff Collins for another pair and the sum of one hundred and fifty dollars which was paid, and Collins took the horses into his possession. On January 2, 1915, Collins paid Green three hundred and seventy-five dollars and Green surrendered the Holmes note covering the horses.

ROWE SUIT.

Rowe brings an action of tort against Green, the declaration containing one count in deceit and another in trover. The count in deceit is based upon the allegation that the plaintiff was induced to surrender the horses to Green by Green's representations that he held a valid and subsisting mortgage on the property when in truth and in fact the defendant knew that the mortgage was invalid and of no effect. The count in trover is based upon the taking of the property by Green under the mortgage.

Neither count can be sustained. The mortgage to Green was duly executed and recorded. It was a valid instrument and its record gave constructive notice of its existence to all would-be purchasers. It is not pretended that the debt has ever been paid or the mortgage discharged.

The plaintiff however claims, and Stubbs so testifies, that at the time the mortgage was given there was an oral understanding between Green and Stubbs that the latter could sell and dispose of the horses in any way he saw fit and that the security was given simply to prevent attachment of the property by any other parties with whom Stubbs might be dealing. With this oral understanding the plaintiff attempts to overcome the effect of the mortgage itself, but such an attempt is futile. The statute forbids it. R. S. (1916), Chap. 96, Sec. 2, contains this provision: "No consent given by the mortgagee of personal property to the mortgagor, on and after the first day of January, 1905, for the sale or exchange of the mortgaged property shall be valid or be used in evidence in civil process unless in writing and signed by the mortgagee or his assigns." This statute was evidently designed to meet just such cases as the present. It is consistent with sound public policy. Mortgages given as security for debt, and duly recorded, ought not to be open to such oral attack. The purchaser has merely to examine the records in order to ascertain whether the property is or is not encumbered. Had the plaintiff in this suit taken that precaution he would not have found himself in his present unfortunate predicament.

The defendant therefore had a valid and subsisting and duly recorded mortgage upon the horses that Rowe bought. The representations made by him to Rowe were in exact accord with the truth, and the count in deceit is controverted by the evidence. It is unnecessary to discuss the proposition that the representations com-

plained of, if made, were representations of law and not of fact and therefore not actionable. The defense on its merits goes deeper than that. The representations were true under whichever class they may fall. Nor can the count in trover be maintained. The sale of the mortgaged chattels by the mortgagor revested the right of possession in the mortgagee. *Dean* v. *Cushman*, 95 Maine, 454. The defendant simply took what he had a legal right to take.

COLLINS SUIT.

As before stated, Green made his demand on Collins in October, 1914, for the horses which Collins had bought of Stubbs and after various interviews Collins paid Green the sum of three hundred and seventy-five dollars on January 2, 1915, in settlement, and obtained a discharge of the mortgage. Collins then brought this suit in assumpsit for money had and received to recover the amount so paid. This action also must fail. Green held a valid mortgage on the property. He notified Collins of the fact in October, 1914. Collins then examined the town records and ascertained that it had been duly recorded. He also took legal advice. Finally the settlement was made. For the reasons already stated it is clear that the payment made by Collins was necessary in order to relieve the horses from a valid incumbrance and there is no legal ground on which, under the facts disclosed here, it can be recovered back.

It is unnecessary to consider other points raised in the briefs of counsel. The validity of the mortgage and, under the statute, the inadmissibility of oral evidence to assail it, determine the rights of the parties here.

Judgment for defendant in each case.

JULIA A. BILLS, et als., In Equity,

vs.

H. C. PEASE, Ex'r, et als.

Knox. Opinion March 14, 1917.

Public charities defined. Gifts for purely public charities as distinguished from bequests or devises "solely for benevolent purposes." General nature and character of "public charities." Motive of donor as affecting public charity.

Bill in equity to construe the sixth paragraph of the will of the testatrix which reads as follows:

"As a memorial to my late beloved brother C. F. Wentworth, I give to the town of Appleton, in trust however, the sum of six thousand dollars which is already on deposit in the Rockland Savings Bank, Rockland, Maine, for the purposes hereinafter named, and I hereby direct the executor of this will to deposit such balance as remains in his hands from sale of said property after the payment of all legacies and all expenses, in said bank to the credit of said town to be used for said purposes only, said fund to be known as the C. F. Wentworth Memorial Fund; said fund shall be kept in said bank so long as said bank shall exist, then to be deposited in some safe institution as the selectmen of said town shall determine, the annual interest or income of said fund or so much of the same as shall be found necessary, shall from time to time be distributed or be expended in the purchase of fuel or other necessities of life to be given or sold at low prices as shall be deemed best by said selectmen, to such worthy and industrious persons as are not supported wholly or in part at the public expense but who need some aid in addition to their own labor to enable them to sustain themselves during the inclement season of the year, such aid to be afforded in the most private manner possible and the names of the recipients withheld from the public. . . . . And it is the especial request of the donor to this fund that no idler, loafer, gambler or drunkard receive any benefit of said fund."

Held:

1. That this bequest is not void for indefiniteness or uncertainty.
2. That a charitable bequest, in the legal sense, is a gift to be applied consistently with existing laws for the benefit of the persons or classes specified, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life or by erecting or maintaining public buildings or works, or otherwise lessening the burden of government.

3. That the bequest under consideration contains the necessary elements of a public charity, the relief of the deserving needy in time of stress and is created for the benefit of an unascertained body of individuals, the beneficiaries being a portion or class of the community.
4. The fact that the bequest is made as a private memorial to a relative does not impair its public character or affect its legal validity.

Bill in equity asking for the construction of paragraph six of the will of Helen R. Wentworth. Cause was heard on bill and answers. Questions of law having arisen of sufficient importance to justify the same, the cause, by agreement of parties, was reported to the Law Court for its determination. Bill sustained with costs. Decree in accordance with opinion.

Case stated in opinion.

J. H. Montgomery, for plaintiff.

Charles T. Smalley, for H. C. Pease, Exr. and Inh. of town of Appleton.

F. B. Miller, for Rockland Savings Bank.

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

CORNISH, J. The sixth paragraph of the will of Helen R. Wentworth, late of Appleton, deceased, which this court is asked to construe, reads as follows:

"As a memorial to my late beloved brother C. F. Wentworth, I give to the town of Appleton, in trust however, the sum of six thousand dollars which is already on deposit in the Rockland Savings Bank, Rockland, Maine, for the purposes hereafter named and I hereby direct the executor of this will to deposit such balance as remains in his hands from sale of said property after the payment of all legacies and all expenses, in said bank to the credit of said town to be used for said purposes only, said fund to be known as the C. F. Wentworth Memorial Fund; said fund shall be kept in said bank so long as said bank shall exist, then to be deposited in some safe institution as the selectmen of said town shall determine, the annual interest or income of said fund or so much of the same as shall be found necessary shall from time to time be distributed or be expended in the purchase of fuel or other necessities of life to be given or sold at low prices as shall be deemed best by said selectmen to such worthy and

industrious persons as are not supported wholly or in part at the public expense but who may need some aid in addition to their own labor to enable them to sustain themselves during the inclement season of the year. Such aid to be afforded in the most private manner possible and the names of the recipients withheld from the public. In no event shall any part of the principal be expended for this or any other purpose and all interest on said fund which is unexpended at the end of each fiscal year (meaning the time of settling town accounts) must be added to the principal, and it is the especial request of the donor of this fund that no idler, loafer, gambler or drunkard receive any benefit of said fund." Then follow provisions as to the method of accounting which are immaterial in this discussion.

The question at issue is the validity of this gift, which must be upheld, if at all, as a charitable bequest. Such bequests are always favorites of the law.

The accepted definition of a public charity is that given by the Massachusetts Court in a leading case in these words: "A charity in the legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burden of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature." *Jackson* v. *Phillips*, 14 Allen, 539-556.

The heirs at law contend in the first instance that this bequest is void for uncertainty. This claim is without foundation and the authorities cited by the learned counsel for the plaintiffs are clearly to be distinguished.

Thus in *Chamberlain* v. *Stearns*, 111 Mass., 267, the trust was to be applied "solely for benevolent purposes." The court held that the word "benevolent" as used in that bequest, unqualified and unrestricted by the context, included not only purposes deemed to be charitable under the accepted legal definition but also those objects which bear no relation to a public charity, such as acts dictated by kindness, good will or a disposition to do good, which cannot be

deemed charitable in a technical and legal sense. The bequest was therefore held void.

In *Nichols* v. *Allen,* 130 Mass., 211, there was no restriction to the objects of the trust except that they must be "such persons, societies or institutions as they" (the trustees) "may consider the most deserving." The court held that the word "deserving" denoted worth or merit without regard to need or condition and was not limited to the persons or the objects that come within the well recognized class of charitable uses. That bequest was accordingly held void. These cases illustrate the principle that a trust, which by its terms may be applied to objects not charitable in the legal sense, is too indefinite to be carried out.

In *Kent* v. *Dunham,* 142 Mass., 216, a trust was created "for the aid and support of those of my children and their descendants who may be destitute and in the opinion of said trustees need such aid." Here there was clearly no public object, and one element of a public charity was held to be lacking.

The bequest under consideration contains all the necessary elements of a public charity as before defined. The trust is charitable in its nature, the relief of the needy in time of stress, and is created for the benefit of an unascertained, uncertain and fluctuating body of individuals in which the beneficiaries are a portion or class of the community. Bequests strikingly similar have been upheld: "To be divided among the poor colored people of the city of Lynn." *Atty. Gen.* v. *Goodell,* 180 Mass., 538. "To the suffering poor of the town of Auburn." *Howard* v. *American Peace Soc.,* 49 Maine, 288. "To the town of Skowhegan for the worthy and unfortunate poor and to save them from pauperism." *Dascomb* v. *Marston,* 80 Maine, 223.

In fact, gifts far more general and indefinite in their terms have been sustained as charitable bequests. *Everett* v. *Carr,* 59 Maine, 325; *Fox* v. *Gibbs,* 86 Maine, 87; *Dunn* v. *Morse,* 109 Maine, 254; *Saltonstall* v. *Sanders,* 11 Allen, 446. *Weber* v. *Bryant,* 161 Mass., 400.

The intention of the testatrix is clear. She desired that the objects of her bounty should be not the shiftless, nor the intemperate, nor the gamblers, whose poverty could be relieved by the municipality; but those worthy people in her own town whose means fall just short of a comfortable support and who, though deprived of some of the

necessities of life, would bear their deprivations in silence rather than feel the shame of public pauperism. They may have seen better days and through misfortune or ill health are brought low financially in spite of their industry and yet their pride would forbid their being recipients of public charity. It is this needy class that is embraced within the scope of this bequest, and not only the deserving recipients but also the manner in which the benevolence is to be carried out render the trust a most needed and commendable form of public charity, and one that should be encouraged. Its validity is clear.

In the second place the heirs attack the validity of this bequest because as they allege, the property is devoted to a memorial or monument to the brother of the testatrix. Were this fund to be established for the preservation, adornment and repair of a private monumental structure, it would indeed be void, as creating a use not charitable. *Bates* v. *Bates*, 134 Mass., 110. But the mere fact that a gift for a charitable purpose is intended by the donor also as a private memorial to some relative or friend does not impair its public character or affect its legal validity. *Eliots Appeal*, 74 Conn., 586; *In re Smith Est.*, 181 Pa. St., 109; *Jones* v. *Habersham*, 107 U. S., 174; *Atty. Gen.* v. *Belgrave Hospital*, L. R., 1, Ch. Div., 73 (1910); *Richardson* v. *Essex Inst.* 208 Mass., 311, and note 21 A. & E. Ann. Cas., 1159.

The motive which inspires a lawful act does not make it unlawful, especially when that motive is commendable. The gift here is made in memory of a brother and in that sense, and that alone, is a memorial. Such gifts are common, as in *Webber Hospital Association* v. *McKenzie*, 104 Maine, 320.

Our answer therefore to the question propounded is that the bequest under consideration is valid.

The executor, the Inhabitants of the town of Appleton, and the Rockland Savings Bank are each entitled to recover one bill of costs to be paid out of the estate, and also the three heirs at law who are to be treated as one party.

Decree accordingly.

FRANK H. HASKELL, Admr., D. B. N. C. T. A., In Equity,

vs.

HALL J. STAPLES, et als.

York. Opinion March 14, 1917.

Words showing intention to create a trust, but indefinite and uncertain as to objects of trust. Title of trustee where trust purposes are indefinite and uncertain. Resulting trusts.

Item four of a testator's will contained these words:

"And the residue of my personal estate I leave in trust to said Hall J. Staples to be by him distributed and disposed of as he pleases."

In a bill in equity brought to obtain the construction of this clause it is *Held:*

1. That the testator did not intend to give the absolute ownership of the residue to Staples, but to create a trust therein.
2. That this trust cannot be upheld as a charitable trust, because the fund is not limited to any use that falls within the scope of a public charity as known to the courts.
3. That the attempted trust must fail for uncertainty and indefiniteness. A trust which, by its terms, may be applied to objects not charitable in the legal sense and to persons defined neither by name nor by classes, is too indefinite to be carried out.
4. When a bequest is made in terms clearly manifesting that it shall be taken in trust and the trust is so indefinite that it cannot be carried into effect, the legatee takes the legal title only and a trust results by implication of law to the testator's residuary legatees or next of kin.
5. That in this case there is a resulting trust in favor of the heirs at law and the balance of the estate after the payment of any remaining expenses of administration should be divided among them under the laws governing the distribution of intestate property.

Bill in equity asking for the construction of the will of Nathaniel McLellan, and especially paragraph four of said will. This cause was heard upon bill and answers. Questions of law having arisen of

sufficient importance and doubt, and the parties agreeing thereto, the cause was reported to the Law Court for decision upon the bill and answers. Bill sustained with costs. Decree in accordance with opinion.

Case stated in opinion.

Frank H. Haskell, for plaintiff.

Earle L. Russell, for defendants.

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

CORNISH, J. Nathaniel McLellan of Newfield in the County of York died testate in 1884, his last will and testament being duly proved and allowed on the first Tuesday of August, 1884. Hall J. Staples was appointed executor thereof. The executor converted all the assets of the estate into cash, paid the indebtedness and the bequests and filed two accounts which were duly allowed. The last account showed a balance of $3,054.94 in his hands, which balance is on deposit in the Portland Savings Bank and with accrued dividends now amounts to more than five thousand dollars.

Hall J. Staples being adjudged of unsound mind was removed from the executorship by the Probate Court on May 2, 1916, and on June 5th, 1916, the plaintiff was duly appointed administrator de bonis non with will annexed.

After providing for the payment of debts and making certain devises and legacies the concluding paragraph in the will is as follows:

"Fourth. I give and bequeath to my nephew Hall J. Staples of Buxton in the County of York five hundred dollars, and the residue of my personal estate I leave in trust to said Hall J. Staples to be by him distributed and disposed of as he pleases and I do hereby appoint said Hall J. Staples to be executor of this my last will and testament, hereby revoking all former wills by me made."

What disposition shall be made of the residuum? Does it belong to Staples personally, or was it given in trust and if so has the trust failed so that the executor is authorized to distribute the same as intestate property among the testator's heirs at law? These are in substance the questions propounded to this court, and under well settled principles of construction it is clear that distribution must be made among the heirs.

That the testator did not intend to give the residue outright to Staples is apparent.

In the first place in this same paragraph he makes an absolute bequest to Staples of five hundred dollars. If he had intended to give him the residue also, no reason can be conceived why he should have divided his gift into two parts. The carving out of the five hundred dollars and making it an absolute gift and then leaving the balance to him in trust makes a sharp distinction between the nature of the two estates intended to be conveyed. When other and separate provision has been made for the legatee, it has been held to indicate an intention on the part of the testator, not to bequeath the beneficial interest in other property, the legal title to which is also given to the legatee. *Briggs* v. *Penney*, 3 DeG. & Sm., 525, aff., 3 McN. & G., 546; *In re Keenan*, 107 App. Div., 234, 94 N. Y. Supp., 1099; *Nichols* v. *Allen*, 130 Mass., 211.

Again the words "I leave in trust" coupled with "to be distributed and disposed of as he pleases" leave no room for doubt as to the testator's intention. They are meant to create a trust and not to grant an absolute ownership. The legal title is conveyed but not the beneficial. Perry Tr. Section 158; *Fitzsimmons* v. *Harmon*, 108 Maine, 456, and note 37 L. R. A., N. S., 400.

The attempted trust however, must fail for uncertainty and indefiniteness. "A trust which by its terms may be applied to objects not charitable in the legal sense, and to persons not defined by name or by class, is too indefinite to be carried out." *Nichols* v *Allen*, 130 Mass., 211. The bequest in that case was in these words: "to be by them distributed to such persons, societies or institutions as they may consider most deserving." The trust was declared void. Other illustrations of the same principle are these: "Upon trust to dispose of the same at such times and in such manner and for such uses and purposes as they shall see fit, it being my will that the distribution thereof shall be left entirely to their discretion." *Fowler* v. *Garlike*, 1 Russ. & Mylne, 232; "Upon trust to pay her debts and legacies and to dispose of the ultimate residue to such objects of benevolence and liberality as the Bishop in his own discretion shall most approve of." *Morice* v. *Bishop of Durham*, 10 Ves., 521. "To my brother. . . . in trust to be disposed of by him as I have heretofore or may hereafter direct him to do" and the beneficiaries were disclosed neither in the will nor in any other document that

could be regarded as a part of it. *Heidenheimer* v. *Bauman,* 84 Tex., 174, 19 S. W., 382; "In trust . . . . to expend solely for benevolent purposes in their discretion." *Chamberlain* v. *Stearns,* 111 Mass., 267; "To distribute the same in such manner as in his discretion shall appear best calculated to carry out wishes which I have expressed to him or may express to him." *Olliffe* v. *Wells,* 130 Mass., 221. "To divide as seems to her best, as I have told her my wishes in the matter mentioning all relatives including my nephews." *Fitzsimmons* v. *Harmon,* 108 Maine, 456.

The bequest in the will under consideration. "I leave in trust to Hall J. Staples to be by him distributed and disposed of as he pleases" is certainly no less uncertain and indefinite than the illustrations above given. It cannot be upheld as a charitable trust because the fund is not limited to any use that falls within the scope of a public charity as known to the courts and as defined in *Jackson* v. *Phillips,* 14 Allen, 539. This definition has been followed and applied in this State in the very recent case of *Bills* v. *Pease,* 116 Maine, 98. Clearly the attempted trust must be held to fail.

Here comes in another well settled rule that when a bequest is made in terms clearly manifesting an intention that it shall be taken in trust and the trust is so indefinite that it cannot be carried into effect, the legatee takes the legal title only, and a trust results by implication of law to the testator's residuary legatees or next of kin. *Nichols* v. *Allen,* 130 Mass., 211; *Fitzsimmons* v. *Harmon,* 108 Maine, 456, and the other authorities cited above.

Answering therefore the questions propounded by the executor we would say, first, that Hall J. Staples is not entitled to the residue of the personal estate bequeathed under clause four in the will of Nathaniel McLellan; and second, that there is a resulting trust in favor of the heirs at law of said McLellan and that the balance of the estate after payment of any remaining expenses of administration, should be divided among them under the laws governing the distribution of intestate property in this State.

Bill sustained with one bill of costs for the plaintiff and one for the defendants. Reasonable counsel fees shall also be allowed by the sitting Justice to attorneys on both sides to be paid from the estate and allowed to the plaintiff in his account.

Decree accordingly.

MOSES B. WADLEIGH

vs.

KATAHDIN PULP & PAPER COMPANY.

Penobscot. Opinion March 24, 1917.

Meaning of and what form of actions may be included in an "action on the case." Form of action to be brought under R. S., 1916, Chap. 47, Sec. 6. Necessity of proving demand in such actions. Rule at common law as to enforcing payment for services rendered where there was no request, express or implied.

1. An action on the case includes assumpsit as well as tort. Its distinguishing characteristic is that all the facts upon which the plaintiff relies must be stated in the declaration.
2. The "action on the case" provided for in R. S., (1903), Chap. 43, Sec. 6, R. S., 1916, Chap. 47, Sec. 6, need not necessarily be in form ex delicto instead of in form assumpsit.
3. Where, in an action brought under the provisions of said statute to recover reasonable compensation for driving the defendant's pulp wood which had become so intermixed with the plaintiff's logs that it could not be conveniently separated therefrom, the declaration sets out in a special count all facts necessary to make out a cause of action under the statute, and then concludes, "Wherefore by force of the statute in such case made and provided, the plaintiff is entitled to have and recover of the said defendant a reasonable sum for driving its said logs and pulp wood, as aforesaid, ... for which, by said statute, defendant became liable and promised plaintiff on demand," *held*, that such declaration is sufficient in form to permit a recovery thereunder for the driving upon proof of the facts alleged.
4. It is a well settled general rule, that if A. performs services beneficial to B. under circumstances that negative the idea that the services are gratuitous, and B. knows it, and permits it, and accepts the benefits thereof, A. may recover of B. in an action upon a quantum meruit, what the services were reasonably worth. But that rule is sustainable and applicable only upon the theory that facts and circumstances are proved sufficient to justify the inference that B requested the services, and intended to pay for them, and, therefore, the law implies a promise on his part to pay for them.
5. Where there is no promise to pay, the common law gives no right to enforce payment for services rendered to another without his request express or implied; for in such case no promise to pay can be implied.

6. Where it was for plaintiff's own interest to drive the defendant's pulp wood that had become so intermixed with his own logs that it could not be conveniently separated therefrom, and he had the right by statute to drive it without request, and without the defendant's consent, and even against its wish, and with the further right to recover a reasonable compensation from the defendant for so doing, it is not to be inferred that he drove the pulp wood with his logs because the defendant requested him to do so, even though the driving of it may have benefited the defendant.
7. Where the plaintiff's declaration contained a special count in which were alleged all the facts necessary to be proved for the recovery under the provisions of R. S., (1903), Chap. 43, Sec. 6, of a reasonable compensation for driving the defendant's pulp wood which had become so intermixed with his logs that it could not be conveniently separated therefrom, which special count was followed by a count upon a quantum meruit for labor performed for the defendant, and where there was a sharp issue at the trial whether the plaintiff made the demand required by the statute, and the jury were instructed that if they did not find a demand proved or a waiver of the demand shown, but did find that the plaintiff in driving the pulp wood rendered the defendant a valuable service and conferred on it a valuable benefit, then the plaintiff is entitled to recover what the jury would consider a reasonable compensation for those services under the quantum meruit count in the writ, *held*, that the instructions were erroneous as applied to the facts and circumstances of the case.
8. The plaintiff's claim as presented at the trial plainly was to recover the reasonable compensation provided for by the statute for driving the pulp wood under the authority of the statute, and the instructions enabled the jury to give the plaintiff such compensation, without proof of the demand required by the statute. And they may have done so. The instructions, therefore, were prejudicial to the defendant.

Action on the case in the nature of assumpsit brought under R. S., 1903, Chap. 43, Sec. 6, same Statute R. S., 1916, Chap. 47, Sec. 6. Defendant filed a plea of general issue. Verdict for the plaintiff in the sum of $912.94. Motion for new trial filed by defendant, and also exceptions to certain rulings of presiding Justice. Exceptions sustained as stated in opinion.

Case stated in opinion.

Gillin & Gillin, for plaintiff.

Ryder & Simpson, for defendant.

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

KING, J. Action to recover compensation for driving certain of the defendant's pulp wood down the Penobscot river to its destina-

tion at the booms of the company at Lincoln, which pulp wood had become intermixed with the plaintiff's logs in said river so it could not be conveniently separated; and also to recover wages and expenses of the plaintiff's men furnished the defendant to assist in separating the pulp wood from the logs at the sorting gaps at the defendant's booms. The verdict was for the plaintiff for $912.24, of which sum $408 is the amount found by the jury for the driving of the intermixed pulp wood. The case comes up on defendant's exceptions and motion for a new trial.

R. S. (1903) Chap. 43, Sec. 6, (same Statute R. S., 1916, Chap. 47, Sec. 6), provides: "Any person, whose timber in any waters of the State is so intermixed with the logs, masts or spars of another, that it cannot be conveniently separated for the purpose of being floated to the market or place of manufacture, may drive all timber with which his own is so intermixed, toward such market or place, when no special and different provision is made by law for driving it; and is entitled to a reasonable compensation from the owner, to be recovered after demand therefor on said owner or agent, if known, in an action on the case; he has a prior lien thereon until thirty days after it arrives at its place of destination, to enable him to attach it; and if the owner cannot be ascertained, the property may be libeled according to law, and enough of it disposed of to defray the expenses thereof; the amount to be determined by the court hearing the libel."

The declaration contains three counts. The first is a special count wherein are set out all the essential facts relied upon by the plaintiff to recover, under the provisions of the statute quoted, a reasonable compensation for the driving of the pulp wood, and this count also declares specially for the services and expenses of the plaintiff's men furnished to assist at the sorting gaps in separating the pulp wood from the logs and turning it into the defendant's booms. The second count is upon a *quantum meruit* for labor performed for the defendant. And the third count is for money had and received.

1. The defendant contended at the trial that the remedy of "an action on the case" prescribed by the statute for the recovery of compensation for driving intermixed logs and lumber is necessarily an action in form ex delicto. It is conceded that the action in this case is not an action ex delicto but is in form an action of assumpsit, and the defendant requested the presiding Justice to instruct the jury

that the plaintiff could not recover in this action of assumpsit any compensation for the driving of the pulp wood. That request was denied, and we think rightfully denied.

It is familiar knowledge that very early in the history of the common law approved forms of writs, applicable to the usual and common causes of action, were preserved in the register of writs for use by the persons charged with the duty of issuing writs. When, however, no approved form of writ was found adapted to a plaintiff's particular cause of action, he was then permitted to bring a special action on his own case. And to this fact is attributed the origin of the "action on the case." 6 Cyc. Law and Procedure, 683.

Unquestionably an action on the case includes assumpsit as well as an action in form ex delicto. In *Hathorn* v. *Calef*, 53 Maine, 471, 477, Danforth J., after quoting from Chitty on Pleading, from Bacon's Abridgement, and from Stephen on Pleading, as to the origin, the signification, and the distinquishing characteristic of the "action on the case," said: "From these authorities which are believed to be sound, the action on the case includes assumpsit as well as tort, and, when this remedy is provided by statute, we know that all the facts must be set out in the declaration, but whether in the form of assumpsit, or tort, must be decided from the nature of those facts. It may be true that, when an action on the case is mentioned, we usually understand one of tort, for usually violations of statute provisions are tort." Courts in other jurisdictions, and text writers, have also stated that the question whether a declaration, in an action on the case, should be in form assumpsit, or in tort, is to be determined from the nature of the facts to be stated and established to make out the cause of action.

Undoubtedly logs of different owners may and do become intermixed in the waters of the State, so that they cannot be conveniently separated, without the fault of either owner. And we do not perceive that this statutory provision, giving an owner of logs the right to drive towards their destination other logs which have become so intermixed with his that they cannot be conveniently separated, and to have a right of action against the owner thereof to recover reasonable compensation therefor, necessarily involves any element of tort or active wrong on the part of the defendant in such an action. The defendant in such action may be wholly blameless for the intermixing of the logs and lumber, and yet the provisions of the statute be

applicable just the same. If the owner of logs wrongfully obstructs a floatable stream with his logs and timber whereby another log owner is hindered in his lawful right to use the stream as a common highway, he becomes liable to the latter in a common law action of tort for the damages resulting from his negligent or wrongful use of the stream. But there is no provision in this statute the violation of which by a log owner would be a tort. It does not provide that a log owner must so control and drive his logs that they will not become intermixed with the logs of another. It merely provides that when the logs of different owners do become intermixed, from whatever cause, so that it is reasonably necessary that they should be driven along together as one drive, they may be so driven, and the owner who does it may recover of the other a reasonable compensation therefor. It seems plain to us that the purpose of the statute was to prevent the useless expense, and to avoid the vexatious delay, that would be occasioned in separating intermixed logs and timber in the floatable waters of the State. It authorizes a log owner to do what otherwise he would have no right to do, that is, to drive the logs of other owners, which become so intermixed with his that they cannot be conveniently separated, towards their place of destination, whether the owner assents or not, and it also secures to him a reasonable compensation for so doing. It does not seem, therefore, that the remedy by "an action on the case," provided for in this statute to recover such reasonable compensation, is predicated upon the idea of negligence or the neglect of any duty, statutory or otherwise, on the part of the defendant log owner. The statute gives the plaintiff log owner the *right* to drive the defendant's logs with which his own have become so intermixed, irrespective of the cause of the intermixing, and it imposes an *obligation* on the defendant log owner to pay the plaintiff a reasonable compensation therefor to be enforced after demand in "an action on the case." We think there is no element of tort or active wrong on which that statutory obligation to pay the reasonable compensation is predicated, and, therefore, we see no reason why the action should necessarily be in form ex delicto instead of in form assumpsit. We think it may be in either form. The action on the case includes both. Its distinquishing characteristic is that all the facts upon which the plaintiff relies must be stated in the declaration. *Hathorn* v. *Calef*, supra. In the case at bar the special count in the declaration sets out all the facts necessary to

make out a cause of action under the statute, and then concludes: "Wherefore, *by force of the statute in such case made and provided,* the plaintiff is entitled to have and recover of the said defendant a reasonable sum for driving its said logs and pulp wood, as aforesaid, ... for which, *by said statute,* defendant became liable and promised plaintiff on demand."

Notwithstanding that the plaintiff's special count concludes in assumpsit, it is the opinion of the court that it is sufficient in form to permit a recovery thereunder for the driving, upon proof of the facts therein alleged.

2. There was a sharp issue at the trial whether any demand for the driving was made before this action was brought. The defendant denied that a demand was made, and the plaintiff claimed that it was made, but, if not, that it was waived. The court clearly presented to the jury those issues as to demand and waiver of demand, and further instructed the jury as follows: "The plaintiff goes still further and says to the defendant, if you insist that this action cannot be brought under my first count, because you do not admit demand or waiver, then I say to you, the plaintiff says in substance, that the statute is simply declaratory of a common law principle, and in this statute adds to the declaratory principle the right of lien. And so the plaintiff says, I have put in my writ another count, which he says is a quantum meruit. The plaintiff says that, regardless of statute, I can bring my action and maintain it under the quantum meruit. That is, upon the principle that if A renders beneficial services to B and B knows it, and accepts the benefit of those services, that B is bound to pay. So I say, the plaintiff says that if the defendant is going to stand upon his legal rights of a demand under the statute, then we will go to the other count in our writ. . . . I should have said that as the statute requires a demand for recovery under the statute, that the plaintiff must satisfy you by a fair preponderance of all the evidence, either that a demand was made, or by its conduct the pulp company waived the demand. And so I say, coming back to my broken thread, the plaintiff says that if the defendant insists upon the letter of the law that we cannot maintain our action without a demand proved or a waiver of the demand shown, then we go to our quantum meruit. And so the plaintiff says that if the jury is satisfied by a fair preponderance of the evidence that the plaintiff in driving the logs down the river rendered the

defendant a valuable service, and conferred on it a valuable benefit in driving the logs of the defendant sixteen miles down the river to the mill at Lincoln, then the plaintiff is entitled in this action to recover of the defendant what the jury would consider a reasonable compensation for these services under the quantum meruit count in the writ. And I give you that instruction as to the quantum meruit. I also give exceptions to the defendant if they so desire." And further on in the charge the court said: "If you find there was not a demand, you may proceed to the question of quantum meruit, which involves this question of fact for you to determine: Was the defendant pulp company the recipient of beneficial services at the hands of this plaintiff? In other words, did it benefit the pulp company to have those logs driven down in this way? You are not forgetting of course that the pulp company strenuously insists that the benefit was more to Mr. Wadleigh—more to Mr. Wadleigh than it was to them, don't forget that contention. I say, you will determine whether this driving of the logs down the river by the plaintiff was a benefit or not. And if you should not find a demand under the statute, if you should find that the defendant company received beneficial services under the rule I have given you, that if A. performs beneficial services to B. and B. knows it and accepts the benefit of the services that B is bound to pay for them. I say if you find they were a benefit then you are to determine the damages and assess this claim for plaintiff."

We have thus quoted in full the instructions to the jury as to the plaintiff's right to recover for the driving under his quantum meruit count in order that the question whether those instructions constitute prejudicial error might be more clearly disclosed, applying the instructions to the plaintiff's claim presented in the trial.

It is a well settled general principle, that where one party renders services beneficial to another, under circumstances that negative the idea that the services were gratuitous, and the party to whom the services are rendered knows it, and permits it, and accepts the benefit of those services, he is bound to pay a reasonable compensation therefor. That is because such facts and circumstances justify a presumption that the party to whom the services are rendered must have requested them, and must intend to pay for them, and, therefore, the law implies a promise on his part to pay for them.

But we think the case at bar is not quite within the scope of that general principle. The plaintiff had a right by statute to drive the defendant's pulp wood as he did, if it had become so intermixed with his logs that it could not be conveniently separated therefrom. The defendant could not prevent it. No request on the part of the defendant was necessary, and under those circumstances we think it is not to be inferred. "This statute gives a party a right to enforce a claim for services supposed to be rendered for the benefit of another. but without his request, and sometimes without his knowledge, and possibly against his wishes. Such a statute is in derogation of the common law." *Lord* v. *Woodward*, 42 Maine, 497. The common law gives no right to enforce payment for services rendered without a request, express or implied, because in such case no promise to pay can be implied. It is not to be doubted, we think, that the plaintiff drove the defendant's pulp wood because he had a right to do so under the statute provisions, and not because of any request or assent, express or implied, on the part of the defendant. It is plain from the record that the plaintiff's claim at the trial was to recover the reasonable compensation provided for in the statute for driving the pulp wood under the authority of the statute. To sustain that claim it was incumbent upon him to prove the demand provided for by the statute. That he undertook to do. But the jury were instructed that if they did not find a demand for the services of driving was made, "then the plaintiff is entitled in this action to recover of the defendant what the jury would consider a reasonable compensation for these services under the quantum meruit count in the writ." We think the instructions as to the plaintiff's right to recover under his count upon a quantum meruit must be held to be error prejudicial to the defendant, and that its exceptions thereto must be sustained. Those instructions enabled the jury to give the plaintiff "reasonable compensation" for driving the defendant's pulp wood, under the authority of the statute, but without proof of the demand therefor required by the statute. And the jury may have done so.

The exceptions to the instructions as to the plaintiff's right to recover under his quantum meruit count being sustained, it becomes unnecessary to consider the motion, for inasmuch as we are of opinion that the plaintiff may recover for the driving under the special count therefor in his writ, upon making proper proof, we would not be authorized under the motion to suggest a remittitur of so much of the

verdict as represents the driving. The other exceptions appear to relate to the sufficiency of the evidence and need not now be passed upon. The entry will therefore be,

Exceptions sustained as stated in the opinion.

HOWARD COAL COMPANY

vs.

MELVIN H. SAVAGE

and

BATH IRON WORKS, LTD., Trustee. (Appellant)

Sagadahoc. Opinion March 29, 1917.

Effect of successive attachments under R. S., 1916, Chap. 91, Sec. 55.

Action of assumpsit on account annexed with trustee process brought in the Bath Municipal Court. The writ was served three times upon the alleged trustee; the first day of April, the day of the first service, there was due and payable to the principal defendant for his labor for the week next preceding said service the sum of $10.93; at the date of the second service, to wit, the 8th day of April, 1916, there was due and payable to the principal defendant for his labor for the week next preceding said service the sum of $11.76; at the date of the third service, to wit, the 15th day of April, there was due and payable to the said principal defendant as wages for his personal labor for the week next preceding said service the sum of $9.55. All of these sums were paid by the trustee to the principal defendant. Upon hearing, judgment was rendered against the trustee and from that judgment the trustee appealed to the next term of the Supreme Judicial Court.

Held:

1. That under R. S., 1916, Chap. 91, Sec. 55, Paragraph 6, the trustee was not chargeable.
2. That where successive trustee attachments are made, the amount so attached cannot be added to avoid the exemption allowed the principal debtor but shall be treated separately and the exemptions allowed the debtor shall apply to each amount so trusteed.

Action of assumpsit on account annexed with trustee process. Judgment was rendered against principal defendant and trustee, from which judgment trustee entered an appeal to Supreme Judicial Court. Case reported to Law Court upon agreed statement of facts, the Law Court to render such final decision thereon as law and justice require. Trustee discharged with costs.

Case stated in opinion.

Walter S. Glidden, for plaintiff.

Joseph M. Trott, for alleged trustee.

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

HALEY, J. This is an action of assumpsit on account annexed for coal furnished the defendant, brought in the Bath municipal court, where judgment was rendered against the principal defendant for $9.30 damages and $5.70 costs. Upon a disclosure upon the same day the trustee was charged for $12.24, less it's costs. Judgment was rendered accordingly, and from that judgment the trustee appealed to the next term of the Supreme Judicial Court for the County of Sagadahoc, at which court the case was reported to this court upon an agreed statement of facts as to the liability of the trustee, from which it appears that the defendant was in the employment of the trustee as a watchman, and that the trustee, in compliance with the statute, paid the wages earned by the employees up to and including Wednesday of each week, upon the following Saturday. The writ was served three times upon the alleged trustee. The first day of April, the day of the first service, there was due and payable to the principal defendant for his personal labor for the week next preceding said service the sum of $10.93, and the same was not held by the said alleged trustee, but was paid over to the principal defendant, as the trustee claims, in compliance with the statute. At the date of the second service upon the trustee, on the 8th day of April, 1916, there was due and payable to the principal defendant for his personal labor for the week next preceding said service the sum of $11.76, and the same was not held by the said alleged trustee, but was paid over to said principal defendant in compliance, as he claims, with the statute. The writ was served the third time upon the alleged trustee on the 15th day of April, and there was due and payable to the said principal defendant

as wages for his personal labor for the week next preceding said service the sum of $9.55, and the same was not held by said alleged trustee, but was paid over to said principal defendant, as the trustee claims, in compliance with the statute.

Paragraph 6 of Sec. 55, Chap. 88, R. S., provides, no person shall be adjudged a trustee "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."

As said by the court in *Pike* v. *Bannon & Trustee*, 115 Maine, 124, "the history of this sub-section of Sec. 55, Chap. 88, R. S., as shown in it's various amendments and the decisions of the court, make it clear that this sub-section exempts the amount due the principal defendant for his personal labor, or that of his wife or minor children earned during a period not exceeding one month prior to the service of the 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 personal labor, exceed the sum of $20, and when earned within a period more than one month prior to said service, the amount shall be limited to $10."

It is urged by counsel for plaintiff, that the principal defendant is not entitled to an exemption of $20 upon each of the successive trustee attachments, but that the amounts due him at the time of each service should be added together, which makes a total of $32.44, all of which were admittedly earned within a month and the $20 exemption deducted therefrom. The decisions of this court are to the contrary. In *Haynes* v. *Thompson & Trustee*, 80 Maine, 125, the court held: "The trustee cannot be charged for the sum exempted for personal labor by R. S., viz: twenty dollars earned within one month prior to each service on the trustee." In *Quimby* v. *Hewey*, 92 Maine, 129, there were three services on the trustee. At the time of the first service there was nothing due the defendant. At the time of the second service there was $11.86 due, and, at the time of the third service, $16.31, and the court held that these sums, being less than twenty dollars at the time of each service, were exempt from attachment.

In *Collins* v. *Chase*, 71 Maine, 435, a case in which an attempt was made to hold under a second service what was exempt at the time of

the first service, it was held that the exemption still continued, the court saying: "The provision authorizing further service upon trustees may have its full fair effect, without applying it to cases in which the garnishee's indebtedness would have been securely held by the first service, had it not been specially exempt by another section of the same statute. We are not willing to hold that a creditor whose demand though otherwise valid . . . . may take away the small sum which the legislature has granted to the laborer's necessities, by manipulation of legal process under another section designed to accomplish other and legitimate ends. We think on the contrary that what would have been lawfully attached under the first service on the trustee, had it not been specially exempted by statute from attachment, ought not to be held under a further service, merely because it was retained in the garnishee's hands by means of the first."

In *Hall* v. *Hartwell & Trustee*, 142 Mass., 447, the same claim was urged by the plaintiff as is urged in this case. The Massachusetts statute at that time exempted ten dollars from attachment on trustee process, and the court stated: "The plaintiff contends, although the writ was served upon the trustee several times, the various services constituted one attachment; and that, when the second and all later services were made, the trustees were bound to bear in mind that they had already reserved and paid over eight dollars to the principal defendant (that being the amount due him at the time of the first service), and that they were only entitled to reserve and pay over ten dollars in all . . . . But we think the statute should receive a broader construction. The intention was, to enable persons whose earnings are small and often payable to receive the whole of them, without the risk of their being intercepted by the trustee process. Otherwise, a diligent creditor, by making numerous successive services, could reach and appropriate a large portion of the earnings of persons who might be dependent upon the immediate product of their labor and the necessary support of themselves and their families. If the defendant had worked at the rate of eight dollars a week for four different persons in succession, a week for each, it would hardly be contended that the plaintiff, by summoning each of them as trustee as soon as his indebtedness to the defendant accrued, would hold the surplus of their united indebtedness to him, after reserving ten dollars. The defendant should not be any worse

off because he continued in the employment of the same firm. It is more conformable to the obvious intention and policy of the statute to hold that ten dollars should be reserved at the time of each service. And such construction is in accordance with the spirit of the cases cited by the trustees." Citing among other cases *Collins* v. *Chase*, supra.

The above cases are conclusive as to the rights of the parties in this case.

Trustee discharged with costs.

VAN BUREN LIGHT & POWER COMPANY

vs.

INHABITANTS OF VAN BUREN.
No. 1179

VAN BUREN LIGHT & POWER COMPANY

vs.

INHABITANTS OF VAN BUREN
No. 1180.

Aroostook. Opinion March 30, 1917.

Power of municipalities to contract. How such contracts shall be made. Right of agents or representatives to make contracts binding upon town without vote thereon. Power of municipalities to ratify acts of agents.

Two actions brought to recover on an account annexed, and quantum meruit, for electric current and electric lights furnished the inhabitants of the town of Van Buren. The first writ seeks to recover for lighting the streets and certain public buildings in Van Buren from April 1, 1915, to June 26th of the same year, and the second from November 27, 1915, to February 29, 1915. The cases are before this court upon report.

The plaintiff claims that on the 19th day of July, 1911, it entered into a contract with the inhabitants of the town of Van Buren, acting by a committee, binding the parties thereto for a period of fifteen years from the date the plant began operation, to furnish the town the electric lights specified, and that the contract provided in default on the part of said inhabitants to make payment as stipulated that the light company might, at its option, shut off the street lights until payment for all arrears to said light company was made. From October, 1911, until the first day of April, 1915, the defendants paid monthly for electric service at the prices stipulated in the alleged contract. In June, 1915, there being due, as claimed by the plaintiff, the payments for lights from April first to June, and the town refusing to pay therefor, they exercised their right under the contract and stopped furnishing the lights. In 1915 certain residents of the town of Van Buren proceeded to erect, at their own expense, an electric light plant, which duplicated the electric lighting system of the plaintiff, and made arrangements to obtain their current from the same source as the plaintiff, and in the fall of 1915 the plaintiff, who during the summer shut off their service, again began on the 27th day of November to light the streets of Van Buren, and thereafterwards the second company started their plant and furnished lights for the street and public buildings by virtue of an alleged contract with the town.

It appears that from the 22d day of November to the date of the purchase of the two writs now under consideration, both the plaintiff and the associates above described, or their successors, have each continued to furnish a set of street lights for operation in the defendant town, and that, at about the time of the annual meeting of defendant town, in 1916, the town agreed to purchase the plant constructed by said associates.

Held:

1. In an action against a town by a light and power company for electric lights furnished, the burden was on plaintiff to prove the authority of the persons signing the contract on behalf of the town.
2. That the authority to so act must be proven by a vote of the town at a meeting which the record must show was legally called and that there was an article in the town warrant authorizing the appointment of a committee and giving it the authority to act for the town in making the contract.
3. The particular subject matter upon which action is called for in a town meeting must be distinctly specified in the notice calling the meeting. If any prescribed step is omitted, the inhabitants, and hence the town itself, are not bound by the results. Whoever deals with the town or its officers must bear in mind these bulwarks about the property of the inhabitants of the town and make certain, not only that the proposed contract is clearly within legal power of the town, but also that such power is exercised in a legal manner.
4. A municipal corporation may ratify the unauthorized acts and contracts of its agents and officers which are within the corporate powers but not otherwise.

Two actions of assumpsit upon account annexed and quantum meruit to recover for electric current and electric lights furnished defendant town under an alleged contract entered into between plaintiff company and agents or representatives of defendant town. It was agreed that defendant was entitled to all the defenses that it might have made under any form of pleading. Questions of law having arisen, the parties agreeing thereto, the case was reported to the Law Court for determination upon so much of the evidence as legally admissible, the Law Court to render such judgment as the law and evidence require. Judgment for defendants.

Case stated in opinion.

Hersey & Barnes, and R. W. Shaw, for plaintiff.

Peter C. Keegan, and Archibalds, for defendant.

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

HALEY, J. Two actions brought to recover on an account annexed, and quantum meruit, for electric current and electric lights furnished the inhabitants of the town of Van Buren. The first writ seeks to recover for lighting the streets and certain public buildings in Van Buren from April 1, 1915, to June 26th of the same year, and the second from November 27, 1915, to February 29th, 1916. The cases are before this court upon report.

On the 19th day of July, 1911, the plaintiff claims that it entered into a contract with the inhabitants of the town of Van Buren, acting by a committee, binding the parties thereto for a period of fifteen years from the date the plant began operation, to furnish the town the electric lights as specified, and that the contract provided on default on the part of said inhabitants to make payments as stipulated that the light company might, at it's option, shut off the street lights until payment for all arrears to said light company was made. From October, 1911, until the first day of April, 1915, the defendants paid monthly for electric service at the prices stipulated in the alleged contract. In June, 1915, there being due, as claimed by the plaintiff, the payments for lights from April first to June, and the town refusing to pay therefor, they exercised their right under the contract and stopped furnishing the lights. In 1915 certain residents of the town of Van Buren proceeded to erect, at their own expense, an electric

light plant, which duplicated the electric lighting system of the plaintiff, and made arrangements to obtain their current from the same source as the plaintiff, and in the fall of 1915 the plaintiff, who during the summer shut off their service, again began on the 27th day of November to light the streets of Van Buren, and thereafterwards the second company started their plant and furnished lights for the street and public buildings by virtue of an alleged contract with the town.

It appears that, from the 22d day of November to the date of the purchase of the two writs now under consideration, both the plaintiff and the associates above described, or their successors, have each continued to furnish a set of street lights for operation in the defendant town, and that, at about the time of the annual meeting of defendant town in 1916, the town agreed to purchase the plant constructed by said associates.

Several questions as to the legality of the alleged contract arise, but it is unnecessary to decide them because there is no contract proved. The alleged contract is claimed to have been proved by the oral testimony of one of the committee who signed the contract, together with others as agents of the town; and the alleged contract describes them "as a committee duly chosen, and qualified, on behalf and as the agents of said inhabitants of said town of Van Buren, hereunto duly authorized by a vote of said inhabitants of said town, taken at a special town meeting of said inhabitants duly called and held in said town on the 19th day of July, A. D. 1911, parties of the second part"; and they signed the alleged contract "as a committee and agents of said town duly chosen, qualified and authorized, by a vote of said town as aforesaid, for and in behalf of said inhabitants of said town of Van Buren on the day and year first above written." It was no part of the defendant's case to prove that the persons signing the contract as a committee and agents of the town, did not have authority to make the contract. The burden was upon the plaintiff to prove the authority, and it is admitted that, if the authority was possessed by them, it was by virtue of a vote of the town. The only proof of the authority was the record of the town meeting. It being within the jurisdiction of the court, it was the best evidence and would show whether the town meeting was legally warned or not. It would show whether there was an article in the warrant that authorized the appointment of a committee, and it would show the authority

conferred upon the committee, and it would have shown whether the so called committee were authorized to execute the contract that they attempted to execute, and whether they had exceeded their powers or not. As said by EMERY, J., in *Lovejoy* v. *Foxcroft*, 91 Maine, 370, in reference to town meetings: "The particular subject matter upon which action is called for must be distinctly specified in the notice. If any prescribed step is omitted, the inhabitants and hence the town itself are not bound by the result. Whoever deals with the town or its officers must bear in mind these bulwarks about the property of the inhabitants of the town, and make sure before hand not only that the proposed contract is clearly within the legal powers of the town, but also that such power is exercised in the legal mode. . . . . It must be apparent, after consideration of the cases cited and of the other cases upon the subject, that a claim against a town can not be supported and enforced solely upon the general principles of equity and good conscience applied to individuals and corporations."

The plaintiff claims that, even if the contract was not proved, it is entitled to recover for the electric lights furnished under the agreement in the record that the plaintiff should have the benefit of the count in quantum meruit in each writ, claiming an implied promise on the part of the defendant to pay for the lights furnished. But there was no implied promise on the part of the town to pay for the lights furnished. Upon the contrary, when it's selectmen settled with the plaintiff for the lights furnished in the month of March, 1915, they claimed that the contract under which they were being furnished was void and they would not longer continue it, and offered to execute a contract to pay the plaintiff a different rate per lamp, which the plaintiff refused to make. Thereupon, with no authority from the town, or it's officers, the plaintiff continued to furnish the current until in the month of June, during which time the defendant town refused to pay and denied their liability. To recover in this action under a count indebitatus assumpsit the plaintiff must prove that it furnished the lights to the town by the authority of some one who was authorized to purchase them. There is no evidence of any such contract or authority. The selectmen refused, and said they would not authorize the furnishing of the lights at the price that the plaintiff charged, and the plaintiff, without authority from any one, continued to furnish them until June, 1915. As no person with authority from the defendant authorized the furnishing of the current,

the defendant is not liable upon an implied contract to pay so much as the current was reasonably worth. "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. *Morse* v. *Inh. of Montville*, 115 Maine, 454; *Goodrich* v. *Waterville*, 88 Maine, 39. The second writ seeks to charge the defendant upon the same ground for lights furnished from November to the date of the writ. The plaintiff had not for several months been furnishing any lights when it turned on the current and started the lamps in November, 1915, without authority from the town, or any pretense that any one in authority had requested them to, and, during the time for which recovery is sought in the second writ, the town was purchasing from another company what lights it needed, and the system of the plaintiff was duplicated by the lights and wires furnished by the other company. The plaintiff claims it had a right to furnish under the contract entered into by the so called committee or agents, but there is no evidence, as we have already decided, of any such contract. Therefore, having neglected for several months before they started the lights in November to furnish the defendant town lights, and the defendant having entered into a valid agreement, as far as the case shows, with another company to furnish the lights needed by the town and which company furnished them, the plaintiff had no right during the period that the lights were furnished by the other company, without request from some one in authority, to furnish the lights and charge the town for them. The furnishing of the lights, both as charged in the first writ from April to June, 1915, and from November, 1915, to the date of the writs, was in each instance without authority from any one who had authority to represent the town. So far as the report shows the plaintiff furnished what lights it did furnish, sued for in both writs, with the expectation or understanding that they had a valid contract with the town to pay them certain prices for the lights. They had no contract. They never entered into any arrangements with any officers of the town who had authority to make a contract, and whatever they furnished was without the consent of the defendant town.

It is urged by the plaintiff that the defendant is liable because the supposed contract was ratified by the inhabitants of the town, and it is a rule of law "that a municipal corporation may ratify the unauthorized acts and contracts of it's agents and officers, which are

within the corporate powers, but not otherwise." But there is no admissible testimony in the record that shows that the unauthorized acts of the so called committee or agents in entering into the contract was an act of the agents or officers of the town, and the admissible testimony fails to show the so called committee or agents were ever authorized to enter into any contract for the town. They had no authority from and were not agents or a committee of the town, and the above rule as to ratification does not apply.

Judgment for defendant in each case.

THOMAS J. ROBINSON,
Appellant from the Decree of the Judge of Probate.

Androscoggin. Opinion March 30, 1917.

R. S., 1916, Chap. 87, Sec. 37, interpreted. Power of court under such statute. Meaning of term "vacation" as to filing or rendering judgment "in vacation." Effect of filing a decree after the next term of court has begun, where the docket entry shows that such decree was to be filed during the term then in session or in vacation as of the term.

Where a case is heard by the Justice presiding at a term of court and it is stipulated by the parties that the decision may be "given and entered during the term or in vacation as of the term," there must be strict conformity and no entry of the decision can be made after the expiration of the vacation.

Under Chap. 305, Public Laws, 1915, (R. S., 1916, Chap. 87, Sec. 37), providing that a Justice of the Supreme Judicial Court or Superior Court may in vacation render judgment heard by him in term time, such Justice obtains no power to render judgment in such a case at the term occurring subsequent to the expiration of the vacation.

Probate appeal from the decree of the Judge of Probate, Androscoggin County. Appeal was entered at the April term, 1916, of the Supreme Court of probate for said county of Androscoggin. At said

term certain rulings were made by the Justice presiding, certain agreements and stipulations were entered into and it was agreed by all parties interested that the decision of the presiding Justice might be given and entered during said term or in vacation as of the term. Exceptions were filed to certain rulings of the Justice presiding. Exceptions sustained.

Case stated in opinion.

W. H. Judkins, for appellee.

McGillicuddy & Morey, for appellant.

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

BIRD, J. This appeal to the Supreme Court of Probate from the decree of the Judge of Probate of Androscoggin County was heard by the Justice presiding at the April term, 1916, of the Supreme Court of Probate, and this stipulation was entered upon the docket by agreement of parties—"the decision is to be given and entered during the term or in vacation as of the term."

The presiding Justice, reached a conclusion during the vacation following the April term, 1916, but by reason of misapprehension on the part of the Justice and the confusion of counsel, the decree, embodying his decision, was not received in the clerk's office until the third day of the September term, 1916. By order of the court, the decree was entered at the September term against the objection of the appellee who had exceptions.

Without considering the effect of the stipulation entered upon the docket by agreement of parties, *Powers* v. *Mitchell*, 75 Maine, 364, 369, 370; *Gurdy, appellant*, 103 Maine, 356, 360; *Bates* v. *Gage*, 40 Cal., 183; *Francis* v. *Wells*, 4 Colo., 274; *State* v. *Parsons*, 115 N. C., 730; *Dinsmore* v. *Smith*, 17 Wis., 20; *Daggett* v. *Emerson*, 1 Wood & M., 1; 7 Fed. Cas., No. 3961, it is clear that the entry of the decree was not made in accordance with the stipulation. Not only was the decision to be made during the term, when heard, or the vacation, but it was to be entered during the term when heard, or in vacation, as of that term. There must be strict conformity. *Patterson* v. *Hendrix*, 72 Ga., 204; *Bean* v. *Reading*, 96 Ill., 130.

By Chap. 305, Public Laws, 1915, (R. S., 1916, Chap. 87, Sec. 37), it is provided that any Justice of the Supreme Judicial Court may in vacation render judgment heard by him in term time. Undoubtedly

the enactment means that he may in vacation render judgment in a matter or cause heard by him in term time next preceding such vacation. Does this give authority to the presiding Justice, or the court, to render or enter judgment at the term following the vacation? We think not. While the statute may be regarded as remedial, to so hold would render it necessary to import new terms into the statute. It is sufficient, indeed, to note that the statute makes no mention of the term following the vacation. Expression of one is exclusion of the other. Undoubtedly the legislature made use of the term vacation as meaning the period of time between the end of one term and the beginning of another. *Brayman* v. *Whitcomb*, 134 Mass., 525, 526; See *Hasten* v. *B. & O. R. R.*, 115 Maine, 205, 206.

The exceptions must be sustained and it is so ordered.

FLORENCE E. HIGGINS, et als.

vs.

ELIZABETH E. BECK, et als.

Penobscot. Opinion March 31, 1917.

Meaning of words "surplus income," "net income." Rule where bonds are part of trust funds. Rule as to vesting of title to bequests or legacies which are to be paid at the death of a particular person.

Bill in equity for construction of certain portions of the will of John H. Higgins.

The residuum of the personal estate of the testator was given to his three daughters, who are the plaintiffs here, to be held by them and the survivors or survivor, in trust until the last one of them should decease; the net income only of said trust fund to be paid from time to time to them equally, the issue of those deceased, if any, to take the share of the net income that the parent would be entitled to, if living, and upon the decease of all three of the daughters of the testator then the principal of the trust fund was to be divided according to certain terms mentioned in the will.

The testator died April 16, 1910. Prior to his death, to wit, on July 20, 1909, his brother, A. Hamilton Higgins, died testate. The latter was a resident of New York City at the time of his death and his will was probated and allowed in the Surrogate Court of that city.

In the will of Hamilton there was a provision that the residuum of his estate should be held in trust during the life of his wife, and upon her death the trustees were directed by the testament to divide and pay over the trust fund "to such of my brothers or sisters as may survive me and unto the issue me surviving or either of them who may have died before me" (an exception of one relative being made) "and unto the issue me surviving of any issue dying before me of any of my brothers or sisters who may fail to survive me, said issue to take the share to which his, her or their parent or parents would have been entitled to if living."

Soon after the death of Hamilton the Surrogate Court was called upon to construe his will for the purpose of determining whether or not certain directions therein for accumulation of a portion of the income were void, and if void, to determine whether or not the income of the trust fund, not then payable to the widow, was payable to the persons designated in the will as the ultimate beneficiaries. The court decided that these certain directions for accumulation were void, and that a certain sum, then held by the executors as income of the trust fund, was presently distributable to the holders of the next eventual estate. As a result of that decree there was paid to these plaintiffs, as executors of the estate of John H. Higgins, the sum of $1,323.54. The Surrogate Court further ordered the executors of Hamilton's will to hold certain cash and securities, to pay the widow of Hamilton the income from one hundred thousand dollars thereof and to distribute the surplus income therefrom arising from time to time to the holders of the next eventual estate.

As a result of this further order, and the decree for payment of the specific sum just named, the plaintiffs have already received the sum of $1,867.53 from this surplus income arising out of the estate of Hamilton, and will receive further sums in the future.

We are requested to determine, by construction of the will of John Higgins, whether the $1,867.53 already received, and the further sums to be received, from the so-called "surplus income" of Hamilton's estate, constitute a part of the net income of the estate of John H. Higgins, to be paid directly by the plaintiffs, in their capacity as trustees, to themselves as individuals, because they are entitled to the net income of their father's estate, or whether this "surplus income" should be added to the corpus of the estate of their father, thus enlarging the principal of the trust fund from which they are to derive a net income, and eventually, with the rest of the trust fund, be paid to the persons entitled to such trust fund on the death of his last surviving daughter.

Held: Where there is a gift of a legacy, or a share of a residue, to be paid at the death of a particular person, the gift vests in the legatee at the death of the testator, and the time applies only to the payment. Applying this rule to the present case it must appear that the legacy or distributive share of the trust fund, which Hamilton's will provided for John, became vested in John at the

death of Hamilton. It follows therefore that this "surplus income" is a part of the income of the residuum of John's estate and should be enjoyed accordingly by his daughters.

Another and entirely different question is raised by the plaintiffs. John H. Higgins, at the time of his death, owned certain bonds issued by various railroad companies all of which were worth more than their par value and were appraised in the inventory above par value. The plaintiffs say and the answers admit that these bonds are part of the trust fund created by their father's will, from which they are entitled to the net income, but that they are in doubt as to whether or not the whole of the income which they have already received, and which they may hereafter receive from said bonds, constitutes part of the net income of the trust estate, and whether or not it should all be paid to the plaintiffs for their own exclusive individual benefit; or whether some part thereof, as fast as received, must be treated as part of the principal of the trust estate.

Held: If a testator leaves bonds, which he owns, to trustees, with directions or authority to hold the same, paying the interest to certain persons for life, with remainder over, the fact that such bonds are worth a premium at and after his death will not warrant the trustees in retaining any portion of the interest for the benefit of the remainder-men. The plaintiffs are therefore entitled to the entire income from these bonds, without deductions in favor of the remainder-men.

Bill in equity asking for construction of certain clauses or portions of the will of John H. Higgins of Charleston, Maine. The cause was heard upon bill and answer, and it appearing to the Justice presiding that questions of law were involved of sufficient importance and doubt to justify the same, by consent and agreement of the parties the cause was reported to the next Law Court for hearing and decision upon bill as amended and answers, the Law Court to render such final judgment as the legal and equitable rights of the parties require. Decree to be drawn in accordance with opinion.

Case stated in opinion.

George H. Worster, for complainants.

Ryder & Simpson, for Guardian ad litem.

Arthur L. Thayer, for Higgins Classical Institute.

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

PHILBROOK, J. This is a bill in equity coming to this court on report, wherein the plaintiffs, as executrices and trustees under the will of John H. Higgins, allege that they are in doubt as to the mode of executing the trust created in said will, and pray that certain portions of said will may be construed and interpreted.

The residuum of the personal estate of the testator was given to his three daughters, who are the plaintiffs here, to be held by them and the survivors or survivor, in trust until the last one of them should decease; the net income only of said trust fund to be paid from time to time to them equally, the issue of those deceased, if any, to take the share of the net income that the parent would be entitled to, if living, and upon the decease of all three of the daughters of the testator then the principal of the trust fund was to be divided according to certain terms mentioned in the will.

The testator died April 16, 1910. Prior to his death, to wit on July 20, 1909, his brother, A. Hamilton Higgins, died testate. The latter was a resident of New York City at the time of his death and his will was probated and allowed in the Surrogate Court of that city.

In the will of Hamilton there was a provision that the residuum of his estate should be held in trust during the life of his wife, and upon her death the trustees were directed by the testament to divide and pay over the trust fund "to such of my brothers or sisters as may survive me and unto the issue me surviving or either of them who may have died before me" (an exception of one relative being made) "and unto the issue me surviving of any issue dying before me of any of my brothers or sisters who may fail to survive me, said issue to take the share to which his, her or their parent or parents would have been entitled to if living." Further provisions were made as to the division if a brother or sister of Hamilton died before his decease but those provisions do not call for discussion here. As we have seen, the testator in this case, John H. Higgins, a brother of Hamilton, survived the latter. In the recent case of *Bryant* v. *Plummer*, 111 Maine, 511, this court had occasion to refer to the well established rule that where there is a gift of a legacy, or a share of a residue, to be paid at the death of a particular person, the gift vests in the legatee at the death of the testator, and the time applies only to the payment. Applying this rule to the present case it must appear that the legacy or distributive share of the trust fund, which Hamilton's will provided for John, became vested in John at the death of Hamilton.

Soon after the death of Hamilton the Surrogate Court was called upon to construe his will for the purpose of determining whether or not certain directions therein for accumulation of a portion of the income were void, and if void to determine whether or not the income of the trust fund, not then payable to the widow, was payable to the

persons designated in the will as the ultimate beneficiaries. That court decided that these certain directions for accumulation were void, and that a certain sum, then held by the executors as income of the trust fund, was presently distributable to the holders of the next eventual estate. As a result of that decree there was paid to these plaintiffs, as executors of the estate of John H. Higgins, the sum of $1,323.54. The Surrogate Court further ordered the executors of Hamilton's will to hold certain cash and securities, to pay the widow of Hamilton the income from one hundred thousand dollars thereof and to distribute the surplus income therefrom arising from time to time to the holders of the next eventual estate.

As a result of this further order, and the decree for payment of the specific sum just named, the plaintiffs have already received the sum of $1,867.53 from this surplus income arising out of the estate of Hamilton, and will receive further sums in the future.

We are requested to determine, by construction of the will of John Higgins, whether the $1,867.53 already received, and the further sums to be received, from the so-called "surplus income" of Hamilton's estate, constitute a part of the net income of the estate of John H. Higgins, to be paid directly by the plaintiffs, in their capacity as trustees, to themselves as individuals, because they are entitled to the net income of their father's estate, or whether this "surplus income" should be added to the corpus of the estate of their father, thus enlarging the principal of the trust fund from which they are to derive a net income, and eventually, with the rest of the trust fund, be paid to the persons entitled to such trust fund on the death of his last surviving daughter.

As we have already observed, the distributive share of John, in the estate of Hamilton, was vested in the former at the death of the latter. We have also noted that subsequent to that death, by the decree of the Surrogate Court, the "surplus income" arising in Hamilton's estate was declared to be due and payable to the holders of the next eventual estate, of which holders John was one. The trust fund, out of which this "surplus income" arose, was the residuum of Hamilton's estate, and the devise to John and the other brothers and sisters of Hamilton was the devise of a residuum. "It is constantly held that a residuary devise, in the ordinary terms, carries with it not only the property of the testator in which no interest is devised or bequeathed in other portions of the will, but

also all reversionary as well as contingent interests in property which are not otherwise disposed of by him." *Davis* v. *Callahan,* 78 Maine, 313.

In *Pierce* v. *Stidworthy,* 79 Maine, 234, we find a case where a testator devised to his wife, for her support during life, all the residue of his estate, both real and personal of which he should die deceased, or which he might be entitled at his decease. Some years after his death, but during the life of the widow, his estate was awarded quite a sum of money under the so-called "Alabama Claims" and the court held that this after acquired money was part of his estate from which the widow might receive support because it was a property right existing before his death even if the testator could not enforce the right during his lifetime. See also *Grant, Applt.,* v. *Bodwell,* 78 Maine, 460.

From these authorities we conclude that the vested right which John had in Hamilton's estate was a portion of the estate of John, since we have been shown no part of Hamilton's will which otherwise disposed of it, and that it was a property right forming a portion of the residuum of John's estate, as much as the stocks and bonds owned by and in the possession of John at his decease and from which his daughters were to receive the net income as set forth in the bill. It follows therefore that this "surplus income" is a part of the income of the residuum of John's estate and should be enjoyed accordingly by his daughters.

Another and entirely different question is raised by the plaintiffs. John H. Higgins, at the time of his death, owned certain bonds issued by various railroad companies all of which were worth more than their par value and were appraised in the inventory above par value. The plaintiffs say and the answers admit that these bonds are part of the trust fund created by their father's will, from which they are entitled to the net income, but that they are in doubt as to whether or not the whole of the income which they have already received, and which they may hereafter receive from said bonds, constitutes part of the net income of the trust estate, and whether or not it should all be paid to the plaintiffs for their own exclusive individual benefit; or whether some part thereof, as fast as received, must be treated as part of the principal of the trust estate.

In *Shaw* v. *Cordis,* 143 Mass., 443, the court declares "If a testator leaves bonds which he owns to trustees, with directions or authority

to hold the same, paying the interest to certain persons for life, with remainder over, the fact that such bonds are worth a premium at and after his death will not warrant the trustees in retaining any portion of the interest for the benefit of the remainder men." It is true that in the will under consideration there is no specific direction or authority given the trustees to hold these certain securities but a fair construction of the will leads to the conclusion that the testator intended that the whole income of the trust fund should be paid to his daughters without any deduction in favor of the remainder-men. This should accordingly be done.

Decree below to be drawn in accordance with this opinion.

MILES F. BIXLER *vs.* PERLEY A. WRIGHT.

Somerset. Opinion April 12, 1917.

Necessary proof in an action to recover price of goods bargained and sold. Form of action if party ordering refuses to accept same. Rule of law as to questions not raised at trial being considered on exceptions. Rule as to negligence defeating the defense of fraud. Rule where fraudulent representations are used.

1. One who is fraudulently misled as to the contents of a paper which he signs without reading is not estopped by his negligence from setting up the fraud in an action between the original parties.
2. The evidence in this case would warrant a jury in finding that the defendant's signature to the contract in suit was procured by the fraud of the plaintiff's agent.

Action of assumpsit to recover $192.00 for goods claimed to have been sold defendant under a written contract. Defendant filed a plea of general issue, and also brief statement alleging that the contract on which plaintiff had declared was procured from the defendant by misrepresentation and fraud of plaintiff's agent and that said

contract was therefore void. At the close of testimony, verdict was directed for plaintiff by Justice presiding, to which ruling defendant filed exceptions. It being further stipulated by the court, all parties agreeing thereto, that in case the exceptions should be sustained, judgment should be entered for defendant. Exceptions sustained. Judgment ordered for defendant.

Case stated in opinion.

O. H. Drake, for plaintiff.

Manson & Coolidge, for defendant.

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

SAVAGE, C. J. Action to recover the price of certain goods sold to the defendant in accordance with a written order signed by him. At the conclusion of the evidence, the presiding Justice directed a verdict for the plaintiff, and the defendant excepted. It was stipulated by the parties that if the exceptions are sustained, judgment shall be entered for the defendant.

It is evident that the action is misconceived. The goods were shipped to the defendant, but were never accepted by him. In such a case the seller's remedy is not a suit for the price, but a special action for breach of the implied contract to receive and accept. To maintain an action for the price, actual acceptance must be shown. *Tufts* v. *Grewer*, 83 Maine, 407; *Greenleaf* v. *Gallagher*, 93 Maine, 549. But this point does not appear to have been made at the trial, and is not made in argument before this court. It is well settled that a question not raised at the trial will not be considered on exceptions. *Stockwell* v. *Craig*, 20 Maine, 578; *Withee* v. Brooks, 65 Maine, 14; *Verona* v. *Bridges*, 98 Maine, 491; *Coan* v. *Auburn Water Comrs.*, 109 Maine, 311.

The defense offered is that the defendant's signature to the order, under which the goods were shipped was procured by fraud. The defendant says that he signed the order without reading it. He does not controvert the well settled rule that in the absence of fraud or misrepresentation, one who signs a contract or other written instrument without reading it is presumed to know its contents. But he says that his signature to this order was procured by the fraud and misrepresentation of the agent.

A verdict having been directed for the plaintiff, the only question for this court to determine is whether there was any evidence that would have warranted the jury in finding that the plaintiff's signature was induced by fraud. *Johnson* v. *N. Y., N. H. & H. R. R.*, 111 Maine, 263. Fraud is a mixed question of law and fact. It cannot be taken from the jury when there is evidence that warrants an affirmative finding.

It is true in a case like this one that the defendant is under the burden of substantiating the charge of fraud by clear and convincing proof. *Strout* v. *Lewis*, 104 Maine, 65. In this case the facts are undisputed. No attempt was made to contradict the defendant's testimony, and we can discover no reason why the jury might not have been warranted in believing it.

The defendant's story is this. He is the proprietor of a country store in a small village. He was approached in his store by the plaintiff's agent, James, who introduced himself as a brother Odd Fellow, and said that he had been sent to the defendant by one Raynes, a near-by neighbor, which latter statement was not true. The agent said that he had some jewelry that he was putting in on consignment, and then showed the defendant his goods. Then, to use the defendant's language, the agent "told me on these goods that I would pay for the goods every two months, thirty two dollars, providing I had sold that amount of jewelry, and if not, if I had sold five dollars worth or ten dollars worth of jewelry, that I could send that amount in to the company and tell them that that was all that was sold of jewelry at the present time, and that would be all right. And at that time, as I remember, it was growing a little dark, although I am not positive that I had my lights on, but there was a number of customers in my store, and of course, I kept dodging out to wait on them, and then when I went to sign this contract, he was standing, well, as my office stands, I stood here, and this store is out like that (illustrating), and there is a little kind of a place here (indicating), to come into the office, rather narrow, and I, of course, stepped out like this to look through my store to see who was waiting for me; Mr. James stood on the further side here, then handed out this card, not a card, but a pad like, holds his hands like this, I takes the other end, takes the corner of it and commenced to sign my name on it; didn't think no more of it; and that is about the way he got my signature on the contract." The defendant further says that the

agent had told him that at the end of the year they would take back all the goods not sold. The defendant did not read the contract before signing. James was a stranger to him. And the defendant before this time had never heard of the Continental Jewelry Company, under which name the plaintiff did business. These are all of the material facts concerning the signing.

The paper which the defendant signed was not an order for jewelry on consignment, but was an unconditional order for the purchase of jewelry, amounting to $192. At the top of the paper in capital letters were the words,—"Positively no goods consigned,"—"Read this order carefully." Then followed a price list of about 90 articles; then the terms of payment; then an agreement by the plaintiff to repurchase at the end of the year all goods paid for and remaining unsold, in case the purchaser had sold less than half during the year; then just above the signature, the sentence, "We have read this order and find same complete and satisfactory."

That the conduct of the agent was deliberately, intentionally fraudulent a jury would be authorized to find. The agent's talk was all about the details of a consignment. The defendant had a right to understand that the written contract embodied the substance of the oral negotiation. But the plaintiff contends that even so it was such negligence and folly on the part of the defendant to sign without reading a paper which he had the opportunity to read that the law will not relieve him from the consequences of his foolishness.

Whether the negligence of the defrauded party will defeat the defense of fraud has been much debated, and courts have come to different conclusions. The question has arisen more frequently in actions for deceit. And many courts have held in effect that when the party defrauded might by the exercise of reasonable care have ascertained the truth, he had no right to rely upon the representations of the other. But in the case of fraudulent misrepresentations the rule is settled otherwise in this state. In *Eastern Trust & Banking Company* v. *Cunningham*, 103 Maine, 455, we said, "If one intentionally misrepresents to another facts particularly within his own knowledge, with an intent that the other shall act upon them, and he does so act, he cannot afterwards excuse himself by saying, 'You were foolish to believe me.' It does not lie in his mouth to say that

the one trusting him was negligent." This rule was affirmed in *Harlow* v. *Perry*, 113 Maine, 239. The rule is supported by numerous cases cited in note, 37 L. R. A., 593.

The more limited question whether one who signs a paper without reading it is so far concluded that he cannot set up that his signature was induced by a fraudulent misrepresentation as to its contents has also received varying answers. There is a general accord that a paper signed by one who cannot read or write may be defeated by proof of such misrepresentation. So generally when the paper is misread to the person who then signs without reading. It is also generally agreed that a negotiable promissory note in the hands of an innocent holder cannot be so defeated. And the courts in a few states, notably, Indiana and Iowa, hold squarely that even between the original parties if one who can read and write signs a paper without reading it, it is such negligence that he cannot be permitted to say that its contents were misrepresented to him. But we think the weight of authority is to the contrary.

The plaintiff relies upon *Maine Mutual Marine Ins. Co.* v. *Hodgkins*, 66 Maine, 109, the language of which case certainly does support the principle for which he contends. But that case was a suit on a promissory note, given pursuant to a previous contract signed without reading. The misrepresentations relied upon to show fraud appear not to have been so much misstatements of the contents of the instrument, as of its legal effect. And the court said, "It is not fraud, if one misapprehends, and misapprehending, misstates the legal effect of an instrument." We have no occasion to criticise this conclusion.

In *Great Northern Mfg. Co.* v. *Brown*, 113 Maine, 51, the defendant signed without reading a contract to purchase goods, when he had reason to suppose from the previous conduct of the seller, and the seller's agent, that he was to receive them free. He had an opportunity to read the paper before signing. He may have been negligent in that he did not read. The court held that his signature was procured by fraud, and sustained his defense. It is true that the fraudulent artifices in that case were more numerous and more elaborate than in this. But the principle established in that case applies to this one. It is that in a case between the original parties, when one is fraudulently misled as to the contents of a paper which he signs without reading he is not estopped by his negligence from setting up the fraud, as he might be after third parties had acted

upon it. *Carlisle & Co.* v. *Bragg,* Eng. L. R. (1911) 1 K. B. Div. 489. This view is supported, we think, by the greater weight of authority and by the better reason.

In the first place it must be held that the presentation of the paper for the defendant's signature was itself a representation that its contents were the same as agreed upon in the oral negotiation. As was said in *Tremblay* v. *Ricard,* 130 Mass., 259,—"The jury may well have found that the production of the writing at that time was in itself an affirmation on the part of the defendant (plaintiff here) that its terms did not differ from the terms of sale agreed upon. Fraud may be proved from the acts and conduct of a party quite as effectively as from his declarations. And any act falsely intended to induce a party to believe in the existence of some other material fact, and having the effect of producing such effect to his injury is a fraud."

"There is ample authority", said the court in *Weil* v. *Quidnick Mfg. Co.,* 33 R. I., 58, a case apparently on all fours with this one, "that as between the parties to a written contract where one party is induced by the false statements of the other to sign the same, he is not bound thereby, and may defend against the contract on the ground of fraud, even though he was negligent in signing without reading it. . . . . When he undertook to write the order he was bound to write it according to the agreement, and if it did not embody the agreement, and was signed by inadvertence or negligence that would not preclude the defendant from avoiding it on the ground of fraud.

In *Freedley* v. *French,* 154 Mass., 339, it was said, "It is true that she (the party signing without reading) was required to use reasonable care in acquainting herself with the contents of the paper. But this rule is subject to the condition that no fraud was practiced upon her for the purpose of procuring her signature." And holding that the question of negligence was for the jury, the court said, "It can hardly be said as a matter of law, that a party is guilty of negligence who signs a paper relying upon the representations as to its contents and effect made by the party presenting it, and without himself examining it. . . . . It was concealment if he stated the contents as other than they really were."

In New Jersey, it has been held that while signing without reading generally binds, there is an exception to the rule, and that when a signature to a contract has been procured by fraud or imposition

practiced upon the signer with intent to deceive him as to the import of the paper he signs, he may attack it for fraud, although he might have discovered the fraud perpetrated upon him by reading the paper and he was guilty of negligence in not doing so. *Dunston Lithograph Co.* v. *Borgo*, 84 N. J. L., 623; *Alexander* v. *Brogley*, 62 N. J. L., 584.

The case of *Western Mfg. Co.* v. *Colton*, 126 Ky., 749, was in all essential respects like this one, even to the fact that the contract as signed was for the sale, instead of the consignment, of jewelry. The court said that it was immaterial whether the contract was misread, or was written differently. In either case the act of obtaining the signature was a fraud, and that the agent's "baseness is not offset in law by the mere negligence of the other party who relied on what he had no reason to doubt", and that even gross negligence does "not preclude an inquiry into the truth as to whether he was in fact misled by the stratagem of his adversary." The court remarking that some of the earlier cases enforced a harsher doctrine noted that the trend of the courts is to liberalize the defense in this class of cases.

In *Linington* v. *Strong*, 107 Ill., 295, the court said that "the doctrine is well settled that as a rule, a party guilty of fraudulent conduct shall not be allowed to cry 'negligence' as against his own deliberate fraud. . . . While the law does require of all parties the exercise of reasonable care . . . . there is a certain limitation of this rule, and as between the original parties to the transaction we consider that where it appears that one party has been guilty of an intentional and deliberate fraud . . . . he cannot escape the legal consequences of his fraudulent conduct by saying that the fraud might have been discovered, had the party whom he deceived exercised reasonable diligence and care."

To the same effect are *Eggleston* v. *Advance Threshing Co.*, 96 Minn., 241; *Maxfield* v. *Schwartz*, 45 Minn., 150; *McBride* v. *Macon Telegraph Pub. Co.*, 102 Ga., 422; *American Fine Art Co.* v. *Reeves Pulley Co.*, 127 Fed., 808; *Albany City Savings Inst.* v. *Burdick*, 87 N. Y., 40; *Wenzel* v. *Shulz*, 78 Calif., 221. We have limited our citations on the question of negligence to cases of signing writings without reading them.

The law dislikes negligence. It seeks properly to make the enforcement of men's rights depend in very considerable degree upon whether they have been negligent in conserving and protecting their rights.

But the law abhors fraud. And when it comes to an issue whether fraud shall prevail or negligence, it would seem that a court of justice is quite as much bound to stamp out fraud as it is to foster reasonable care.

We think the doctrine of the cases cited is sound, and we affirm it. The conclusion follows that it was error to take this case from the jury by directing a verdict for the plaintiff, and the exceptions must be sustained.

In accordance with the stipulation of the parties, the mandate will be,

Judgment for the defendant.

LIZZIE S. THOMAS *vs.* ADELBERT A. HALL.

Waldo. Opinion April 14, 1917.

Foreclosure proceedings. Right to waive same. Powers and rights of attorneys at law. Subrogation.

The plaintiff brought a writ of entry to settle the title to real estate. By agreement of the parties, the case was reported to the Law Court for determination upon so much of the evidence as is legally admissible.

The defendant had given the plaintiff, for real estate purchased of her, a demand note for $225. secured by a mortgage which was second to a prior mortgage which the defendant assumed and agreed to pay. Her own efforts to collect being unsuccessful, the plaintiff placed the matter in the hands of an attorney. She was advised that, because the equity above the mortgages was very scant and because of the financial irresponsibility of the defendant, the chances of collecting were extremely doubtful, but that it was advisable to try a foreclosure by publication. The foreclosure notice was signed by the plaintiff and seen by her in print. The defendant was referred to the attorney by the plaintiff as the proper person to settle with. The attorney several times assured the

defendant that he had until May thirteenth to make payment and this information was communicated to the plaintiff. Though the attorney subsequently learned that the time for redemption would expire on the eighth of May instead of the thirteenth as he had supposed, he did not inform either plaintiff or defendant of his error but still told the defendant payment could be made within the time orginally set by him. While the plaintiff complained about the foreclosure because of expense to her, and claimed that a suit on the note would have been more efficacious, she continued to let the attorney handle the claim. During the forenoon of May twelfth, one Knight came to the attorney's office with the defendant and stated that they had agreed that Knight should help the defendant out of his trouble by buying the plaintiff's note and mortgage so the defendant would owe Knight instead of the plaintiff. As the plaintiff failed to come to the attorney's office, after being sent for, and Knight was about to withdraw, the attorney took the amount of the mortgage and accrued costs, endorsed the note and assigned the mortgage, as attorney for the plaintiff. When, later in the same day, the money was offered the plaintiff by her attorney she refused to accept it, stating she intended to punish the defendant. On the night of the eleventh of May the buildings had been destroyed by lightning, which fact was known to all parties on the twelfth. Insurance on the burned buildings increased the value of the plaintiff's security. The plaintiff claims the defendant's rights and Knight's rights in the premises were extinguished by foreclosure of the mortgage.

Held:

1. That the assurance given the defendant that he had until May the thirteenth to pay the mortgage, was an extension of the period of redemption to that date, that under the facts of the case the attorney had authority so to do and that the plaintiff was bound by his action.
2. That Knight was not a volunteer, but having paid the mortgage on the assurance from the defendant that he should have the plaintiff's rights under the note and mortgage, he was entitled to receive and hold the same under the principles of subrogation.
3. The right by subrogation is an equitable matter of defense to this action at law, which was reported without any limitation of the court to the pleadings, and that the Law Court can give effect to the same, even though not pleaded.

Writ of entry to recover possession of a certain lot or parcel of land situate in Lincolnville, in the county of Waldo and State of Maine. Defendant filed plea of general issue. This case is reported to Law Court for its determination upon so much of the evidence as is legally admissible. Judgment for defendant.

Case stated in opinion.

Arthur S. Littlefield, for plaintiff.

Job H. Montgomery, for defendant.

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

MADIGAN, J. The plaintiff claims title to real estate under a foreclosed mortgage. By agreement of the parties the case was reported to the Law Court for determination upon so much of the evidence as is legally admissible.

The premises were conveyed to the defendant by the plaintiff subject to an existing mortgage, which the defendant assumed and agreed to pay as a part of the consideration. The balance of the purchase price was cash and a demand note secured by a second mortgage on the premises.

After repeated unsuccessful attempts to collect herself, the plaintiff consulted an attorney by whom she was advised that the defendant was worthless, the prior mortgage large and the description in her own mortgage indefinite, but that possibly, if foreclosure by publication were started, the defendant, through shame, might be stimulated to unusual exertion. She personally signed the foreclosure notice and left the mortgage and note in the attorney's hands and told the defendant that he must settle with the attorney who had the matter in charge.

The defendant several times was assured by the attorney that he had until the thirteenth day of May to make payment and this fact was communicated to the plaintiff. The attorney erred in supposing the thirteenth was the true date, but, on learning later that the proper date was the eighth day of May, no notice of that fact was given to the defendant.

About nine o'clock on the morning of May 12th the defendant and one Knight came into the attorney's office and told him the house on the mortgaged premises had been destroyed by lightning the day before and that Mr. Knight had come down to help the defendant in his trouble, that he was going to buy the Thomas mortgage and pay the attorney for it and let Hall owe him instead of Mrs. Thomas. The amount due upon the mortgage, including principal, interest and costs, was computed and the defendant was sent to ask Mrs. Thomas to come to the office, get her money and settle up. Not finding her, he went again when she informed him she would be right up. As she did not appear, Knight becoming impatient was withdrawing when the attorney, though having no written authority

therefor under seal or otherwise, transferred both note and mortgage to Knight. Later in the same day the plaintiff refused to receive the money from the attorney, remarking she intended to punish the defendant, and, on the day following, demanded her papers and insisted that the defendant's rights were terminated by foreclosure. All parties knew on the morning of the twelfth that the buildings had been burned and it was also in evidence that, by reason of insurance, the plaintiff's security was improved.

We are satisfied that the papers were left with the attorney not merely for the purpose of foreclosure but also for the purpose of collecting the debt. The plaintiff testifies that she was told by the attorney that, if he collected the money during the year, he would notify her at once. Whether the expression " within the year" was actually used by the attorney or not is open to some question, to say the least it would be a little unusual. She had repeatedly said that she wanted the money, that she had worked hard for it and needed it to build, and it was for the purpose of getting it that the matter was left with the attorney. It follows therefore that the attorney had ample authority to receive the money due on the mortgage at any time before the actual expiration of the foreclosure.

We feel clear also that under the evidence the time allowed for redemption was extended and that the same expired on May 13th and not on May 8th. To hold otherwise would be contrary to the equities of the case and to the well established principles governing in such matters.

That the mortgagee may waive the foreclosure altogether or extend the time within which it would expire is well settled. "The right to redeem mortgaged real estate may be kept open by the express agreement of the parties, or by facts and circumstances from which an agreement may be satisfactorily inferred when it would be foreclosed were it not for such agreement." *Dow* v. *Bradley*, 110 Maine, 249; *Fisher* v. *Shaw*, 42 Maine, 32; *Chase* v. *McLellan*, 49 Maine, 375; *Stetson* v. *Everett*, 59 Maine, 376; *Brown* v. *Lawton*, 87 Maine, 83.

"It is undoubtedly the law that an agreement between mortgagee and mortgagor or those holding their respective interests, to extend the time of redemption, although not in writing nor supported by any other consideration than the promise of the redemptioner when such an agreement has been acted upon so far that the parties cannot be placed "in statu quo" is not within the statute of frauds and is

binding upon the parties. If within the period the mortgage debt is paid or tendered it has the same effect as though done prior to the time the equity would have otherwise expired. *Dow* v. *Bradley*, supra. In *Chase* v. *McLellan*, supra, the language of the court is especially applicable to this case "When the evidence is examined it is manifest that McLellan was influenced by a wish to obtain the payment of his notes and to do this he was not disposed to exact of the complainant his strict legal rights provided a short delay would enable the complainant to redeem. The extension of the time was definite and fixed and the mortgage was open so far and not beyond it." Under the circumstances of this case the plaintiff is bound by the promise of the attorney that the defendant should have until May 13th to pay the debt. The evidence shows that the defendant promised to pay it within that time and he did. The defendant relied upon the statement made by the representation of the plaintiff to whom he had been referred as the one with whom settlement must be made.

It would be unusual for a mortgagee to look to other sources for this information and it would be grave injustice to hold that this defendant could not rely with absolute safety upon repeated assurances of a reputable attorney.

"Any agreement whether made by the debtor or the creditor for the substitution of the person advancing money for the payment of a debt as to securities, remedies or priorities of the creditor, will to the extent of the agreement be enforced in equity even against parties having intervening interests in the property held as security." Sheldon on Subrogation, Section 248.

Knight was not a volunteer. At the special instance and request of the defendant who had a perfect legal right to change his creditors, he was taking up the mortgage and the debt thereby secured in accordance with an agreement between himself and the debtor that he should stand in the shoes of this plaintiff. All that the plaintiff could ask or expect was the amount due and this the debtor had a right to pay. In behalf of the defendant, Knight was entitled to satisfy the claim against him and be subrogated to all of the plaintiff's security.

"A stranger may be subrogated to the interests of a mortgagee as against a subsequent mortgagee, or purchaser, by force of an agree-

ment made by a mortgagor at the time of paying the mortgage debt, or any part of it, to the mortgagee. This may be called a conventional subrogation." Jones on Mortgages, Section 874 A.

"Subrogation may arise by agreement between a mortgage debtor and a third person, whereby the latter upon paying the mortgage debt is substituted in place of the mortgage creditor in respect to the security." Jones, 874 A.

"A party who advances money to another that is used to discharge a valid preexisting lien on real estate, if not a mere volunteer, is entitled by subrogation to all the remedies which the original lien holder possessed as against the property; and generally where one pays or advances money to pay a mortgage debt with the understanding that he is to have the benefit of the mortgage, he becomes the holder of the lien by subrogation, although the creditor is not a party to the agreement, and thus where one advances money upon real estate security for the express purpose of paying off a mortgage, or other encumbrance, on the same property, upon the understanding, express or implied, that his security will be subrogated in place of that which he discharged, and that he should have a first lien on the property, he is not a volunteer nor is the original encumbrance considered extinguished, and, if for any reason a security turns out not to be a first lien he will be subrogated to the extent of the encumbrance paid with the money loaned by him. Cyc. 37, 471.

"A person who has let money to a debtor may be subrogated by the debtor to the creditor's rights and if the party, who has agreed to advance the money for the purpose, employs himself in paying the debt and discharging the encumbrance on land given as security, he is not to be regarded as a volunteer. The real question in all such cases is whether the payment made by the stranger was a loan to the debtor through a mere desire to aid him, or whether it was made with the expectation of being substituted in the place of the creditor; if the former is the case he is not entitled to subrogation, if the latter, he is." *Tradesman's Building Association* v. *Thompson*, 32 New Jersey Equity, 135.

"Where money is loaned under an agreement to be used in the payment of a lien on real estate and it is so used and the agreement is that the one who loans the money shall have a first mortgage lien on the same lands to secure his money and through some defect in the new mortgage or oversight as to other liens, the money cannot be

made from the last mortgage, the mortgagee has a right to be subrogated to the lien, which the money supplied by him has paid when it can be done without placing greater burdens upon the intervening lien holders than they would have borne if the old mortgage had been released."

Stramen v. *Rechtine*, 58 Ohio State, page 455. *The Home Savings Bank* v. *Bierstadt*, 168 Illinois, page 618.

"A third person who pays a debt at the debtor's request does not occupy the position of a mere volunteer. Legal subrogation springs from the mere fact of payment of another's debt, as where the debt is paid to protect the payer's rights, or as surety, guarantor or insurer; conventional subrogation springs from express agreement with the debtor, by which one pays a secured debt with the promise of receiving a lien equal to that discharged by such payment. One who, at the debtor's request, pays off a first mortgage before due with the promise of receiving a first lien for the money advanced, will be subrogated in equity, upon failure of the lien given as agreed, to the rights of the first mortgagees, as against a second mortgagee whose security was taken with knowledge of the first mortgage lien. The principle of conventional subrogation will be applied, in equity, as against a second mortgagee, even though the first mortgage was released of record upon the execution of a new mortgage to secure money advanced by a third person to discharge the first mortgage, where the second mortgage was not taken nor the position of the second mortgagee changed because of the record showing the discharge of the prior lien."

In the case at bar Knight had a right, as had the defendant, to rely upon the assignment of the mortgage and the endorsement of the note by the attorney. If, by reason of the fact that he lacked sufficient legal authority to transfer the note and mortgage, Knight should be deprived of the security he expected to obtain or the defendant should lose valuable interests in real estate by reason of the expiration of the foreclosure, grave injustice would be done. Under the principles, heretofore cited, Knight is entitled to be subrogated the rights of the plaintiff.

While this is an action at law, by virtue of the statute of this State, any defendant may plead in defense to any action at law in the Supreme Judicial Court, any matter which would be ground for relief in equity, and shall receive such relief, as he would be entitled

to receive in equity, against the claims of the plaintiff. This action was reported upon the evidence without any limitation of the court to the pleadings and hence the Law Court can give effect to any matter of defense disclosed by the evidence even if not pleaded.

Insurance Company v. *Tremblay*, 101 Maine, page 589.

Judgment for defendant.

PATRICK J. NORTON

vs.

MAINE CENTRAL RAILROAD COMPANY.

Cumberland. Opinion April 30, 1917.

Action under Federal Employers' Liability Act. Rule as to assumption of risk on part of plaintiff being open to defendant. Rule as to negligence on part of plaintiff being considered on question of damages.

An action on the case under the provisions of the Federal Employers' Liability Act for the recovery of damages sustained by plaintiff by coming in contact in the night time, with the central girder of a bridge, of which he claimed he was ignorant and not warned, while in the discharge of his duties as a brakeman of defendant. At the close of the evidence of plaintiff, the defendant asked a directed verdict which was refused. The verdict was for plaintiff. Upon the exceptions to the refusal to direct a verdict for defendant, it is held that the question of negligence of the defendant and assumption of the risk by plaintiff were properly submitted to the jury.

Upon the motion for new trial, urged upon the ground that the damages are excessive by reason only of the alleged contributory negligence of plaintiff, the plaintiff denied all knowledge of the girder and any warning of it or its dangers. In this he was uncontradicted. The jury must have so found, as also non-assumption of the risk. Under these circumstances there was no ground for any finding of contributory negligence on the part of plaintiff.

Action on the case to recover damages on account of injuries received by plaintiff through the alleged negligence of defendant

company. Plaintiff, claiming that he was engaged in interstate commerce, brought his action under the provisions of the Federal Employers' Liability Act, 35 U. S. Statutes at Large, Chap. 149, page 65, and Chap. 143, page 291. Defendant filed a plea of general issue. Defendant offered no evidence, and at close of plaintiff's testimony defendant moved the court to direct a verdict in its behalf. The presiding Justice refused to grant said motion, to which ruling defendant filed exceptions. Verdict for plaintiff in the sum of fifteen thousand dollars. Motion for new trial filed by defendant. Exceptions and motion overruled.

Case stated in opinion.

William H. Gulliver, and Elton H. Thompson, for plaintiff.

Symonds, Snow, Cook & Hutchinson, for defendant.

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

BIRD, J. The plaintiff brings this action on the case under the provisions of the Federal Employers' Liability Act. (35 U. S. Statutes at Large, Chap. 149, page 65 and Chap. 143, page 291), to recover damages for injuries sustained by him through the alleged fault or negligence of defendant corporation. The case was submitted to a jury upon defendant's plea of the general issue. At the close of the testimony, the defendant offering none, the latter moved the direction of a verdict for defendant, and the motion being refused by the presiding Justice, the defendant had exceptions to his ruling and refusal. The verdict of the jury was for the plaintiff in the sum of fifteen thousand dollars. The defendant also filed the usual motion for new trial which is now urged only upon the ground of excessive damages.

The injury for which plaintiff seeks the recovery of damages was sustained at the easterly end of Carmel Bridge, a few miles westerly of Bangor.

The statement of the first count of the plaintiff's declaration as to the manner in which the injury of which he complains was received, is as follows:

"And the said plaintiff acting upon the orders and directions of the said engineer in charge of the said locomotive, as aforesaid, descended from said cab and onto the road bed between the said west bound track and the said east bound track and then and there walked

along between said tracks in the direction in which said train was then proceeding and commenced the work of bleeding and releasing the air brakes on certain freight cars hereinbefore mentioned; that at said time the said train was in motion and was proceeding westerly towards Portland at a rate of speed of five miles per hour; that at said time the plaintiff had been employed as a brakeman for a short period of time and had not been informed and was not aware of any dangers or obstructions in and about said portion of the defendant's track and road bed, and was not then and there informed by the engineer in charge of said locomotive or any other person of the existence of any dangers or obstructions at the place aforesaid; that the plaintiff while so walking along the said road bed and while in the exercise of due care suddenly and without warning walked into and against a certain obstruction, to wit, a certain truss or girder or beam standing between the said west bound and the said east bound tracks and close to the said tracks and the freight cars which were then and there passing over said railroad; that when the plaintiff then and there came in contact with said obstruction, to wit, with said truss, girder or beam, he was caused to fall under the moving cars on said railroad." Lack of knowledge of the plaintiff and failure of defendant to warn or caution are variously set forth in other counts.

The plaintiff at the time, October 4, 1913, he received the injury was a brakeman in the employment of the defendant. He was about twenty-one and one-half years old. Before he was appointed brakeman, he had served the defendant three years as freight handler and about a year and six months as freight checker. He had received the regular training of brakeman and his employment as such was accepted by himself and approved by the defendant. Plaintiff's training began on the first day of September, 1913, and was given him upon a division of the railroad of defendant other than that on which he received his injury. He began to run as brakeman on the latter division on the twenty-second day of September, 1913, and had been over the route seven times and on three of the runs passed Carmel bridge in the day light. On the other divisions of the road to which plaintiff was assigned, either for instruction or service, prior to his assignment to the Bangor route, there were no bridges constructed with a central girder, as was the Carmel Bridge. Although

he had bled the brakes in the day time, during his service upon other divisions of defendant's railroad, he had never performed this duty upon the division where he was injured.

On the night in question the train was upon a long up grade, the brakes were creeping, that is there was too much air pressure upon them. There was danger that the locomotive would stop and, if this took place, the train could not start again except in sections. The engineer, besides giving the usual attention to his engine was engaged in working an appliance for distributing sand upon the rails. Under these circumstances the engineer told the plaintiff that he must get off and bleed the brakes. This is done by pulling the bleeder rod on each car where the brakes are pressing, thereby letting the air out of the auxiliary cylinder. The bleeder rods, extending out, or nearly, to the side of the car, are situated near the center (lengthwise) of the car, varying somewhat with different cars. The "bleeding" is accomplished by pulling the rod outwards and holding it in this position till the air has escaped. It is the duty of the brakeman to bleed the brakes when ordered. In the present instance conditions required it.

The plaintiff, on receiving the order, completed the filling of his pipe, lighted it and descended from the train. The place at which the plaintiff alighted was about one quarter of a mile from the underpass bridge which was the scene of the accident. The speed of the train was five or six miles an hour. This bridge, passing over a highway, carried two tracks with a girder between them, the girder being seventeen inches wide and thirty-nine and three-fourths inches high. The immediate place where the plaintiff alighted from the train was entirely free from obstruction and safe for walking or running and so continued until the bridge was reached. The plaintiff, with his lantern in his hand and pipe in his mouth at once began bleeding the brakes keeping up with the speed of the train until, being unconscious of the vicinity of the bridge and looking with the aid of his lantern, for the bleeder rod of a car, which he had just grasped, he came in contact with the girder of the bridge, was thrown beneath the cars and most seriously injured. He estimates that he had bled four or five cars before the accident. The casualty occurred about one o'clock in the morning. The night was dark, starless and somewhat misty. There is evidence to the effect that plaintiff had not noticed the peculiar construction of the Carmel Bridge, that his

attention had not been called to it by any officer or employee of defendant, that the engineer, when he ordered plaintiff to bleed the brakes did not tell him that the train was nearing a bridge with central girder and that he was not warned or cautioned in regard to it by any officer or employee of defendant.

It is admitted in the arguments of counsel that the jury was fully instructed "that they were to find that so far as this case was concerned the bridge was not unsafe or defective, and that defendant company was not negligent in failing to provide lights, guards and signals." We must assume that the jury respected the instructions thus given.

In support of its exceptions to the refusal of the court to direct a verdict, defendant urges the absence of negligence upon the part of defendant and assumption of the risk by plaintiff. Upon a most careful consideration of the evidence, the court is unable to conclude that there was no evidence of negligence of the defendant upon which the jury could find a verdict for plaintiff or that, as matter of law, there was no negligence in the failure of defendant or its servants to warn plaintiff of the presence of the girder. It was known to both engineer and conductor of the train that plaintiff was but recently employed for the first time as brakeman and they knew, or ought to have known, that his knowledge of the track of the division or route upon which he was employed was necessarily slight, or even casual. It is true that during the period of his "instruction" he was warned to be on the lookout for water pipes and switches, but not as to bridges with central girders. Water pipes and switches are not ordinarily found midway of stations. It was known, or should have been known, that at the rate of five miles an hour, and we have seen that the train was progressing at the rate of five or six miles per hour, the plaintiff, being obliged to keep up with the speed of the train, would encounter the bridge in three minutes. The estimate is uncontradicted that when the bridge was reached four or five cars only had been bled; so, too, the evidence that the plaintiff had, immediately before coming in contact with the girder, by the aid of the light of his lantern located and grasped the bleeder rod of the next car to be bled.

The recent case of *Portland Terminal Company* v. *Jarvis*, (U. S., C. C. A., 1st Cir.), 227 Fed. 8, where the only error assigned was a refusal to direct a verdict for the defendant, is not dissimilar to the

case under consideration. The plaintiff, a yard conductor of plaintiff in error, was, in the night time, swept or thrown from a tall car by an over-head bridge. He had been long employed in the yard, had frequently passed under the bridge, both by day and by night, had knowledge of the variance of freight cars in height, could have seen the car in question while standing in the yard for more than two weeks before the accident, and, on the evening, when injured, had passed along the train, lantern in hand, to the rear car, which he then mounted and from which he was thrown. The court holds it a question for the jury, whether the master was reasonably bound to anticipate plaintiff's presence on top the car at such place, and had knowledge regarding the car, material to his safety, which he could not reasonably have been supposed to possess and which it ought to have communicated to him. See also *Mather* v. *Rillston*, 156 U. S., 391, 398; *Potter* v. *Titusville F. & F. Land Co.*, 238 Fed., 759, 761, 762; *Welch* v. *Bath Iron Works*, 98 Maine, 361, 369, 370; *Young* v. *Chandler*, 102 Maine, 251, 253.

The defendant urges, as we understand, that the evidence conclusively shows that plaintiff assumed the risk of injury from the girder, that this court, should, so hold as matter of law, and that therefore, the refusal to instruct as it requested was error. This defense is undoubtedly open to defendant in this case. (*Seaboard Air Line Ry.* v. *Horton*, 233 U. S., 492). Ordinarily it raises a question of fact for the jury and we think this case presents no exception to the rule. The prime question was whether the plaintiff knew or ought to have known the danger and, knowing the danger, appreciated or ought to have appreciated it. This it was to determine upon the evidence and such inferences as might properly be drawn from it. It was a question upon which fair-minded men might differ. *Seaboard Air Line* v. *Padgeth*, 236 U. S., 668, 673; *McGovern* v. *P. & R. R. R.*, 235 U. S., 389, 403; See also *Chesapeake & Ohio Ry.* v. *Proffit*, 241 U. S., 462, 468; *Reid* v. *Steamship Co.*, 112 Maine, 34; *Colfer* v. *Best*, 110 Maine, 465, 467. See also *Potter* v. *Titusville F. & F. Co.*, supra.

In *Portland Terminal Co.* v. *Jarvis*, supra, the court, after discussing the question of the negligence of plaintiff and determining that it was properly submitted to the jury, says, "the same considerations prevent us from holding that it was error to refuse the ruling requested that on the evidence the danger from the bridge was a risk incident to

Jarvis' employment, obvious to him if he had exercised ordinary care, and therefore assumed by him. If the failure to exclude the car in question from the train, or the omission to caution him, regarding its height, were due to negligence on the part of his fellow employes, the defendant cannot say that the risk of injury from these causes was assumed."

We conclude that the exceptions to the refusal to direct a verdict for defendant must be overruled.

Under its general motion defendant contends that the damages are excessive by reason of the contributory negligence of the plaintiff, invoking the provision of the Act under which the action is brought; "The damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." No other ground is urged.

The plaintiff, however, denied all knowledge of the girder, or that he was warned, of it or of its dangers. In this he was uncontradicted and the jury must have found that he was not aware of the existence of the girder, that he was not warned or cautioned in regard to it, that such lack of warning was negligence on the part of defendant and that plaintiff did not assume the risk. Could the jury, having so found, upon the evidence have also found contributory negligence? In *Mather* v. *Rillston*, 156 U. S., 391, 400, Mr. Justice Field, in closing the opinion of the court has occasion to say "it is plain from what has already been stated that the plaintiff knew nothing of the special dangers attending his work, or that he was at all informed by the defendants on the subject. His testimony is positive on this point, and and is not contradicted by any one. With that fact shown there was not ground for any charge of contributory negligence on his part." It would seem that the answer to our inquiry must be in the negative.

The exceptions and motion must therefore be overruled and it is so ordered.

NATHAN E. MORRILL, In Equity

vs.

RALPH H. MORRILL, et als.

Oxford. Opinion May 1, 1917.

Construction of wills. Rule as to devisees taking fee when no words of limitation are used. Effect of limitations or conditions which are inconsistent and repugnant to language used in devise. Rule as to intention to create a fee where devisee is given power of sale and disposal.

1. It is a well settled rule that a devise absolute and entire in its terms, without words of inheritance, presumptively conveys an estate in fee and that any limitation over afterwards is repugnant and void.
2. Where an absolute power of disposal is given to the first taker, a subsequent limitation is inconsistent and destructive of all other rights.

Bill in equity asking for the construction and interpretation of certain provisions of the will of Nathan E. Morrill of Buckfield, in the county of Oxford and State of Maine. Cause was reported to law court upon bill, answer and agreed statement of facts. Bill sustained. Decree in accordance with opinion.

Case stated in opinion.

Frederick R. Dyer, for plaintiff.

William H. Gulliver, for defendants.

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

HALEY, J. This is a bill in equity asking the court to construe and interpret the provisions of the will of Nathan E. Morrill of Buckfield in the County of Oxford. This case is reported to this court upon an agreed statement of facts.

The clauses of the will which we are asked to construe are 3 and 5. Clause 3 reads as follows: "I give and devise to Nathan E. Morrill and Ellen U., children of my son Isaac, and their heirs and assigns

forever, all the real estate in Buckfield village that I own at my decease that was formerly owned by my son Isaac and conveyed to me by his administrator, Alfred Cole, now consisting of Isaac's home stand, the large pasture north and west of the railroad, and the field on East Branch near Silas Shaw's , to them or the survivor of them, and in case both shall die without issue, and without selling the same, then I give and devise the same to such of my heirs as may be living at their death, to them and their heirs and assigns forever."

The fifth clause reads as follows: "I give and bequeath property as follows, viz.: To my son Horace three thousand dollars, to my wife Fanny two thousand dollars, to my daughter Ellen Thomes two thousand dollars, to each of the children of my son Horace the sum of one hundred dollars, to Nathan E. and Ellen U. children of my son Isaac the sum of two thousand dollars, viz. one thousand to each or the whole to the survivor of them, the above sums to the above named and their heirs forever, except in the case of the said sum given to the children of my said son Isaac I hereby order and direct that in case both should die without issue, then said sum of two thousand dollars or such part thereof as remains shall revert to my estate for my heirs and I do hereby make the same conditions and stipulations to all property both real and personal that I hereby and herein bequeath and devise to said Nathan E. and Ellen U. viz. that it all reverts to my estate for my heirs unless they or either of them leave a living issue at their decease or a living husband or wife in which case said husband or wife may take such part as a husband or wife inherits and no more."

It is agreed that the plaintiff and the respondents named in the will are all the living persons interested in the estate described in the two paragraphs of the will above set forth, and they all join with the plaintiff in asking that the court construe and interpret the provisions of said will and determine the nature and extent of the estate devised by the third paragraph of said will as modified, if modified, by paragraph five.

In the third clause of the will the property mentioned therein was devised to the devisees, their heirs and assigns. It was a devise in fee simple. In a later part of the clause there was a provision in case both legatees should die without issue, and without selling the property devised, then it was devised to other heirs. In the construction of the clause it is the duty of the court, as stated in *Bradley* v.

Warren, 104 Maine, 427," to be governed by the well settled rule that a devise absolute and entire in its terms, presumptively conveys an estate in fee, without words of inheritance, and that any limitation over afterwards is repugnant and void. It may be true that the rule sometimes appears to operate harshly in the probable intent of the testator, but the observance of it has been deemed indispensable to the required certainty and security in establishing titles to property, and especially in the disposition of landed estates."

Later the testator attempted to limit the estate given by him in fee, and in doing so he recognized the right of the devisees to sell and dispose of the property, which conveyance by the above rule would convey the fee. The authorities are cited in the opinion of *Bradley* v. *Warren*, supra, and in all cases that have been before the courts of the different states the rule is recognized as there laid down.

Clause 5 of the will was not a revocation of clause 3. It did not attempt to take from the devisees the property given them in item 3, or to revoke the gift, but merely attempted to impress upon the gift which had been completed in paragraph 3, limitations which were repugnant and void to the gift in paragraph 3. Having given to the devisees by paragraph 3 full dominion of the property it was inconsistent with and destructive of all other rights. *Bacon* v. *Jones*, 68 Maine, 34, quoting Hoar, J. in *Guilford* v. *Choate*, 100 Mass., 343. "An absolute power of disposal in the first taker is held to render a subsequent limitation repugnant and void." It is the opinion of the court that the devise to the plaintiff and Ellen U. Morrill of the property described in the third paragraph of said will was an estate in fee simple.

Bill sustained; decree according to the opinion.

WILLIAM D. HAMILTON *vs.* MADISON WATER COMPANY.

Somerset. Opinion May 7, 1917.

Nature of action against water company on account of furnishing impure water. Rule as to burden of proof in such actions. Negligence of water company. Degree of care required of water company. Contributory negligence on part of plaintiff.

In an action on the case to recover damages sustained by the plaintiff by reason of the defendant's alleged negligence in furnishing him with water from which he contracted typhoid fever,

Held:

1. That it was the duty of the defendant to exercise ordinary care and vigilance in furnishing and distributing at all times an adequate supply of wholesome water for domestic use.
2. That the degree of care and vigilance necessary to constitute ordinary prudence has relation to the importance of the subject matter and is commensurate with the duty to be performed.
3. When a corporation assumes what is practically an exclusive right to provide a community with such a prime necessity of life as water, sound public policy requires that it be held to a high degree of faithfulness in furnishing a supply adequate in quantity and wholesome in quality. This is but the exercise of ordinary care applied to the circumstances of the particular case.
4. Actual notice or knowledge of the unwholesomeness of the water on the part of the defendant is not an essential element to be proven in order to establish the defendant's liability. It is sufficient if there was credible testimony showing that the defendant in the exercise of reasonable care might have discovered its unwholesome and dangerous condition.
5. Nor is the plaintiff legally required to prove by positive testimony and with absolute certainty that the drinking of the water was the cause of his typhoid fever. It is sufficient if he proves facts and circumstances from which it is made to reasonably appear that the drinking of the water was the probable efficient cause of his illness.
6. The facts and circumstances in this case lead to the reasonable conclusion that the typhoid fever from which the plaintiff suffered was contracted from the use of the water furnished by the defendant, and that the defendant was not in the exercise of due care in supplying him with such contaminated water.

7. While the doctrine of contributory negligence on the part of the plaintiff obtains in this class of cases, as in all others of actionable negligence, its enforcement depends upon the peculiar facts and circumstances of each case, and those facts and circumstances must be weighed in the light of the relations between the parties.
8. This case is barren of any substantial evidence tending to prove want of due care on the part of the plaintiff. He did what the ordinarily prudent water taker would have done under the same circumstances and therefore fulfilled the measure of duty resting upon him.

Action on the case to recover damages on account of alleged negligence of defendant company in furnishing plaintiff water from the use of which he contracted typhoid fever. Defendant filed plea of general issue. At close of testimony, questions of law of sufficient importance having arisen, case was reported to law court for final determination and all the rights of the parties on so much of the evidence as legally admissible: If the plaintiff prevails, damages to be assessed in the sum of fifteen hundred dollars; if defendant prevails, no cost to be taxed against plaintiff. Judgment for plaintiff for fifteen hundred dollars.

Case stated in opinion.

W. B. Brown, and J. H. Thorne, for plaintiff.

Butler & Butler, and W. R. Pattangall, for defendant.

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

CORNISH, J. This is an action on the case to recover damages sustained by the plaintiff by reason of the defendant's alleged negligence in furnishing him with water from which he contracted typhoid fever.

The defendant corporation was chartered by Chap. 97 of the Private and Special Laws of 1891, for the purpose of "conveying to and supplying the inhabitants of the towns of Madison and Anson, and of such parts of the towns of Starks and Norridgewock as may be within two miles of the Madison and Anson toll bridge, with water for all domestic, sanitary and municipal purposes." The original authorized source of supply was the Kennebec River, but by amendment (Private and Special Laws, 1913, Chap. 176), this was extended to Hayden Lake in Madison and Embden Pond in Embden. The Company was duly

organized, entered into a contract with the Madison Village Corporation on August 14, 1891, for the supply of hydrants, drinking fountains and the flushing of sewers, and constructed its water works in 1892.

The general situation is as follows: The village of Madison lies on the east bank of the Kennebec River. A short distance out in the river from the east bank is an island which has been utilized in the development of the water power at that point. A dam has been constructed from the head of this Island extending in a southerly direction to the west bank of the river, and head gates between the head and the east bank. The Island and the east bank form a canal. On this canal, and taking their power from the dam, are the plants of three manufacturing corporations, the Madison Woolen Company, the Indian Spring Woolen Company and the Great Northern Paper Company.

The intake pipe of the Water Company leaves the east bank about one hundred and fifty or two hundred feet above the head gates and, as originally constructed, extended into the river about one hundred and twenty-five feet in a diagonal direction. In 1909 the intake pipe was extended up the river a further distance of about seven hundred feet so that the intake itself is now at a point about midway of the river, which is between five and six hundred feet wide at that place.

The pumping station in use is located on the west bank of the canal below the bridge. The distributing system is confined to the village of Madison which contains about two thousand inhabitants, and the stand-pipe is located northeasterly from and outside the village limits.

Briefly stated, the plaintiff's claim is that he contracted typhoid fever in December, 1914, from the water supplied by the defendant, and that the defendant is liable in damages for its negligence in failing to take proper precautions to prevent pollution at the source of supply, in neglecting to purify or sterilize the water before distributing it through its system and in failing to notify the plaintiff or the public that it was in fact unfit for drinking purposes.

This case is of novel impression in this State, but the principles involved are those that uniformly pertain to actions of negligence.

In order to recover, the burden rests on the plaintiff to establish three propositions by a fair preponderance of the evidence, as this case is before us on report and the Court is sitting with jury powers on questions of fact. These three propositions are:

First, that the typhoid fever from which the plaintiff suffered was contracted from the use of the water furnished by the defendant.

Second, that the defendant was guilty of negligence in supplying him with such contaminated water.

Third, that the plaintiff exercised due care on his part and was not guilty of contributory negligence.

We will consider these propositions in their order.

1. The Source of the Plaintiff's Disease.

This is purely and simply a question of fact. From the very nature of the case it is evident that the proof must be wholly circumstantial. Direct and positive evidence is not available.

That typhoid fever is communicated only by taking the germs into the system either by food or drink is admitted. That the plaintiff was stricken with this disease on December 25, 1914, and that his illness lasted for four months is also conceded. We think the evidence touching the history and surroundings of the case reasonably establishes these further facts. The plaintiff came to Madison on September 22nd or 23rd 1914. His family, consisting of a wife and two children, came about a month later, which was the last of October. His business was that of a baker, and immediately upon his arrival he entered the bakery of one Legendre and continued in his employ until he was taken sick. At the bakery he drank only from the faucet of the defendant. For the month prior to the arrival of his family, that is, from the last of September until the last of October, he boarded at the restaurant of one Champagne where spring water was used. When his family arrived he went to housekeeping in a tenement in the Wentworth Block, used there the public water supply exclusively and continued to do so until he was taken ill. Champagne testified that the plaintiff boarded at his restaurant a part of the time in November and December, but he had no books or memoranda on which to base his recollection, and his testimony as to dates was indefinite and unconvincing. As he was testifying more than a year after the event occurred, and in relation to an event unimportant at the time of its occurrence, his unaided recollection as to the date of its occurrence was naturally vague. On the other hand the testimony of the plaintiff as to the time is clear and positive, and he is corroborated by the circumstances. After he set up housekeeping he had no occasion to leave his family and board at a restaurant, and that he did

not do so is most probable. The plaintiff has therefore sustained the burden of proof that the only source of his drinking water during the months of November and December immediately preceding his illness was the public supply. According to the medical testimony two weeks are required for incubation, one for the development of the disease, and often three or more days pass before the case is diagnosed and reported, so that from three to four weeks are usually consumed after the germ is taken into the system before the case is reported to the authorities. As the plaintiff fell sick on December 25, 1914, and his case was reported on January 4, 1915, it is probable that the germ was taken sometime in early December. At that time he was drinking the defendant's water exclusively, both when at home and when at work.

All other possible sources of communication are eliminated by the evidence except the milk supply which was from Welch's dairy, and this source is urged by the defendant as a possible cause. It is true that milk is a vehicle of typhoid germs, but milk as it leaves the cow is free from them. The contamination is produced later and, once produced, the germs multiply more rapidly in milk than in water. The origin of the germs however is human excrement and the contamination in either milk or water must come from that source. "It may come through the washing of dishes the milk is in and it may come through a typhoid carrier, who has contaminated, who has pulluted the dishes by handling them with his hands, the vessel the milk is contained in. The milk could be contaminated in that way. I do not understand that there are typhoid germs in the milk when it comes from the cow." These are the statements of Dr. Sawyer, the Chairman of the Madison Board of Health.

But no evidence was introduced attacking the quality of the Welch milk or proving any conditions tending to pollute it. The Board of Health made an investigation of all the milk supplies but they did not condemn any. The mere fact that a person having typhoid fever had used the Welch milk is of no more consequence than that he had used certain bread, in the absence of evidence tending to show contamination of the milk or the bread. It is post hoc, not propter hoc.

But we will trace the evidence a little further. It appears that upon investigation only two persons beside the plaintiff who used the Welch milk contracted the disease. Of these, one used water from a

private well and the other chiefly from the defendant although occasionally from the artesian well in the yard of the Great Northern Paper Company. So that of the three, two used the town supply.

Two other cases of typhoid fever were reported on the same day as the plaintiff's case. Both of these were school boys, and of these neither had used the Welch milk, while both used the town water at home and spring water at the public school. The three cases therefore, reported on January 4, took their milk supply from three different sources but their water supply chiefly from a single source, that of the defendant.

The rule as to burden of proof in this class of cases has been well stated as follows:

"The plaintiff was not legally required to prove by positive testimony and with absolute certainty that the drinking of the water was the cause of the typhoid fever. The plaintiff satisfied the burden of proof which the law imposed upon him by proving such facts and circumstances from which it was made to reasonably appear that the drinking of the water was the probable efficient cause of the typhoid fever. *Wilkinson* v. *Standard Oil Co.*, 78 N. J., Law 524. It is only when it appears that the injuries were occasioned by one of two causes, for one of which the defendant is responsible but not the other, that the plaintiff must prove such facts and circumstances as will exclude the equal probability of the injury having resulted from the cause for which the defendant is not liable." *Jones* v. *Mt. Holly Water Co.*, 87 N. J. Law, 106; 93 At. 860.

Let us apply this rule in the light of these additional circumstances.

The water was taken from the Kennebec River. The intake was about nine hundred feet above the head-gates. The dam created a basin or pond from which the water was drawn. When the water was below the crest of the dam or of the flash-boards on top of the crest, the only exit was through the head-gates into the canal. When these gates were closed, the current stopped, and there was more or less of a refluence, an eddying back, especially along the shores, until the pond was again filled and the current began to flow over the flash boards. Under these conditions one witness testifies that objects would move up river on the surface even as far as the intake. The sediment and foreign substances at the bottom would be correspondingly stirred up and moved about.

In the Summer and Fall of 1914 there was a severe drought. The river was low. No water ran over the dam from the time the river was frozen in the Fall of 1914 until the latter part of February, 1915. The mill pond was covered with ice. Such was the basin of supply.

What were the possible sources of pollution that might reach this basin while in this condition?

On the west or Anson side, there were several danger spots all above the dam, and at varying distances from the intake. On the banks of Getchell Brook, which empties into the mill-pond at a distance of about twelve hundred feet below the intake, were twelve or fifteen houses, the most of them with water-closets discharging into the brook, which became, as one physician describes it, like an open sewer. Farther down the river and nearer the bridge was a four tenement house with two privies near the bank. Farther up the river and at a point about three hundred and fifty feet above the intake in a diagonal direction was the so-called Powers house where the privy drained into the river. Close by were a pig pen and a pile of hog dressing, both near the water.

The situation on the east or Madison side was fraught with even greater possibilities of contamination. The Great Northern Paper Company used a large tract on the bank for their log piles, extending twelve or fifteen hundred feet up and down the river. Some of these piles were above the intake, some opposite and some below. Above the intake and at a distance from it of about three hundred and fifty feet in a diagonal direction, Rowell Brook empties into the river. This is a stream fifteen or twenty feet wide at its mouth, and narrowing to three or four feet in width at a distance of one thousand feet. Even in low water it is an active stream at that distance from its mouth. It drains a section in the outskirts of Madison Village and beyond the water shed of the thickly settled portion. On Rowell Street, which is within the water shed of Rowell Brook, Mrs. Charles Frazer was taken ill with typhoid fever and her case was reported on September 19, 1914. The natural drainage from her house was into Rowell Brook, but the evidence does not disclose the actual conditions about her house as to toilets.

This brook just before reaching the river runs midway between the log piles. The crew of men employed on these piles during the Summer and Fall varies from ten to twenty. A privy for their use had been built on the bank over the water at a point below the lowest

log pile and about five or six hundred feet below the intake, the excrement falling directly into the mill-pond. But the men were accustomed at times to use also the spaces behind the log piles for toilet purposes, and as the land in that locality is low, all this filth which had accumulated during the dry season was washed into the river at high water chiefly through Rowell Brook. Farther down the east bank was a group of four houses, one of which was occupied in the season of 1914, with drainage into the river.

In addition to all this the village of Bingham, twenty miles above Madison, in 1912 established a public sewage system, the outlet of which was the Kennebec River. Whether or not typhoid fever existed in that village in 1914 does not appear in evidence. The plaintiff's counsel endeavored to ascertain the fact from the Secretary of the Board of Health in that town, but his questions as put in different forms were so strenuously objected to by the defendant's counsel that the vital one was finally withdrawn. It might not be fair to draw any inference of fact from this procedure.

So much for the conditions existing on both sides and above the mill-pond. Various other possible causes of pollution were suggested, but after a careful analysis of the evidence we are not impressed with their importance. They were not shown to be connected with the water supply with sufficient closeness.

The plaintiff's case was one of the earlier ones. As we have already stated, Mrs. Frazer's was reported on September 19. The next was John Withee's which was reported on December 26. His disease however was contracted in Carratunk, a town farther up the river, and he was sick when he was brought to Madison. His house was only four or five hundred feet from the bakery where the plaintiff worked, but as the plaintiff must have contracted the disease before Withee came to Madison there is no connection between the two cases. One other case was reported on January 2, 1915, and three on January 4, the plaintiff's and two others. Other cases followed in rapid succession until there existed what might well be termed an epidemic.

On February 22, a sample of water was taken by the Superintendent of the Electric Light Company from a hole in the ice in the rear of the Powers' house, fifty feet from the shore and three hundred and eight feet in a northwesterly direction from and above the intake.

This was found by Dr. Whittier, Professor of Bacteriology at Bowdoin College to contain a very large quantity of bacteria and he pronounced the water unfit for drinking.

On March 9, 1915, eight samples were taken at various places, during an investigation made by the State Chemist, Mr. Evans, under the direction of the Public Utilities Commission. Every sample except one, which was taken one and one-half miles up the river, gave evidence of sewage pollution and indications of colon bacilli. They varied as to amount. Those taken at the mouth of Rowell Brook, at the intake, at the hotel tap, and at various other places, showed thirty colon bacilli to the ounce, while the sample taken at the mouth of Getchell Brook showed three hundred to the ounce. The water was generally impregnated with sewage pollution. This high percentage did not of itself signify the presence of typhoid germs, but of the existence of a large quantity of sewage. Colon bacilli are normally present in the intestines while the typhoid germ is a parasite. The presence of a large quantity of colon bacilli in water indicates therefore sewage pollution, and naturally the greater the percentage the greater likelihood of the existence of the typhoid germ.

It was soon after these tests were made that the use of the water was condemned unless boiled, and its condition was such that even as late as June 14 the same injunction was given by the State Chemist.

In view of all the foregoing facts, the details of which have already exceeded the reasonable limits of an opinion, we are forced to the conclusion that the source of the plaintiff's illness was the water furnished by the defendant company. Upon this first element in the case he has given the Court satisfactory and convincing proof.

2. DEFENDANT'S NEGLIGENCE.

What was the measure of duty resting upon the defendant toward its patrons of whom the plaintiff was one? Speaking in general terms it was the duty of exercising ordinary care and vigilance in furnishing and distributing at all times an adequate supply of wholesome water for domestic use. But here, as always, the degree of care and vigilance necessary to constitute ordinary prudence has relation to the importance of the subject matter and is commensurate with the duty to be performed. When a corporation assumes what is practically an exclusive right to provide a community with such a prime necessity of life as water, sound public policy requires that it

be held to a high degree of faithfulness in furnishing a supply adequate in quantity and wholesome in quality. This is but the exercise of ordinary care applied to the circumstances of the case. From the very nature of the undertaking and the relations of the parties, the consumer must rely upon the proffered supply. Other sources are naturally supplanted, and the health and, to a certain extent, it may be the lives of the consumers are at the mercy of the company.

The rule as to the defendant's liability has been defined in a recent case by the Supreme Court of Connecticut as follows:

"Such a corporation is not a guarantor of the purity of its water or of its freedom from infection; but it is bound to use reasonable care in ascertaining whether there is a reasonable probability that its water supply may be infected with a communicable disease from causes which are known to exist, or which could have been known or foreseen by the exercise of such care; and if the exercise of such care would have disclosed a reasonable probability of such infection, then it becomes the duty of a water company to adopt whatever approved precautionary measures are, under the circumstances of the case, reasonably proper and necessary to protect the community which it serves from the risk of infection." *Hayes* v. *Torrington Water Co.*, 88 Conn., 609, (1914). The New Jersey Court, in a similar action decided in 1915, prescribed the nature of the evidence which would be probative of negligence in these words: "Actual notice or knowledge of the unwholesomeness of the water of the defendant company was not an essential element to be proven in order to establish the defendant's liability. It was sufficient if there was testimony tending to show that the defendant in the exercise of reasonable care might have discovered the unwholesomeness and dangerous condition of the water." *Jones* v. *Mt. Holly Water Co.*, 87 N. J., Law, 106.

The application of these rules to the facts and circumstances in the pending cause shows a failure on the part of the defendant to faithfully perform its legal obligations, both in apprehending the danger and in taking precautionary measures to avert it.

In the first place the reasonable probability of typhoid infection should have been apparent to careful and watchful minds charged with a responsibility so grave as theirs. The general situation might have created apprehension. It is a commonly accepted scientific fact that the water from a stream or river flowing through villages and populated country is viewed with suspicion and such sources of

public supply have been gradually abandoned, and the lakes utilized in their place. Dr. Whittier, whose testimony before the Public Utilities Commission, in their investigation of this matter, was admitted at this trial, so far as legally admissible, stated that he did not think it was safe for a town to take its water supply at any point in the Kennebec River below Madison or immediately above Madison.

In the second place, when we pass from the general to the specific situation the menace increases. The possible sources of pollution from the banks and watershed on both sides of the mill pond from which this supply was taken have already been pointed out in detail and need not be repeated. These conditions had existed for years and no attempt whatever had been made by the defendant to abate or correct them, although the charter of the company as well as the general laws of the State gave ample power for its protection. The company's agents did not investigate or attempt to ascertain these conditions although a superficial examination would at any time have revealed them to the attentive eye. The defendant should have anticipated trouble and not have waited until the trouble arrived. Ordinary prudence in such a situation looks to the future, and endeavors to avert probable or possible danger. It does not allow one to sit idly by until the blow has fallen.

In the third place, the history of typhoid fever in Madison should have given the defendant reasonable grounds for anxiety. We have the record of the reported cases for a period of eight years. It is as follows: In 1907, ten cases; 1908, fifty-five cases; 1909, fifteen cases 1910, twenty-one cases; 1911, sixteen cases; 1912, nine cases; 1913, four cases; 1914, five cases. The evidence as to the number in 1915 when the last epidemic occurred, of which the plaintiff's case was one, was objected to by the defendant and excluded. But the Chairman of the Board of Health had already testified that for the ten years ending December 31, 1915, there had been one hundred and sixty-two reported cases, or an average of more than sixteen each year. This revealed a condition, in a village of two thousand inhabitants, that called for investigation and action. After the epidemic of 1908, with its fifty-five cases, the defendant, after conferences with the Board of Health, extended the intake pipe up river about seven hundred feet, and to a point even farther than the Board had recommended. That however only partially solved the problem, because

in 1909 there were fifteen cases, in 1910, twenty-one, and in 1911, sixteen. For the next three years the number diminished, the lowest being in 1913, four cases.

In the fourth place and finally the defendant had been specifically and frequently warned.

The conditions on the bank of the river and on the streams continued, and to increase the peril, Bingham, twenty miles up the river, installed a partial sewage system with which, including both public and private sewers, twenty residences beside the hotel were connected. All this sewage emptied into the Kennebec River. This possible peril Mr. Evans had taken pains to guard the officers of the company against as early as 1908, and on October 7, 1912, he informed them of the installation of the Bingham sewers and their likelihood to affect the water supply. The officers of the company however made no investigation to ascertain the condition at Bingham or the quantity of sewage that was coming into the river from that source.

Repeated warnings had been given to the Company by Mr. Evans, but without apparent avail. On April 14, 1913, he wrote: "During the past year there has been evidence of more drainage water entering the upper river. This has not been enough to seriously affect this water as yet. It should however be understood that with the natural increase in population on the upper watershed, and especially with the introduction of sewage systems by the towns above your intake, serious pollution of the water is sure to take place in the future; and so it would be well to be prepared for such a condition by considering the desirability of either filtering the river water or using a lake or ground supply." On October 13, 1913, Mr. Evans again reported: "The analysis shows this water to be in the poorest chemical condition that I have found it during the past two years. The recent rains have washed into the river much organic refuse, which had accumulated on the banks during the Summer, and the increased current has brought some little sulphite wash to the intake. . . . No sewage bacteria were found in this sample, so that its use for drinking should not cause intestinal disease. It is worthy of note, however, that if sulphite wastes are being brought to your intake, that there is the chance of sewage wastes also being brought down when once sewage systems appear in the towns above you. At the

present time the water is safe to drink, but it is not of high quality. . . . It is entirely probable that means will have to be adopted to purify this water in the near future."

This caution was repeated in Mr. Evans' report of January 12, 1914, in these plain words: "As I have called to your notice before, this water is one that is sure to become polluted as soon as sewers are installed by the towns on the upper river, and is likely to be so polluted for short times after heavy rains in the Spring and fall. As a result the water is one that should be carefully watched and provision made for sterilization of the water at once on the installation of sewers by the towns above you. It would be preferable to have such a plant for emergency use in the spring and fall even now." Sewers had already been installed in Bingham, but not in the intervening town of Solon, so far as the evidence discloses.

Confronted with all these facts, the natural conditions of the source of supply, the lurking perils on either bank, the sewage system above, the persistence of the disease year after year, the repeated warnings and suggestions of the State Chemist, especially during the two years, 1913 and 1914, immediately preceding the last outbreak, what steps did the defendant take, after the extension of its intake pipe in 1909, to protect its supply or to filter or sterilize it before distribution? Practically nothing. At one time the State Chemist spent two days on the ground in an investigation, and the superintendent states that no conclusion was reached although they viewed the water with suspicion. The superintendent also sent a bottle of water four times a year to Mr. Evans for analysis, and received his reports thereon, stating that "in its present condition" it was suitable for drinking purposes, but at the same time incorporating the cautions and suggestions before referred to.

What practical good, it may properly be asked, did the securing of the quarterly analysis accomplish? None whatever. It furnished no preparation against the predicted day of evil. When that day came in 1915, the Company was helpless. Ordinary prudence would have prompted the anticipation of that day, and the avoidance of the epidemic either by going to some other source of supply or by the proper filtration of the water from this source. The former remedy may have been disproportionately expensive, but the latter could and should have been provided.

The excuse offered by the defendant is that it always stood ready to install a filter and had so notified the Madison Village Corporation, but its members were not in favor of the plan. There is evidence which leads us to believe that these people were not opposed to the purification of the water, but doubted whether it could be made suitable for drinking purposes by the proposed filtration.

However that may be, the duty rested on the defendant to use due care and diligence in providing its customers with a supply of wholesome water, and if the conditions were such that ordinary prudence and vigilance dictated the installation of a filtration plant, one should have been installed. The plaintiff's rights were not affected by the views of the Village Corporation.

Reverting now to the rule defining the defendant's duty, it is the opinion of the court that the exercise of reasonable care on the part of the defendant would have discovered the reasonable probability of infection from typhoid germs long prior to the plaintiff's illness, and that being so, it became the duty of the defendant to adopt whatever precautionary measures were reasonably proper and necessary, under the circumstances, to protect the community which it served from the risk of infection. No protective measures were adopted or attempted. Something more than masterly inactivity was demanded *Hayes* v. *Torrington Water Co.*, 88 Conn., 609, supra. *Jones* v. *Mt. Holly Water Co.*, 87 N. J., Law, 106, supra.

3. PLAINTIFF'S CONTRIBUTORY NEGLIGENCE.

But the defendant contends that even granting the existence of negligence on its part, there was similar negligence on the part of the plaintiff which precludes recovery.

It relies upon *Green* v. *Ashland Water Co.*, 101 Wis., 258, 43 L. R. A., 117, where the court held as follows:

"If the source of supply be contaminated with sewage for a long period of time, causing typhoid epidemics annually in the community for several years, and the facts in that regard be notorious and a matter of common knowledge, the presumption is that members of such community of ordinary intelligence have notice of that situation; and in the absence of evidence to the contrary that presumption will prevail and preclude a recovery by a person injured by the use of such water, on the ground of his contributory fault. Therefore, if one drinks water furnished by a water company, with knowledge or

reasonable means of knowledge, that it is dangerously polluted with sewage, he takes upon himself the risk, and if he die, there may be no recovery on the ground of deceit or negligence. Notice may be implied from a general knowledge of the facts in the community." The facts in that case warranted the court in finding contributory negligence on the part of the plaintiff. The court state them to be in part as follows: "He (the plaintiff) knew that the sewage of the city was drained into the bay, and that the defendant's water supply was taken therefrom. He was an intelligent, reading, working man. He took one of the city papers wherein the dangers of taking water from the bay were discussed. He had typhoid fever in his family six months before he was stricken, his wife being the afflicted party. She was attended by Dr. Hosmer, one of the plaintiff's witnesses, who was thoroughly conversant with the condition of defendant's water supply and who probably talked with the deceased on the subject as he did with intelligent men generally, it being a matter of common talk. . . . . The facts in that regard were understood in the city generally, and had been the subject of discussion at public meetings and in the City Council, and in the newspapers and among the people for a long time. There is no evidence in the record to rebut the presumption that the deceased had notice of what was so commonly known." Under these facts the court held that the plaintiff did not exercise due care.

No such facts however exist in the case at bar. The plaintiff, it is true, had lived in Madison four years ending in 1909, and therefore must have known of the typhoid epidemic of 1908. But after that time he was absent from Madison for five years and until late September, 1914. During the three months before he was stricken there was no general discussion of the subject, no public meetings so far as the record shows, and he testifies that he had no reason to distrust the quality of the water. No warning had ever been given him. This testimony is not overborne.

The defendant argues that everything which has been described with regard to the possibility of pollution from different sources was as apparent to the plaintiff as to the defendant and imposes the same want of due care upon the one as the other. Not so. The two parties were not on a parity. The plaintiff was not in law held to such strict account as the defendant. It is no part of the duty of the consumer to investigate the water supply and ascertain possible

sources of pollution. That duty rests on the water company together with the further duty of taking such positive action as is necessary for the protection of its customers. It cannot shift these obligations to the shoulders of the plaintiff. While therefore the doctrine of contributory negligence obtains in this class of cases, as in all others of actionable negligence, its enforcement depends upon the peculiar facts and circumstances of each case, and these facts and circumstances must be weighed in the light of the relations between the parties.

This case is barren of any evidence tending to prove want of due care on the part of the plaintiff. He did what the ordinarily prudent water taker would have done under the same circumstances and thereby fulfilled the measure of duty resting upon him.

Our conclusion therefore is that the plaintiff has maintained, by a fair preponderance of the evidence, the three elements embraced in this action, and is entitled to recover.

According to the stipulation under which this case was reported to this court, damages are to be assessed by agreement in the sum of fifteen hundred dollars in case the action is sustained. The entry must therefore be,

Judgment for plaintiff for $1500.

RALPH L. ABBOTT, et al., In Equity,

vs.

WALLACE M. FELLOWS.

Cumberland. Opinion May 7, 1917.

Conditions subsequent in deeds. Presumption of payment of mortgage after lapse of twenty years, in the absence of evidence to the contrary. Rule as to the record of an undischarged mortgage given more than thirty years creating a substantial incumbrance upon the title, where the defendant and his predecessors have occupied the premises without interruption for more than forty years. Rule where defendant has agreed to convey certain lots by warranty deed and plaintiff claims defects in title but makes no demand for conveyance or tender of purchase price.

In a bill in equity brought on November 12, 1914, asking the cancellation of a written contract dated October 10, 1910, for the sale of certain lots of timber land, because of certain alleged false and fraudulent representations on the part of the defendant vendor, it is,

Held:

1. That the alleged infirmity in the title to certain lots conveyed by the Commonwealth of Massachusetts in 1792 cannot prevail. That deed contained merely a condition subsequent, and in the case of a grant from the State with a condition subsequent, the title remains valid in the grantee until the State by some legislative act avails itself of a forfeiture. There has been no attempted re-entry here for breach of condition.
2. In the absence of evidence to the contrary, the presumption of payment of a debt, although secured by a mortgage, arises after the lapse of twenty years, and in view of the fact that the defendant and his predecessors in title have occupied the premises without interruption for more than forty years, the record of an undischarged mortgage given more than thirty years ago creates no substantial defect in the title.
3. That there was no representation as to the territorial union of lots three and four, but simply as to the contract union for the purposes of sale, which was true.
4. That even if the title in the vendor as to a portion of Lot 4 was imperfect at the time the contract was made, if he perfects it before he is called upon to con-

vey, the plaintiffs cannot complain. The language of the contract refers to the title which is to pass by the deed and not to the conditions existing when the contract was made.

5. That the alleged misrepresentations on the part of the defendant as to the quantity of standing timber upon Lot No. 7, were merely honest expressions of opinion, and whether or not his estimates were correct has never been determined because the lumber remains uncut.

6. The evidence fails to disclose any substantial grounds for the plaintiff's prayers for relief.

Bill in equity asking for the cancellation of a certain written contract for the sale of real estate on account of alleged fraud and false representations on part of vendor. Cause was heard upon bill, answer and proof. At close of testimony, the Justice hearing the same being of the opinion that questions of law were involved of sufficient importance and doubt to justify the same, and the parties agreeing thereto, this cause was reported to the next term of the Law Court for its determination upon so much of the evidence as is admissible. Bill dismissed with a single bill of costs.

Case stated in opinion.

Eben Winthrop Freeman, for plaintiffs.

Frank W. Butler, and Elmer E. Richards, for defendant.

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

CORNISH, J. This bill in equity was brought to cancel a written contract for the sale of real estate, because of certain alleged false and fraudulent representations on the part of the defendant, the grantor.

The contract was made on October 10, 1910. It included seven lots of timberland and the total consideration was to be eighteen thousand five hundred dollars. Separate valuations were placed upon separate lots, at which they were to be conveyed by warranty deed, with the wife's right of descent duly released, whenever desired by the plaintiffs. The agreement expires September 1, 1922. In the meantime the plaintiffs are to pay to the defendant annual interest at the rate of five per cent on the amount remaining unpaid, and also all taxes assessed upon the property. No tender of payment on any of these lots has been made by the plaintiffs and therefore the legal title still remains in the defendant. The plaintiffs paid without

protest or complaint interest and taxes for the years 1911, 1912 and 1913, aggregating $3,164.65. In a letter to the defendant dated November 11, 1914, more than four years after the contract was made, the plaintiffs for the first time set up a claim of right of rescission on the ground of false and fraudulent representations as to the location, quantity and boundaries of the land, the incumbrances existing thereon, the defendant's title and his right to convey. This bill in equity was brought on the following day, November 12, 1914, asking for the cancellation of the contract and the restoration of the various payments made by the plaintiffs with interest thereon.

The grounds urged are as follows:

1. DEFECTS IN TITLE TO LOTS 1, 3, 4, 5, 6, 7.

The infirmity complained of is this. These lots situated in Wyman Plantation so-called, were originally conveyed by the Commonwealth of Massachusetts to Jedediah Prescott, Jr., and Nathaniel Whittier by deed dated February 28, 1792. This deed contained a condition that the grantees, within nine months from its date, should execute a deed in fee of one hundred acres each to seven different parties, evidently settlers, upon the payment therefor of the sum of thirty shillings. The records show no subsequent conveyance to three of these parties. This breach of condition on the part of Prescott and Whittier is set up by the plaintiffs here.

The answers to this claim are evident. In the first place, the deeds were not to be executed to the settlers until the purchase price of thirty shillings was paid. It does not appear that this consideration was ever paid or tendered, so that a breach of condition in fact is not proved. In the second place, this provision in the Massachusetts deed constituted a condition subsequent. The title vested in Prescott and Whittier subject to its being revested in the Commonwealth by entry for breach of condition. Under these circumstances the estate continued in the grantees or their assigns until defeated by an actual entry for the purpose of claiming a forfeiture by someone having the right so to do. *Osgood* v. *Abbott*, 58 Maine, 73; *Chapman* v. *Pingree*, 67 Maine, 198. In case of a grant from the State, containing a condition subsequent of this nature the title remains valid in the grantee, until the State by some legislative act shall avail itself of a forfeiture. *Little* v. *Watson*, 32 Maine, 214. In the case at bar no such action has ever been taken, so far as the evidence discloses, either by the

Commonwealth of Massachusetts or the State of Maine. The title granted in 1792 cannot be successfully assailed on this ground by a third party. It stands unimpeached.

2. Defect in Title to Lot No. 5.

This consists of an undischarged mortgage for $1600. given by Jethro Brown to Moses T. Bean on June 30, 1883.

In the absence of any evidence to the contrary, the presumption of payment arises after the lapse of twenty years. *Howland* v. *Shurtleff*, 2 Met., 26; *Ayres* v. *Waite*, 10 Cush., 72; *Sweetser* v. *Lowell*, 33 Maine, 446; *Chick* v. *Rollins*, 44 Maine, 104; *Jarvis* v. *Albro*, 67 Maine, 310. In view of the fact that the mortgagor and his assigns have remained in undisputed possession of the premises, that the defendant and his predecessors in title have occupied without interruption for more than forty years, the record of an undischarged mortgage given more than thirty years ago creates no substantial incumbrance upon the title.

3. Contiguity of Lots 3 and 4.

The bill alleges that the defendant falsely and fraudulently represented that lots 3 and 4 adjoined each other and constituted one lot, when in fact they are separated and therefore cannot be operated with the same economy as a single lot. The evidence fails to substantiate the alleged misrepresentation. One of the plaintiffs testified that when the contract was drawn the defendant "explained that the two lots were together and he was selling them as one lot." The meaning is clear. The timber, not the soil of these two lots was to be conveyed, and the agreement contained this clause: "The valuation of the standing black growth to be deeded under preceding paragraph 3 and under this paragraph 4 for purposes hereinafter mentioned, is to be five thousand dollars ($5,000.) for all." That is, there was no separate valuation for the timber on the two lots, but the lots were taken together at a single figure and considered as one. There was no representation whatever as to the territorial union, but simply as to the contract union, which was true.

4. Southwestern Boundary of Lot No. 4.

The plaintiffs claim that before they made the contract, the defendant pointed out the southwestern boundary of lot 4 as a line running from a forked ash tree to a pine stub near the road, whereas

the true line strikes the road near a birch stump, some three hundred feet easterly of the pine stub. The effect of this is to diminish the stumpage on lot 4, as the plaintiffs claim, about one hundred and fifty thousand feet.

Assuming these claims to be true they cannot avail the plaintiffs in this proceeding.

The defendant has agreed to convey the various lots by warranty deed whenever, prior to September 1, 1922, the plaintiffs shall demand a conveyance and tender the stipulated price therefor. Until such demand and tender are made and the defendant fails to convey according to the terms of the contract there is no default on his part, The crucial time is the time of delivery of the deed, not the making of the contract. Assuming that the title was imperfect when the contract was made, if he perfects it before he is called upon to convey, the plaintiffs cannot complain. This is settled law and applies not only to this particular point under consideration but to all defects of title or incumbrances, which have been discussed under previous heads. The language of the contract refers to the title which is to pass by the deed and not to the conditions existing when the contract was made. *Galvin* v. *Collins*, 128 Mass., 525; *Kares* v. *Covell*, 180 Mass., 209; *Smith* v. *Greene*, 197 Mass., 16. The defendant, since the contract was made, has purchased the land lying westerly of lot 4, so that whatever the true line may be, he is in a position to make good his representation. In his answer he states that he is ready and willing to convey to the line pointed out by him. He is now able to do so. Under these conditions the plaintiffs should not ask a court in equity to cancel the contract. They will obtain title to all that they understood they were purchasing and the defendant will have faithfully executed his contract.

5. MISREPRESENTATIONS AS TO LOT 7.

These as claimed by the plaintiffs are two. First as to the quantity of standing timber on the lot, and second as to certain timber which was pointed out as being within the lot boundaries.

It appears that the attention of the plaintiffs was called to all this timberland not by the defendant but by one Lander, a forester, who interested them in the purchase and finally received a commission from them when the contract was completed. He was their agent, not the defendant's. For two days prior to the execution of the

contract, the plaintiffs and Lander with the defendant cruised the tracts to ascertain in a general way the quantity of stumpage. "We went through satisfactory to ourselves," as one of the plaintiffs testified, and when he was asked why they did not spend more time in exploration, he replied "I think probably at that time we thought we had seen enough," and the plaintiffs were timber purchasers and operators of considerable experience. It is doubtless true that during the course of the examination of lot 7 the defendant estimated that while the lot embraced one hundred acres there were about fifty acres containing black growth, that there was about a million feet of timber and that he thought there was also some scattering pine that belonged to him down toward the Plymouth line. But all his statements were mere expressions of opinion, merely his own judgment as to the contents and value of the lots. Such expressions as between buyer and seller do not constitute false representations, even if they are false and intended to deceive. Neither of these elements is present here. We think the defendant's statements were honest expressions of his belief and whether or not his estimates were correct has never been ascertained, because the timber remains uncut. It is still a matter of estimate.

In fact, a careful study of the entire evidence fails to disclose any substantial grounds for the plaintiffs' prayers for relief. The trade was solicited by them, not by the defendant. They had full opportunity to examine the property before the contract was made and did examine it to their own satisfaction. No advantage was taken or sought to be taken by the defendant. For three years after the agreement was consummated the plaintiffs were apparently satisfied with their bargain, because they uncomplainingly paid the taxes and the annual interest. It was not until the end of the fourth year that they suddenly discovered the fraud that had been perpetrated upon them so long before. This late discovery savors more of an excuse for nonperformance on their part than of a valid reason for forced cancellation on the part of the defendant.

Bill dismissed with a single bill of costs.

EDGAR A. BLANCHARD, Admr.,

vs.

MAINE CENTRAL RAILROAD COMPANY.

Penobscot. Opinion May 8, 1917.

Speed of railroad trains at crossings as regulated by R. S., 1903, Chap. 52, Sec. 86; see also R. S., 1916, Chap. 57, Sec. 79. General rule as to care of persons approaching railroad crossing when gates are open. Extent to which reliance may be had upon open gates at railroad crossing. Degree of care required by traveler when approaching railroad crossing when view of track is obstructed. Degree of care required of person in any vehicle, although not the driver thereof, in approaching railroad crossing.

This case was an action for damages brought by the administrator of the estate of J. Waldo Miles of Old Town to recover damages from the defendant company for injuries sustained by the plaintiff's intestate by reason of a collision of a train of the defendant company and an automobile in which the plaintiff's intestate was riding, the collision occurring at a crossing on Front Street in Old Town on August 3rd 1914. The verdict of the jury was for the plaintiff, damages being assessed in the sum of $5320.83; and the case comes to this court on a general motion filed by the defendant to set aside the verdict on the grounds that it is not warranted by the evidence, and also that the damages are excessive.

While the fact of open gates at a railroad crossing is a circumstance which a traveller may properly take into consideration and upon which he may place some reliance, he is not thus relieved of all care.

The extent to which the traveller may rely upon the invitation given by open gates is a question of fact for the jury, unless it appears that he relied exclusively thereon.

The fact that the traveller is not the driver of the vehicle in which he is riding does not relieve him of all care.

Ordinarily when the view of the traveller of the railroad track is obstructed, greater care is required in looking and listening, even to the extent, if driving, of alighting.

Action on the case to recover damages on account of injuries received through the alleged negligence of defendant company. Defendant filed plea of general issue. Verdict for plaintiff in the sum of $5320.83. Motion for new trial filed by defendant. Motion sustained. New trial granted.

Case stated in opinion.

James D. Rice, and W. R. Pattangall, for plaintiff.

Fellows & Fellows, for defendant.

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

BIRD, J. "This case was an action for damages brought by the administrator of the estate of J. Waldo Miles of Old Town to recover damages from the defendant company for injuries sustained by the plaintiff's intestate by reason of a collision of a train of the defendant company and an automobile in which the plaintiff's intestate was riding, the collision occurring at a crossing on Front Street in Old Town on August 3rd, 1914. The verdict of the jury was for the plaintiff, damages being assessed in the sum of $5,320.83; and the case comes to this court on a general motion filed by the defendant to set aside the verdict on the grounds that it is not warranted by the evidence, and also that the damages are excessive. The action was not brought for the purpose of recovering damages for the death of the plaintiff's intestate, altho he did die from the effect of the injuries received, but only for the pain and suffering, physical and mental, which he endured during his lifetime.

"It appears that the defendant company's track crossed Front Street, Old Town, at the foot of a hill and that the arrangement of buildings along the left [right] hand side of Front Street as passengers came down the hill toward the track was such as to prevent a person coming down the hill from seeing the track over which trains passed on their way from Bangor to Old Town station until within a very short distance of the track, when a small portion of the rails became visible. The crossing was a blind crossing. Because of this, the defendant company had erected gates, which when in operation, protected the Front Street Crossing. A little to the east of Front Street the defendant company had another grade crossing at Bosworth Street; and still farther to the east another grade crossing was maintained on

Center Street. The crossing at Bosworth Street, like that on Front Street, was protected by a gate, and on Center Street the defendant company maintained a flagman. On the easterly side of Center Street, and west of the railroad, there was erected by the company a small building in which the flagman had his station. The gates on both Bosworth Street and Front Street were worked from this station, so that in order to operate the gate on Front Street the gate tender did not need to go to that point.

"It appears in the evidence that this gate was not operated after the last regular train had gone thru Old Town in the evening, which was ordinarily about six o'clock. The gate tender usually locked his gate in the Bosworth Street gate house at about six P. M., unlocking the gates and putting them in service again at six A. M. The accident in which Mr. Miles met his death occurred at about seven P. M., and at the time of the accident the gate across Front Street was erect.

"It is admitted that the place where the accident occurred—namely at the Front Street Crossing—was near the compact part of the City of Old Town, and hence, the speed of the train comes under the regulations prescribed in Section 86, Chapter 52, of the Revised Statutes and was limited to six miles an hour.

"The testimony of the various witnesses fixes the speed of the train at from ten to eighteen miles an hour, the lowest estimate being ten miles and the highest eighteen. The witnesses for the defense admit a speed of ten or twelve miles an hour. Hence, the train was proceeding at an illegal rate.

"The plaintiff contends that the train approached this crossing without giving any warning by blowing a whistle or ringing a bell. The testimony of all of the witnesses, both for the plaintiff and defense, is that the last time the whistle was blown was at or near O'Connell's blacksmith shop, which was 1877 feet distant from Front Street. At the rate the train was running, this whistle was blown something like two minutes before the time of the accident. And, in view of all the evidence, it cannot be seriously argued that the attention of Mr. Miles was likely to have been attracted by the whistle.

"The evidence concerning the ringing of the bell is conflicting.—"

Such is the statement of the case contained in the brief of plaintiff.

The view which the court entertains of this case is such that it is not necessary to consider the negligence of defendant. The plain-

tiff's intestate and his companion, Bridges, who drove the automobile, proceeded from their home on Front Street, in a northwesterly direction, destined for a point which rendered necessary the crossing of the railroad. The speed of the automobile was that at which a pedestrian would walk, as a man and his wife upon the sidewalk kept pace with the automobile practically until the railroad was reached. While thus proceeding, the plaintiff's intestate, who sat upon the seat with the driver of the car, and the woman were engaged in conversation. From the time it took its northwesterly course towards the railroad until the collision, the automobile did not stop, nor did plaintiff's intestate request Bridges to stop it. Although Bridges testified that he looked and listened as he approached the track (See *Blumenthal* v. *B. & M. R. R.*, 97 Maine, 255) there is no evidence, whatsoever, that plaintiff's intestate did either. When the car was some thirty or forty feet from the track, two young men on the opposite side of the track endeavored to warn the occupants of the car by motions and shouting. It is in evidence that at a distance of from 9 to 10 feet from the more easterly rail of the track a person could see as far northeasterly as the Bosworth Street crossing—substantially one hundred feet—and that at a point 13 feet and 7 inches from the easterly track, his view would extend 65 feet in the same direction. When Miles reached this point the front of the car would have been at least seven or eight feet from the track. If plaintiff's intestate when he reached the latter point, had looked he must have seen the train, if he had listened he must have heard the bell, which the positive evidence conclusively shows was ringing, and the rumble and other noises of the train and in either case it is inconceivable that he would have failed to warn Bridges and request him to stop, but the car was not stopped nor did he speak to Bridges. *Blumenthal* v. *B. & M. R. R.*, ubi supra. The conclusion is irresistible that plaintiff's intestate exercised no care whatever in the premises, but relied exclusively upon the open gates, if he observed indeed, their position. Heedless disregard of the safety of himself and others marked his conduct.

While the fact of open gates is a circumstance which a traveller may properly take into consideration, and upon which he may place some reliance, this does not relieve him of all care. *Romeo* v. *B. & M. R. R.*, 87 Maine, 540, 549; See *McCarthy* v. *B. & M. R. R. Co.*, 112 Maine, 1, 5, 7; *Borders* v. *B. & M. R. R.*, 115 Maine, 207, 212,

213. The extent to which he may rely upon the invitation given by open gates is a question of fact for the jury, unless it appears that he relied exclusively thereon; *Woehrle* v. *M. T. Railway Co.*, 82 Minn., 165; 52 L. R. A., 348. See also *Chase* v. *R. R. Co.*, 78 Maine, 346, 353. The fact that plaintiff was not the driver of the car did not relieve him of all care. *Wood* v. *M. C. R. R.*, 101 Maine, 469; *Allyn* v. *B. & A. R. R. Co.*, 105 Mass., 77, 79.

And ordinarily when the view of the traveller of the track is obstructed, greater care is required in looking and listening, even to the extent, if driving, of alighting, *Day* v. *B. & M. R. R.*, 96 Maine, 207; *Robinson* v. *Rockland T. and C. St. Ry.*, 99 Maine, 47. See also *Smith* v. *M. C. R. R.*, 87 Maine, 339; *Giberson* v. *B. & A. R. R. Co.*, 89 Maine, 337, 343. *Borders* v. *B. & M. R. R.*, 115 Maine, 207, 211, 212.

Upon all the circumstances of the case it must be concluded that plaintiff's intestate's negligence and want of care contributed to the occurrence of the collision and that the motion for new trial must be granted.

ALLISON L. FOSTER

vs.

CUMBERLAND COUNTY POWER & LIGHT COMPANY.

Cumberland. Opinion May 22, 1917.

Negligence. Degree of care required of persons driving vehicle in day time on to and along tracks of street railway. Degree of care required driving on to tracks in the night time. Duty of drivers of teams or other vehicles driving upon street railway tracks having knowledge that cars are approaching. Rule of law where, on account of construction of vehicle, driver's view behind obscured.

The plaintiff brings this action for the recovery of damages to himself and vehicle alleged to have been caused by a rear-end collision with the latter of an electric car of defendant at about seven o'clock of the evening of the thirtieth day of October, 1915. A verdict being found for plaintiff, defendant files the usual motion for new trial.

In the darkness of night when the driver of a team upon a railway track knows that a car is but a short distance behind him upon the same track and must be continually approaching him, he has a duty other than driving onwards with no effort of some of his senses to ascertain the whereabouts of the car.

It is the duty of drivers of teams upon the tracks of street railways to leave them when they are aware, or ought to be aware, of the approach of cars.

One driving a team or wagon at night upon the track of a surface railway may not rely wholly upon the supposition that the servants of the railway will see him in time to give warning but he must be on the alert to discover in some manner and by some exercise of his senses the approach of a car from the rear.

If his sense of hearing be impaired, he is not excused from the exercise of his other senses but is called upon to exercise those unimpaired with a higher degree of alertness than will be the case if all his senses be normal.

Action on the case to recover damages for injuries received through the alleged negligence of the defendant company. Defendant filed plea of general issue. Verdict for plaintiff in the sum of eight hundred dollars. Defendant filed motion for new trial. Motion sustained. New trial granted.

Case stated in opinion.

Harry H. Cannell, and James A. Connellan, for plaintiff.

Bradley & Linnell, for defendant.

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

BIRD, J. The plaintiff brings this action for the recovery of damages to himself and vehicle alleged to have been caused by a rear-end collision with the latter of one of the electric cars of the defendant at about seven o'clock in the evening of the thirtieth day of October, 1915. The jury found for the plaintiff and defendant filed the usual motion for new trial.

At the time of the collision the evening was starlight, and provision for lighting the street was made by placing incandescent electric lights along the side of the street opposite the track on which the collision occurred. The car of defendant, having vestibules at either end, was proceeding southerly towards Portland on the more westerly of the double tracks of defendant. The plaintiff, seated in a long lumber wagon, or truck, was driving the horse drawing the wagon between the most westerly rail of the tracks and the westerly sidewalk. He states that he encountered a muddy place in the roadway and, after looking backwards and observing the car, apparently at a stand still, at a distance of some three or four hundred feet, he turned upon the track on which he saw the car in order to avoid the mud. He continued driving upon the track until he had passed the muddy portion of the way—a distance of thirty or forty feet, as he estimates it—when he turned to his right to leave the track and had nearly done so, when the back of the wagon was struck by the car and the injuries of which he complains inflicted. His hearing was less than normal and he states that he neither heard the approaching car nor looked behind him for it after he entered upon the track.

It was testified by the motorman, who was corroborated by the evidence of an employe of defendant riding in the vestibule with him, that the car had proceeded on its course a distance, not given, when the eyes of the motorman and his companion were so blinded by the lights of an approaching automobile that they were unable to see anything in front of them; that the motorman at once shut off his power, rang his gong, and allowed the car to coast at a speed of six or eight

miles per hour. He also testified that when his eyes recovered their power he saw, for the first time, the wagon of plaintiff partly on the track, the horse being in the act of turning from the track to the west or right; that he immediately took measures to reverse and apply the power; that after the maneuver had been accomplished the car came to a stop in a distance of ten or fifteen feet, but not before it had struck the rear left wheel of the wagon.

Upon this evidence we conclude that the defendant, although apparently doing all within its power to stop the car on perceiving the wagon, was negligent in not reducing the speed to the slowest possible rate or, better, stopping the car altogether, immediately the eyesight of the motorman was affected.

The defendant urges that the plaintiff also was guilty of want of due care contributing proximately to the casualty. We have recently held that the driver of a team, proceeding on the track of a street railway, is not bound to keep a lookout behind his team for a car. *Fickett* v. *Lewiston, Augusta & Waterville Street Railway*, 110 Maine, 267, 271. In support of this statement of the law, *Vincent* v. *Railway Co.*, 180 Mass., 104, is one of the authorities relied upon. In this case the vehicle, ahead of the car, was of such construction that the driver's view of the space behind was fully obscured. The collisions in both these cases occurred in the day time and both vehicles were plainly visible to those operating the cars.

In the darkness of night we conceive a different rule should prevail. Where the driver of the team knows that a car is but a short distance behind him upon the track and, in the nature of things, must be continually approaching him, he has a duty other than driving onwards with no effort of some of his senses to ascertain the whereabouts of the car. See *Denis* v. *Street Ry. Co.*, 104 Maine, 39, 46, where are indicated the precautions to be observed by one who, in the night time is about crossing the track of a street railway. By Statute it is made a criminal offense to obstruct street railways in the use of their tracks: R. S. (1903), Chap. 53, Sec. 28; (R. S., 1916, Chap 58, Sec. 34) and it is the duty of drivers of teams upon the tracks to leave them when they are aware, or ought to be aware of the approach of cars. *Corn* v. *Temple*, 14 Gray, 69, 76, 78; *Flewelling* v. *L. & A. H. R. R. Co.*, 89 Maine, 585; *Marden* v. *Street Railway*, 100 Maine, 41, 45; See *Winter* v. *Federal, etc., R. R. Co.*, 153 Pa. St., 26; 19 L. R. A. 232.

It has been held that it is not negligence, as matter of law, for one driving a wagon at night in the track of a surface railway to fail to look back to see an approaching car, but that he may not rely wholly upon the supposition that the railroad's servants will see him in time to give warning, and that he must be on the alert to discover in some manner and by some exercise of his senses the approach of a car from the rear. *Bossert* v. *Nasson Electric R. R. Co.*, 57 N. Y. Suppl., 896. This is the established doctrine obtaining in New York; Id; *Belford* v. *Brooklyn Heights R. Co.*, 83 N. Y. Suppl., 836; *Hinode Florist Co.* v. *N. Y. & Q. C. Ry. Co.*, 115 N. Y. Suppl., 252. If not already recognized law in this State, upon the principle declared in *Denis* v. *Street Ry. Co.*, supra, we think it should be, not only as supported by authority but also as established by the principles of the common law. The driver of the team must at least be held to the exercise of the same care as one about to cross a street railway track in the day time. See *Thompson* v. *L. A. & W. St. Ry.*, 115 Maine, 560; 99 Atl. Rep., 370, 371.

If his sense of hearing was impaired, he was not excused from the use of his other senses but was called upon to exercise those unimpaired with a higher degree of alertness than would be the case if all his senses were normal. *Emery* v. *Waterville, F. & O. Ry. Co.*, 95 Atl. Rep., 892; He must be more cautious and diligent in the exercise of his remaining faculties.

The plaintiff saw the car on the same track before he entered upon it; he is chargeable with knowledge that it must follow him; his entry upon the track was not necessary; he could have avoided the mud by waiting a short interval for the car to pass; but he entered upon the track, heard no sound of the car, and knowing his deafness, made no attempt, as he states, to look for it. His attitude was one of listless indifference to his situation and surroundings. Under the circumstances, the conclusion that he was lacking in due care is unavoidable.

The motion must therefore be sustained and a new trial granted.

ISRAEL RACINE, Pet'r, *vs.* HENRY C. HUNT.

Cumberland. Opinion May 26, 1917.

Town meetings. Ballots cast at town meetings. Powers of committee appointed to count ballots and declare election. Rights of parties to have ballots inspected and proper count made where there has been apparent error in counting. Power of court under R. S., 1916, Chap. 7, Sec. 87, to pass upon the question of election of selectmen.

1. Any evidence, admissible according to the rules of evidence, is admissible in disputed election case to show the truth.
2. The record of a town meeting may be contradicted by a count of the identical ballots cast, though the ballots are not official, and are not required to be preserved in the custody of any officer.
3. The offices of selectmen, assessor and overseer of the poor are municipal offices within the meaning of R. S., Chap. 7, Sec. 88, and the Justices of the Supreme Judicial Court have jurisdiction to determine the validity of an election to either of these offices, on petition of one claiming to have been elected against the person who has been declared elected in town meeting, and who holds or claims to hold the office.
4. The evidence shows that the petitioner, and not the respondent, was elected, and is entitled to the office.

Petition under R. S., 1916, Chap. 7, Sec. 87, to determine a disputed election. Respondent filed plea denying jurisdiction of the court, and also filed answer. Hearing was had upon bill, answer and proof, respondent not offering any testimony. Sitting Justice found that the total number of ballots cast as claimed by petitioner was correct and ruled that the petitioner was duly elected to the office claimed and that he was entitled to the possession thereof. From this ruling, respondent entered an appeal to the Law Court. Appeal denied. Decree of sitting Justice affirmed with additional costs.

Case stated in opinion.

Joseph H. Rousseau, and Wheeler & Howe, for petitioner.

W. R. Pattangall, for respondent.

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

SAVAGE, C. J. This is a petition to determine a disputed election, and is brought under the provision of Sec. 87, Chap. 7, of the R. S., 1916. The petitioner claims that he was lawfully elected selectman, assessor of taxes and overseer of the poor at the last annual town meeting in the town of Brunswick, but that the respondent was improperly declared to be elected to these several offices. The petitioner prays for judgment that he is entitled to the offices. The sitting Justice rendered judgment for the petitioner, and the respondent appealed.

It appears that the town voted to elect all town officers on one ballot. Two tickets were voted. On one ticket the name of the petitioner appeared as a candidate for the three offices, and on the other the name of the respondent. The ballots were counted by a committee appointed therefor, who reported that the respondent had received 435 ballots, and the petitioner 415. The report was accepted, and accordingly the respondent was declared elected. He qualified, and has since been performing the duties of the office. After the town meeting had adjourned, some question was made as to the accuracy of the count of ballots as reported, and they were examined. Without going into the details, it is sufficient to say that it sufficiently appears, as found by the sitting Justice, that there was an error in counting, and that the petitioner received 415 votes, while the respondent in fact received only 413. The petitioner therefore was elected and should have been so declared.

But the respondent challenges the jurisdiction of the Justices to determine the question. And he contends further that as the tickets were unofficial, and as they were not preserved or kept in custody by any person, by virtue of any statute, they are not admissible in evidence to contradict the record of the meeting which shows that he was elected. In fine, it is claimed that the court cannot go behind the record. We think that there is no merit in the contention, that the Justices have jurisdiction, and that the truth should prevail, notwithstanding the record. Such is the obvious purpose of the statute.

The statute in question was first enacted in 1880, Chap. 198, Sec. 1. It followed a period during which there had been much public discussion and dispute as to the power of various tribunals to go behind the

records of elections. It was evidently intended to declare a power in the court to settle certain classes of election contests according to the truth. To find the truth it is obviously necessary to inquire outside of and behind the records. The correctness of the records is the very question that is to be decided. Under this statute, every petitioner starts in with the record against him. His opponent has been declared elected, and it has been so recorded.

At first the statute applied only to elections of county officers and County Attorneys. In 1893, the statute was so amended as to include elections to any municipal office. Laws of 1893, Chap. 26. There can be no doubt that the offices claimed in this proceeding are municipal offices. *Tremblay* v. *Murphy*, 111 Maine, 38. The statute is broad, and it imposes no limitations as to the manner of proof. Any evidence, admissible according to the rules of evidence, is admissible in an election case to show the truth. In *Howard* v. *Harrington*, 114 Maine, 443, the evidence of an actual count made in ward meeting was held sufficient to outweigh the record of an election, and a count of the official ballots found in the ballot box afterwards.

It being shown, as we think it is, that the ballots offered as evidence in this case were the identical ballots cast, and all of them, we think that they were admissible, and that they offered good ground for determining the result of the election. In such a case, the fact that they were unofficial, and the fact that the law did not put them into the official custody of any person, are immaterial.

Appeal denied.
Decree of sitting Justice affirmed with additional costs.

MARGARET WELCH, Admrx.,

vs.

LEWISTON, AUGUSTA & WATERVILLE STREET RAILWAY.

Cumberland. Opinion June 6, 1917.

Negligence. Contributory negligence. Doctrine of last clear chance. Rule as to proximate cause.

In a statutory action to recover damages for the instantaneous death of the plaintiff's intestate while she was attempting to cross the railroad track in front of a closely approaching car.

Held:

1. Foot passengers in crossing a street should carefully observe the movements of street cars. They should make such use of their senses as the situation demands. They cannot move blindly on, oblivious to everything about them and then seek to throw upon others the blame that attaches only to themselves.
2. The intestate, a woman seventy-one years of age and of defective hearing, left the sidewalk and proceeded to cross the street, with her head bent down, wholly inattentive to her surroundings. She had a clear and unobstructed view of the track for a distance of three hundred feet. The car was in plain sight, was approaching at a reasonable rate of speed, and was giving the customary signals. At a point four feet from the track she looked up and discovered the car, paused, then gave a scream and started to cross in front of it, when she was struck and killed.
3. Far from exercising the care of an ordinary prudent woman under the same conditions, she seems to have exercised no care whatever. Her own conduct precludes recovery.
4. The so-called last clear chance doctrine does not apply. Had the intestate remained at the point outside the track when she discovered the approaching car she would have been safe. Her dash across the rails was clearly negligent on her part and her contributory negligence continued to the very moment of collision. After she made the last fatal plunge the motorman was powerless to save her.
5. The verdict for the plaintiff was so contrary to the force of the evidence that it cannot be allowed to stand.

Action on the case to recover damages for the instantaneous death of plaintiff's intestate through the alleged negligence of defendant company. Defendant filed plea of general issue, and brief statement alleging that the accident and injuries to the plaintiff's decedent happened to her solely through her want of due care at the time and place of the accident to her, and that the accident and injuries to the decedent were caused solely through the contributory negligence of the decedent and through no want of due care on the part of the defendant acting through its servants and agents. Verdict for plaintiff in the sum of $416.67. Defendant filed motion for new trial. Motion granted. Verdict set aside.

Case stated in opinion.

Clarence E. Sawyer, for plaintiff.

Newell & Woodside, for defendant.

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

CORNISH, J. About 11.15 in the forenoon of August 12, 1915, the plaintiff's intestate, Ann Stover, in attempting to cross the tracks of the defendant company on Main Street in Freeport was hit by an electric car on its way from Brunswick to Yarmouth, thrown beneath the wheels and instantly killed. In a statutory action to recover damages therefor the plaintiff obtained a verdict for four hundred and sixteen dollars and sixty-seven cents. The case is before this Court on defendant's motion to set aside the verdict as against the evidence.

There was no substantial conflict of testimony and the facts seem to be these: Main Street, at the point in question, runs a general northerly and southerly course, and the electric car track is in the center of the highway. On either side of the car track the street is macadamized for a distance of fourteen feet to a ditch at the edge of a grass plot beyond which is the gravel sidewalk.

In approaching the place of accident from Brunswick, beginning northerly a distance of six hundred feet, there is first a rise of about two hundred and fifty feet, then a space of two hundred feet nearly level, and then a four per cent down grade for one hundred and fifty feet. About one hundred and twenty-five feet north of the point of collision, Chapel Street leads off to the easterly from Main Street,

and, opposite the point, Maple Avenue leads off to the westerly. The car in question left Brunswick at 10.45 A. M. and was due at Freeport Corner at a point a little beyond the place of accident at 11.15 A. M. It was on time. The conductor and motorman were experienced men.

Mrs. Stover was a woman seventy-one years of age and of defective hearing. Her home was in Brunswick. Her business was that of a peddler of small wares in the surrounding towns, and she had been accustomed to visit Freeport during the Summer for eight or ten years as often as once a week, going there on the electric cars and plying her trade from house to house. On the day in question she was in Freeport for that purpose. She was entirely familiar with the surroundings. Such is the general situation. The story of the accident is this.

The electric car was coming down the grade at a rate of eight or ten miles an hour. The motorman was at his post. The conductor was on the westerly side of the rear platform. The motorman first saw Mrs. Stover as she was leaving the sidewalk on the westerly side of Main Street just northerly of Maple Avenue and was stepping into the ditch or gutter. She was a stranger to him. She had a dress suit case in her hand and was walking quite fast. The motorman was then at a distance of one hundred and fifty feet and he at once sounded the gong and continued to ring it. She proceeded diagonally across the street in a southeasterly direction with her head bent down, and when she had reached the middle of the macadamized surface between the gutter and the tracks the motorman immediately applied the emergency brake. She apparently did not hear the gong nor the approaching car. The speed had been reduced to about four miles an hour. She continued her course and when she was within about four feet of the outer rail she looked up for the first time, discovered the car with a surprised look, hesitated or partially stopped. Then she gave a scream and started to run across directly in front of the car which was then almost upon her. The motorman let go the handles, leaned over the fender and endeavored to seize and rescue her, but he simply got hold of her shawl. She was thrown down and one set of the forward wheels on the easterly side passed over her. The car stopped within ten feet after the collision.

Only one conclusion can properly be drawn from this recital, and that is that Mrs. Stover's own reckless conduct was the proximate cause of the accident. Foot passengers in crossing a street should carefully observe the movements of street cars. They should make such use of their senses as the situation demands. They cannot move blindly on, oblivious to everything about them and then seek to throw upon others the blame that attaches only to themselves. Yet that is what this intestate did. This was neither a regular street crossing nor a street junction. It was a place of known danger. Her sense of hearing being defective, a fact known to herself, but not to the operatives on the car, she should have relied the more upon her sense of sight. Evidently she was engrossed in her own thoughts and moved across the street absolutely inattentive and without making the slightest effort to ascertain whether or not a car was approaching. She had a clear and unobstructed view after she reached the macadamized street for three hundred feet or more, in the direction from which the car was coming. It was in plain sight. It was giving the customary signals of warning. Its speed was reasonable. But she continued heedlessly on her course. At a point four feet from the track she aroused herself and comprehended the situation. She paused. Had she stopped even then she would have been safe, but she made the last fatal plunge in her effort to cross in front of the car and rushed to her death. We can hardly conceive of a state of facts in which contributory negligence could stand out more vividly than here. For from exercising the care of an ordinarily prudent person under the same conditions, she seems to have exercised none. Her own conduct precludes recovery. *Butler* v. *Street Railway,* 99 Maine, 149; *Denis* v. *Street Railway,* 104 Maine, 39; *Emery* v. *W. F. O. Ry. Co.,* 95 At., 892, 114 Maine, 547; *Donovan* v. *Lynn & Boston R. R.,* 185 Mass., 533; *Fitzgerald* v. *Bos. El. Ry.,* 194 Mass., 242; *Plympton* v. *Same,* 217 Mass., 137; *Welch* v. *Ry. Co.,* 223 Mass., 184;

Under the statute and the pleadings the burden of proving contributory negligence rested upon the defendant. R. S., (1916), Chap. 87, Sec. 48; *Curran* v. *Railway Co.,* 112 Maine, 96. That burden is sustained by overwhelming proof.

The plaintiff however sets up the last clear chance doctrine, as a basis of recovery, but that doctrine has no application under the facts of this case. The vital question in that class of cases is this,

do the facts show that subsequent to the plaintiff's contributory negligence and independent of and apart from any prior negligence of its own, the defendant was culpably negligent, and that this subsequent negligence was the proximate cause of the accident. Where this question has been answered in the affirmative, the last clear chance doctrine has been applied, as in *O'Brien* v. *McGlinchy*, 68 Maine, 557; *Atwood* v. *St. Ry. Co.*, 91 Maine, 399; *Conley* v. *R. R. Co.*, 95 Maine, 149; *Ward* v. *R. R. Co.*, 96 Maine, 136; *Curran* v. *Ry. Co.*, 112 Maine, 96. On the other hand where the facts give this question a negative answer the doctrine has not been applied, as in *Butler* v. *Railway Co.*, 99 Maine, 149; *Denis* v. *Railway Co.*, 104 Maine, 39; *Malia* v. *Railway Co.*, 107 Maine, 95; *Philbrick* v. *Railway Co.*, 107 Maine, 429; *Moran* v. *Smith*, 114 Maine, 55.

In the case at bar the intestate could have stopped at any moment and in fact did pause when within four feet of the track with the approaching car only eight or ten feet away. Had she remained there, all would have been well. But she then started and dashed directly across the track. That was clearly negligent on her part and her negligence continued to the very moment of collision. There was not an instant of time when her negligence can be said to have ceased and when the defendant subsequent to that was guilty of culpable negligence. After Mrs. Stover made the last fatal rush, the motorman was powerless to save her.

The verdict of the jury under the well settled rules of law was so contrary to the force of the evidence that it cannot be allowed to stand.

Motion granted.
Verdict set aside.

STATE *vs.* EDWARD JENNESS.

Kennebec. Opinion June 6, 1917.

Sentence. Probation. Rule as to imposing sentence where respondent has been previously sentenced and placed on probation. Rule as to imposing sentence where at former term respondent has been placed on probation and case continued for sentence. Concurrent sentences. Power of court to suspend the execution of sentence. Power of court to decree probation ended.

The respondent was sentenced to fine and imprisonment, and was then placed upon probation by virtue of Revised Statutes, Chap. 137, Sec. 14.

At a later term, the court after hearing ordered that the order of probation be revoked, and that mittimus issue at the expiration of another sentence, which the respondent was then serving in jail.

Held, that under the statutory provision, when an order of probation is revoked, the orginal sentence goes into effect forthwith, and cannot be made to take effect at a later time.

At January term, 1917, of the Superior Court for Kennebec County, the respondent was tried and convicted for the unlawful possession of intoxicating liquor, and on the fifteenth day of said term was sentenced to pay a fine of one hundred dollars and costs, taxed at twenty-five dollars, and in addition thereto to serve sixty days in jail, and if fine and costs were not paid to serve sixty days additional in jail. The respondent was then placed upon probation by virtue of Revised Statutes, 1916, Chapter 137, Section 14. At the following April term, the court, after due hearing, directed the clerk of courts to enter on the docket "Probation off; mittimus to issue at expiration of sentence in No. 30." The respondent at that time being in jail and serving his sentence under No. 30. To this ruling of the court, counsel for respondent excepted on the ground that such an order made at a term subsequent to the term at which sentence was imposed was in fact a changing of sentence, and the imposing of a new and additional sentence; whereas, the original sentence unmodi-

fied by the subsequent order of the presiding Justice ran concurrently with said sentence in case No. 30. To the ruling of the court respondent filed exceptions. Exceptions sustained.

Case stated in opinion.

Burleigh Martin, and Benedict F. Maher, for respondent.

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

SAVAGE, C. J. At the January term, 1917, of the Superior Court for Kennebec County, the respondent was tried and convicted for maintaining a common nuisance, and was sentenced to pay a fine, and in default of payment to suffer imprisonment for the term of ten months. His exceptions taken in the course of the trial were afterwards overruled for want of prosecution, and in March, 1917, he was committed to jail in execution of sentence.

At the same January term of the Superior court, he was also tried and convicted on the charge of unlawful possession of intoxicating liquor. Exceptions were filed and allowed. Later during the same term he was sentenced to fine and imprisonment, and, it seems, was placed "on probation." At the April term of the court the exceptions were withdrawn, and thereupon, complaint of the conduct of the respondent having been made, the court, after hearing, directed that the following docket entry be made:— "Probation off, mittimus to issue at expiration of sentence in number 30," which was the nuisance case.

To this ruling and direction, the respondent excepted, "on the ground," as the bill states, "that such an order made at a term subsequent to the term at which sentence was imposed was in fact a changing of sentence and the imposing of a new and additional sentence, whereas the original sentence unmodified by this subsequent order of the presiding Justice ran concurrently with the sentence" in the nuisance case, which the respondent was then serving in jail.

The court had authority to suspend the execution of sentence, R. S., Chap. 137, Sec. 12. And to place the respondent on probation, Sec. 14. And placing the respondent on probation operated as a suspension of sentence. The court, likewise, if it found that the respondent had violated the terms of his probation, as we must presume it did, had authority to decree the probation ended, Sec. 14. This leaves a single question. Did the court have authority to direct that mit-

timus should issue at the expiration of sentence in the other case? Or, should mittimus have been directed to issue forthwith? We think the statute answers that question.

The statute, Section 14, relating to cases where the court has ended probation, says that if the case has been continued for sentence the court may impose sentence. In all other cases it may order the respondent forthwith to comply with the original sentence. The statute does not authorize any change in the sentence or in its effect. It is to go into operation "forthwith." In this case the court directed that it should go into operation at a future time. The statute, not the court, fixes the time when execution of sentence in such a case shall begin. The respondent should have been committed at once under this sentence, and if it chanced that he was serving another sentence at that time, necessarily, both sentences would run concurrently. To make the distinction, we will add that if in this case, the court had made the original sentence to take effect at the expiration of the other sentence, then, upon the revocation of the order of probation, the original sentence would have taken effect just as pronounced, when the other sentence expired.

The constitutionality of such a statute as the one in question has been raised elsewhere. But it has not been raised nor suggested in this case, and we have now no occasion to consider it.

Exceptions sustained.

EDGAR E. ROUNDS, Appellant, In Equity,

vs.

FLORENCE G. BASHAM, THOMAS WARD AND JAMES B. ALDRICH.

Cumberland. Opinion June 6, 1917.

Lien for lumber and material furnished under R. S., 1903, Chap. 93, Sec. 29; R. S., 1916, Chap. 96, Sec. 29. Rule as to whether plaintiff claiming lien furnished the lumber and materials or simply became a guarantor or surety for the lumber and materials supplied by another. Rule as to mortgagee of property being affected by lien. Rule as to mortgagee giving consent to repairs on buildings.

One who buys lumber of a dealer for the use of a contractor, who receives it and uses it in the repair of a building, furnishes it within the meaning of R. S., 1903, Chap. 93, Sec. 29; R. S., 1916, Chap. 96, Sec. 29, and has a lien on the same for the building.

Bill in equity to maintain a lien on land and buildings on account of lumber supplied in the construction of same by plaintiff. Cause was heard upon bill, answer and proof. After due hearing, sitting Justice ruled that the bill be dismissed with costs for defendant from which ruling plaintiff entered an appeal. Decree below reversed. Bill sustained with costs. Case remanded for further proceedings in accordance with the opinion.

Case stated in opinion.

Harry E. Nixon, John T. Fagan, and Jacob H. Berman, for appellant.

Elmer Perry, for appellee.

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

SAVAGE, C. J. This bill in equity is brought to enforce a materialman's lien for lumber furnished for and used in the alteration and repair of the cottage of the defendant, Florence G. Basham. The sitting Justice dismissed the bill, and the case comes before us on the plaintiff's appeal.

The only question raised is whether the lumber was furnished by the plaintiff within the meaning of Revised Statutes, 1903, Chapter 93, Sec. 29. (R. S., 1916, Chap. 96, Sec. 29). This statute provides that "whoever . . . . furnishes labor or materials in erecting, altering, moving or repairing a house, ... by virtue of a contract with or by consent of the owner has a lien thereon . . . . to secure payment thereof."

The material facts undisputed by any admissible testimony are these. One Aldrich contracted with Miss Basham to repair her cottage. He tried to buy the necessary lumber from the Rufus Deering Company. They declined to sell to him. He then went to the plaintiff and asked him if he would furnish the lumber. The plaintiff replied, "Yes, go up to Rufus Deering & Company and get it." Aldrich went again to the Deering Company, and asked for the lumber upon plaintiff's oral order. They telephoned to the plaintiff and asked him if it would be all right to give Aldrich some lumber on the plaintiff's account. The plaintiff answered, "Yes charge the same right up to me and I will pay for it." The Deering Company then delivered the lumber to Aldrich. How that company charged for it, or to whom it gave credit does not otherwise appear. The books of the Deering Company were not produced, and its officers and agents were not called to testify.

It is true that Miss Basham was permitted, against objection, to testify to some conversations she had with people in the Deering Company office, in the course of which "they" said that "Mr. Rounds had guaranteed the lumber," that they declined to receive payment from her, and gave her a written release. We assume that the persons she talked with were authorized to speak for the company. But even so, it was hearsay evidence. It was inadmissible, and cannot be considered.

If from the facts as found by us the legal conclusion is that the Deering Company sold the lumber to the plaintiff, and he furnished it to Aldrich, the plaintiff has a valid lien. In such case, Aldrich became liable to pay the plaintiff for it, but not liable to pay the Deering Company. On the other hand, if the Deering Company sold the lumber to Aldrich, upon the plaintiff's undertaking to pay for it, if Aldrich did not, or, in other words, if the plaintiff merely became responsible for Aldrich, the plaintiff had no lien. In such

case, his undertaking was collateral, in the nature of a guaranty, and we think he cannot be said to have furnished the lumber within the meaning of the statute.

The parties had a right to make such a contract as they chose. The plaintiff told Aldrich that he would furnish the lumber. By his message over the telephone he gave the Deering Company the right to regard the transaction as a sale to him. We think the legitimate conclusion is that the Deering Company sold the lumber to the plaintiff, but delivered it to Aldrich according to understanding, and that thereby the plaintiff furnished the lumber for Miss Basham's cottage, and has a lien thereon for the same.

One Ward, alleged to be a mortgagee, is made a party to the bill. Inasmuch as the sitting Justice dismissed the bill, he had no occasion to determine the validity of the mortgage, nor the question of priorities. The case must be remanded for the determination of these questions. R. S., Chap. 79, Sec. 22. The bill alleges that the materials were furnished by consent of the mortgagee. But that is not enough, even if proved. By consenting to the repairs, he did not lose any priority he had under his mortgage. *Morse* v. *Dole*, 73 Maine, 351; *Allen Co.* v. *Emerton*, 108 Maine, 221.

Decree below reversed.
Bill sustained with costs.
Case remanded for further proceedings in accordance with the opinion.

JAMES W. SKENE *vs.* JOHN R. GRAHAM, et al.

Kennebec. Opinion June 6, 1917.

Registration of automobiles. R. S., 1916, Chap. 26, Sec. 23, interpreted. Rule as to Law Court considering evidence not included in bill of exceptions.

1. A corporation as well as an individual may adopt a trade name.
2. A corporation whose corporate name was the Wade & Dunton Carriage Company was a dealer in automobiles, which business it carried on under the name of the Wade & Dunton Motor Company, and by which name it obtained a dealer's certificate of registration. It is held that the registration was a compliance with the provisions of R. S., 1916, Chap. 26, requiring registration of automobiles.
3. If the presiding Justice in his charge to the jury incorrectly states the claim or contention of a party, or if he states without warrant that a particular fact is admitted, it is the duty of counsel at the time to call his attention to his error specifically, that he may correct it. If this is not done the error is waived.
4. An exception to an instruction given to the jury will not be sustained when from the bill itself it is impossible to determine whether the instruction was prejudicial or not.
5. In this case, there is sufficient evidence to sustain the verdict for the plaintiff on the question of liability.

Action on the case to recover damages for injuries received by plaintiff through the alleged negligence of defendants' chauffeur. Defendant filed plea of general issue. Verdict for plaintiff in the sum of $1,200.00. Defendant filed motion for new trial; also exceptions to certain rulings of presiding Justice. Exceptions sustained. If within thirty days after the mandate is received by the clerk the plaintiff shall remit all of the verdict in excess of $600.00, motion overruled; otherwise motion sustained.

Case stated in opinion.

Williamson, Burleigh & McLean, for plaintiff.

Ryder & Simpson, for defendants.

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

SAVAGE, C. J. This is a case of collision between two automobiles. It has been before this court once before, and a verdict for the plaintiff was set aside. *Skene* v. *Graham*, 114 Maine, 229. Upon a retrial, the plaintiff prevailed, and the case comes up now on the defendant's motion for a new trial and exceptions.

THE EXCEPTIONS: The first exception is to the refusal of the presiding Justice to direct a verdict for the defendants, for the reason that the automobile, driven by the plaintiff was not registered as required by statute, and therefore was unlawfully upon the road, and for the further reason that there was no evidence that the defendants were negligent.

Whether non-registry, if it were so, would defeat the action, we have no occasion at present to decide. We think the jury might properly find that the automobile the plaintiff was driving was legally registered. The facts are these. The plaintiff was an automobile salesman in the service of the Wade & Dunton Carriage Company, a corporation, and the automobile which he was driving belonged to that company. But the Wade & Dunton Carriage Company carried on an automobile business, buying, selling and repairing. This business was kept essentially separate and distinct from its other business, and was carried on in a separate part of the plant. There was an office for its general business, and another office for the automobile business. The automobile business was carried on in the name of the Wade & Dunton Motor Company. The Wade & Dunton Motor Company was a department of the Wade & Dunton Carriage Company. The Wade & Dunton Motor Company held a dealer's license, or registration certificate.

By the statute, Laws of 1911, Chap. 162, Sec. 8, (R. S., 1916, Chap. 26, Sec. 23) all motor vehicles are required to be registered by the owners or persons in control of them. But Section 9 provides that a dealer, instead of registering each motor vehicle owned or controlled by him, may obtain a certificate of registration, and that his cars shall then be considered as registered until sold. The Wade & Dunton Motor Company certificate covered the car in question. The question is whether such registration was legal. We think it was.

The purpose of the requirement of registration seems to be two-fold,—to obtain revenue, and to make it possible to trace the identity of a car if it should be necessary. The revenue feature is unimportant in this case. The other feature merits attention. Upon registration, the owner of each car receives a number plate to be so attached to the front and rear of the car as to be plainly visible. Similar plates must be attached to cars owned or controlled by dealers. Sections 8 and 9. By observing the number on a plate, followed by reference to the records of the Secretary of State, the identity of the owner, or person in control, can be ascertained readily, whenever desired by officers of the State or by individuals. We think the purpose of the statute was served in this case. It is, of course, settled that a corporation as well as an individual may adopt a trade name, and all its business transactions in that name are valid. The Wade & Dunton Carriage Company adopted the trade name of the Wade & Dunton Motor Company. A jury might find that it was well known in the community by that name so far as its automobile business was concerned. Registration in the trade name was not a sham. It was not false. It was not done to avoid the statute, and to conceal identity. It was registration by the owner in the name in which it did business with all men. We think that was a sufficient compliance with the statute. *Crompton* v. *Williams*, 216 Mass., 184. The exception is not sustainable on this ground.

The other point under this exception, the lack of evidence of the negligence of the defendants, we will consider in connection with the motion.

The next exception relates to a sentence in the charge of the presiding Justice. He said; "I understand, and I say this with the consent of both counsel, that the plaintiff claims he came down on the north side of Western Avenue until he got to where the obstruction ceased, and then crossed over to the south side from there down to the corner of Sewall Street; and that is admitted to be the testimony." Counsel in their brief say: "The presiding Justice erred in making the statement that the plaintiff turned upon reaching the obstruction. The jury may have been prejudiced by the statement." There are two answers to this contention. First, the presiding Justice did not state, as counsel seem to understand, that the plaintiff turned at the point referred to. The presiding Justice was talking of the plaintiff's claim, and that he might properly do. And again, if he stated the

claim incorrectly, or if he stated without warrant that that was "admitted to be the testimony," it was the duty of counsel at the time to call his attention to his error specifically, so that he might correct it. *Jameson* v. *Weld*, 93 Maine, 345. This apparently was not done.

Th occasion of the third and last exception arose in this way. The jury came in for further instructions. The foreman said they wanted to know if the plaintiff came down next to the track when he was on the north side of the road. The stenographer looked over the evidence, but found none on that point. The presiding Justice said, "There is no evidence to show," and added, "It is proper for me to say to you that what the plaintiff was doing up above there can have little probative force on the situation down here; whether he was driving on one side or the other had no connection with this down here. The question is, where after he had left the obstruction was he driving. Then you come down to the moment of the accident, because contributory negligence must be with reference to a particular thing. Did it have a connection with the accident itself." The bill of exceptions is barren of any statement of fact, or contention upon the evidence, to which this instruction could be applied. From the bill itself it is impossible to determine whether the instruction was prejudicial or not. And as we have said many times, we are not permitted to travel outside of the bill. *Doylestown Agr. Co.* v. *Brackett, etc., Co.*, 109 Maine, 301; *Salter* v. *Greenwood*, 112 Maine, 548; *Dennis* v. *Packing Co.*, 113 Maine, 159; *Borders* v. *B. & M. R. R.*, 115 Maine, 207.

THE MOTION: We think there is sufficient evidence to sustain the verdict on the question of liability. When this case was considered by the court the first time we were of opinion that the overwhelming weight of the evidence supported the defendant's contentions. At the last trial the situation was materially changed. Between the two trials one of the defendants, Mr. Graham, had died. At the last trial his evidence given at the former trial was not offered. The other defendant, Mrs. Graham, did not testify. Therefore the plaintiff could not testify, if objection was made, and objection was made. The plaintiff relied upon the testimony of two apparently disinterested witnesses, one of whom did not testify at the former trial. They both testified that they were eye witnesses of the collision. The defendants rely upon the testimony of their chauffeur. The

witnesses for the plaintiff disagreed with the witness for the defendant, in respect to the speed at which the cars respectively were proceeding, and as to the position of the cars, particularly that of the plaintiff just prior to the accident. The testimony for the plaintiff tends to show that the defendants' car ran into the plaintiff's car, while that for the defendants tends to show that their car was run into by the plaintiff's car. The parties draw differing inferences from the condition of the cars after the collision.

The collision occurred on Western Avenue in Augusta, at its junction with Sewall Street. The plaintiff was going easterly; the defendants, westerly. Westerly from Sewall Street, and beginning about 168 feet therefrom the south side of the road for some distance had been torn up for repairs, and travel both ways was confined to the space occupied by the street railway track in the center and the road north of the track. There was sufficient room, however, for teams to pass each other. While passing along this stretch of road the plaintiff was on the northerly side of the road, which was to him the left hand side. His witnesses testified that when he reached the easterly end of the obstruction he turned to the south side, and proceeded along the south side until his car was struck by the defendants' car; that the defendants' car was going up Western Avenue at a speed estimated at 25, 30 or more miles an hour, and that it turned across the street, and hit the plaintiff's car with such force as to shove it sideways several feet on the road.

The defendant's chauffeur testified that they were going up on the right hand side of Western Avenue at a speed of twelve to fifteen miles an hour, that the plaintiff's car was approaching on the same side and that there seemed to be imminent danger of a head-on collision; that to avoid the collision he turned to the left, that the plaintiff turned to his right at about the same instant of time, that the defendants' car was brought to a stop on the south side of the road, and that when stopped it was run into by the plaintiff's car. According to the chauffeur's testimony the cars were less than one hundred feet apart when he began to turn.

The south side of the road being impassable, it was not unlawful for the plaintiff to travel on the north side, at his left hand. He was not in fault in that respect if he turned to the right seasonably after he passed the obstruction. But the situation was one of some danger at the best, and demanded corresponding watchfulness. The chauffeur

saw the situation. He could slow down or stop or turn. It is altogether probable that the approach of the plaintiff's car caused him to begin to turn.

But the chauffeur says that the plaintiff's car turned at the same time. The jury may have thought that if the defendants' car was going no faster than he said, he could have stopped it before the point of collision was reached, had he been watchful and alert. Or, they may have concluded that approaching a situation of danger he allowed the car to go so fast that he could not stop it in time. In either case the chauffeur might be regarded as negligent. The injuries to the cars were such that we think a jury would be warranted in concluding that the defendants' car struck the plaintiff's car. This would tend to corroborate the plaintiff's contention. It would also tend to discredit the chauffeur's account of how the collision occurred. In the end it is very largely a question of the credibility of the witnesses. Of that a jury is always best qualified to judge. It is true, indeed, that it is not necessarily negligence, if one in a sudden emergency chooses an unwise course. Whether or not it is negligence under the circumstances is likewise a question for the jury, whose conclusion will not be disturbed unless manifestly wrong.

Besides there is evidence which we think a jury would be warranted in believing that Mr. Graham said to Mr. Skene at the time,—"You should be carried to a doctor right off, and I shall pay the bills"; also, "I will see to this myself, but I have got to be in Portland tonight. You tell Mr. Dunn to see to it." Mr. Dunn was the local superintendent of the electric railroad of which Mr. Graham was president. This evidence, if true, is of considerable weight either as tending to show where Mr. Graham thought the responsibility lay, or that Mr. Graham out of his kindness was proposing to pay the expenses of the man who had negligently run into him. The jury might decide which.

Again, there is evidence from the same witness that Mr. Graham asked the chauffeur "how he happened to run in," and that the chauffeur replied. "I don't know." That tended to impeach the chauffeur as a witness.

The burden is on the defendants in this court to show that the verdict was clearly wrong. Upon the whole we are not persuaded that the jury might not properly conclude that the defendants were liable.

The defendants insist that the verdict was too large. And a majority of the court are clearly of that opinion.

Exceptions sustained.
If within 30 days after the mandate is received by the clerk, the plaintiff shall remit all of the verdict in excess of $600; motion overruled; otherwise, motion sustained.

ELIZABETH B. TALBOT, et als., Appellants,

vs.

INHABITANTS OF WESLEY.

Washington. Opinion June 6, 1917.

Assessment of taxes. Appeal from assessors on refusal to abate taxes. Rule as to the assessment being made to estate of a deceased person. Rule as to appealing from a void tax. Rule as to application for abatement, first, where there has been over-taxation, with authority to tax, and where the entire tax was unauthorized and illegal.

This is an appeal from the refusal of the assessors of the town of Wesley to grant an abatement of taxes for the year 1915. The assessors for that year assessed the real estate described in the application for an abatement. The assessed tax was $318.50. The petitioners were at the time of the assessment the owners of the land taxed, as devisees under the last will and testament of James R. Talbot, who was in his lifetime the owner of said land. June 30, 1915, Elizabeth B. Talbot, widow of James R. Talbot, acting for herself as agent of the heirs and devisees of said James R. Talbot, paid under protest, said tax less the discount. The petitioners were non-residents of said town of Wesley. After the payment as aforesaid the petitioners made written application to the assessors of Wesley to abate said tax. The petition was refused and an appeal taken to the Supreme Judicial Court, and is before this Court upon report. The assessment was made as of land of non-residents and was assessed to "J. R. Talbot Est." The addition of the letters "Est." shows that it was the inten-

tion to assess it to the estate of the deceased, and the law is clearly settled that an assessment of taxes upon lands to the estate of a deceased person is void. The assessment in this case was illegal. The tax was utterly void. It created no lien upon the real estate nor raised any obligation upon the part of the petitioners or any other person to pay it. It was the same as if there had never been any attempt to assess a tax. It was the same as no tax. There was nothing the assessors could abate. They could not abate something that did not exist.

The defendants are not estopped to deny the validity of the proceedings of the assessors because although the assessors were elected by the town they were public officers having their duties prescribed by law for the general welfare, and are guided by law in the exercise of their duties.

Appeal from assessors of town of Wesley, under R. S., 1903, Chap. 9, Sec. 79, (R. S., 1916, Chap. 10, Sec. 80). Respondent filed answer, setting forth that said petition cannot be maintained because the assessment of the tax for which petitioners ask abatement was illegal and void, having been assessed to the estate of a person deceased and not to the petitioners; it created no lien and raised no obligation on the part of the petitioners to pay, and said petitioners were not under any legal liability to pay, either at law or in equity; nor have they any legal right to ask for an abatement." Reported to Law Court on agreed statement of facts. Petition dismissed.

Case stated in opinion.

C. B. & E. C. Donworth, for appellants.

James H. Gray, for defendants.

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

HALEY, J. This is an appeal from the refusal of the assessors of the town of Wesley to grant an abatement of taxes for the year 1915, the proceedings being instituted under the provisions of R. S., 1903, Chap. 9, Sec. 79, (R. S., 1916, Chap. 10, Sec. 80), and is reported to this court on an agreed statement of facts.

In 1915 the assessors of the town assessed the real estate described in the application for an abatement. The assessed tax was $318.50. The petitioners were, at the time of the assessment, the owners of the land taxed, as devisees under the last will and testament of James R. Talbot, who was in his lifetime the owner of said land. June 30, 1915, Elizabeth B. Talbot, widow of James R. Talbot, acting for herself as agent of the heirs and devisees of said James R. Talbot,

paid, under protest, said tax less the discount. The petitioners were non-residents of said town of Wesley. After the payment as aforesaid the petitioners made written application to the assessors of Wesley to abate said tax. The assessors refused to make an abatement and so notified the petitioners in writing, and an appeal was taken to the Supreme Judicial Court.

The assessment was made as of land of non-residents and was assessed to "J. R. Talbot Est." The learned counsel for the petitioners admit that the assessment was invalid if the term employed by the assessors, "J. R. Talbot Est." be interpreted Estate of J. R. Talbot. There is nothing in the record that authorizes any other interpretation. If they did not intend to tax it to the deceased, J. R. Talbot, why the letters "Est." of J. R. Talbot? If it was intended to assess it to the devisees of J. R. Talbot, they would not have added "Est." The addition of "Est." shows that it was the intention to assess it to the estate of the deceased, and the law is clearly settled that an assessment of taxes upon lands to the estate of a deceased person is void. *Fairfield* v. *Woodman*, 76 Maine, 549; *Philbrook* v. *Clark*, 77 Maine, 176; *Dresden* v. *Bridge*, 90 Maine, 489; *Morrill* v. *Loveitt*, 95 Maine, 169-170.

In the last cited case it was held that the assessments, which were to the estate of the deceased person, were void, and the court said, "These taxes were utterly void. They never had any effect. They never created any lien or raised any obligation to pay. A void tax is no tax. It is as if there never had been any attempt at assessment. The owner is under no duty, either at law or in equity, to pay it." And so of the assessment in this case. The tax was utterly void. It created no lien upon the real estate, nor raised any obligation upon the part of the petitioners or any other persons to pay it. It was the same as if there had never been any attempt to assess the tax. It was the same as no tax, there was nothing that the assessors could abate. They could not abate something that did not exist.

"The remedy by application to the assessors for an abatement of taxes applies only when there has been over taxation, where there was authority to tax, and not where the whole tax was unauthorized and illegal." *Herriman* v. *Stowers et al.*, 43 Maine, 497. As held in an action of assumpsit, *Howe* v. *City of Boston*, 61 Mass., 273, "that where a party is wrongfully taxed for any personal or real estate, the remedy, and his only remedy, for any excess of taxation, is by

application for abatement . . . . ; whether the excess arises from including in the valuation property of which the person taxed is not the owner, for which he is not liable to be assessed, or for placing an undue and disproportionate value upon that of which he is the owner. In all such cases the assessment is valid, and the party aggrieved cannot maintain an action at law to recover back a portion of the taxes so assessed, although paid by compulsion. But, on the other hand, if a person not legally liable to be taxed in a city or town is nevertheless assessed there, then the assessment is regarded as wholly invalid, and, on payment by compulsion, the amount illegally assessed, that is, the entire tax, can be recovered in this form of action."

In this case, under the decisions of this State, the assessment complained of was void, and therefore the assessors had no authority to grant the prayer of the petitioners. The defendants are not estopped to deny the validity of the proceedings of the assessors, because, although the assessors were elected by the town, they were public officers, having their duties prescribed by law, for the general welfare; and are guided by law in the exercise of their duties. *Rossire et al.* v. *City of Boston*, 86 Mass., 57.

The above authorities are conclusive against the petitioners in this case. If they have a remedy, it is not by a petition for the abatement of a void tax, a tax that did not exist.

Petition dismissed.

MARTIN C. MCCLUSKEY, et als.

Appellants from Decree of the Judge of Probate.

Washington. Opinion June 7, 1917.

Executors and administrators. Doctrine of res adjudicata, as applied to motions. When is an executor or administrator held to be unsuitable to perform his trust. General rule where executor or administrator has any conflicting personal interest which prevents him from doing his official duty. Duty of executor or administrator to sue for and recover any property that may properly belong to the estate which he represents.

An appeal from the decree of the Judge of Probate of Washington County removing one of the appellants from the office of administrator of the estate of Charles T. McCluskey, deceased.

The purpose of administration being the complete settlement of the estate of a decedent, a petition for the removal of an administrator is in the nature of an interlocutory proceeding.

Such a petition is but a motion in writing.

To motions the doctrine of res adjudicata does not in strictness apply and motions may be renewed even upon the same state of facts by leave of court, and a hearing by the court of such a motion is equivalent to leave of court.

Upon appeal from a decree of the probate court removing an administrator upon the ground that the administrator upon request of an offer of indemnity by a creditor of the estate refused to commence proceedings for the recovery of property alleged to have been conveyed by decedent in fraud of creditors, it is not necessary to determine that the conveyance was made without consideration or with fraudulent intent. It is sufficient that upon the evidence there was reasonable ground so to believe.

Where it appears the estate of deceased has been represented insolvent and it appears that a conveyance of land was made by him in his lifetime which there is reasonable ground to believe was fraudulent, the creditors have the right to insist that an administrator shall try the question.

An executor or administrator is deemed unsuitable when he has any conflicting personal interest which prevents him from doing his official duty.

On an appeal from the decree of the judge of probate removing an administrator of an estate for failure at the request of a creditor to commence proceedings for the recovery of property of his intestate alleged to have been fraudulently conveyed, the question of no assets is not involved, and arises only when the new administrator has in his hands the proceeds of the real estate alleged to have been fraudulently conveyed.

Appeal of Martin C. McCluskey, et als., from decree of Judge of Probate of Washington County to Supreme Court of Probate, removing said Martin C. McCluskey from the office of administrator of the estate of Charles T. McCluskey, of Danforth. Said appeal was entered at the May term of the Supreme Judicial Court for said county of Washington sitting as the Supreme Court of Probate. After the introduction of certain evidence, questions of law of sufficient importance having arisen, by consent of the parties the case was reported to the Law Court upon so much of the evidence as legally admissible, the Law Court to determine all the rights of the parties and order final judgment thereon. Decree of Probate Court affirmed.

Case stated in opinion.

C. B. & E. C. Donworth, for appellants.

W. S. Lewin, and Leonard A. Pierce, for appellee.

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

BIRD, J. This is an appeal from the decree of the Judge of Probate of Washington County removing one of the appellants from the office of administrator of the Estate of Charles T. McCluskey, deceased.

"William G. Spinney, the appellee, was for some time prior to May 25, 1912, the owner of a judgment against the deceased, Charles T. McCluskey, which amounted to something over six hundred dollars. On that date, McCluskey conveyed a farm, the only asset out of which that judgment could be satisfied, to his wife, Isabelle T. McCluskey," by deed alleged by appellee to be "without any real consideration, and eleven months afterwards he died leaving no property.

"On September 9th of that year, the appellee filed a petition as creditor, asking the appointment of Robert J. Love, as administrator. The family of McCluskey appeared and having the prior right to administer, Martin C. McCluskey, a son of the deceased and Isabelle T. McCluskey, was duly appointed.

"January 24, 1914, a request was made in writing of the administrator to institute proceedings to set aside the conveyance for the benefit of the creditors, and an indemnifying bond tendered to protect him from any loss, cost or damage, because of the bringing of such suit. None was ever brought.

"Having waited a year, the appellee filed a petition that Martin C. McCluskey be removed as administrator, for his failure to bring the suit as requested. No inventory of the estate had been returned to the Probate Court. The judge dismissed this petition.

"The appellee then filed a petition that the administrator file an inventory, which was done July 13th, showing no assets of the estate. The appellee then filed a petition in this case upon which, after full hearing, the judge of probate decreed that the administrator be removed and Max V. Doten, a disinterested party, be appointed in his stead. From the decree the administrator joined with his mother, the record holder of the property in question, his sister and brother, in an appeal to the Supreme Court of Probate, whence the case was, by agreement of counsel, reported to this Court."

The first reason of appeal is that the questions involved in the second petition for removal were res adjudicata by reason of the dismissal of the prior petition for removal. The purpose of administration being the complete settlement of the estate of a decedent, such a petition is in the nature of an interlocutory proceeding; See *Arnold* v. *Sabin*, 4 Cush., 46, 47. It does not finally adjudicate the rights of creditors or heirs or finally dispose of the case. Under such circumstances a petition is but a motion in writing. See *Berger* v. *Jones*, 4 Met., 371, 376. To motions the doctrine of res adjudicata does not in strictness apply. Undoubtedly motions, technically such, may be renewed even upon the same state of facts by leave of court, and a hearing of a motion renewed upon the same grounds is equivalent to leave of court. See *Cilley* v. *Limerock R. R. Co.*, 115 Maine, 382, 384; *Clopton* v. *Clopton*, 10 N. D., 569; 88 Am. St. Rep., 749; *Harris* v. *Brown*, 93 N. Y., 390. The appellee contends that the second petition alleges different grounds for its allowance than those alleged in the former petition. Assuming, without determining, this to be so, it is sufficient or, indeed, unnecessary to say that there could be no objection to a consideration of the second petition by the court.

The second ground of appeal is "because the alleged conveyance was not made without consideration, nor with intention, on the part of said Charles T. McCluskey, to delay and defraud any of his creditors, and particularly the said William G. Spinney." It is not necessary upon appeal, and, by reason of the report, the case is before us upon appeal, to determine that the conveyance was made without consideration or with fraudulent intent. The most that the probate court could be called upon to determine was that there was reasonable ground to so believe. The only evidence upon these points is the examination of Isabelle T. McCluskey, the widow of intestate, taken under the provisions of R. S., (1903), Chap. 66, Sec. 70. No objection was made to its use nor was evidence introduced by appellant to contradict it. We think it admissible and that it affords grounds for reasonable belief that the conveyance was made without consideration and with fraudulent intent as to creditors. *Dunbar* v. *Dunbar,* 80 Maine, 152, 153. The inventory of the estate filed July 13, 1915, shows no assets. Representation of insolvency was unnecessary. R. S., (1903), Chap. 68, Sec. 2.

On the twenty-fourth of January, 1914, written request was made to the administrator to institute proceedings to set aside the conveyance, and an indemnifying bond was tendered him as security against loss or costs thereby. It is admitted that no proceedings had been instituted by him looking to the recovery of the estate so conveyed. *Putney* v. *Fletcher,* 148 Mass., 247, 248. We believe this sufficient answer to the third reason of appeal to the effect that the administrator violated no legal duty by his refusal and neglect to act. *Glines* v. *Weeks,* 137 Mass., 547, 550, 551. (See cases cited). The conclusion disposes also of the fourth reason of appeal.

The fifth reason of appeal is "because said Martin C. McCluskey is not an unsuitable person to hold the office of administrator aforesaid nor is he in any way disqualified on any of the grounds alleged in the petitioners' third assignment of reasons for the removal of said administrator." The third assignment referred to sets forth as grounds of unsuitableness the fact that the administrator is the son and a possible heir of Isabelle T. McCluskey and the belief that he has, as the latter, a direct pecuniary interest in the retention of the real estate by her.

"When any executor or administrator, joint or sole, becomes insane or otherwise unsuitable to perform the trust, refuses or neglects to do

so, or mismanages the estate," the Judge of Probate may remove him. R. S., (1903) Chap. 66, Sec. 23. An executor or administrator is deemed unsuitable when he has any conflicting personal interest which prevents him from doing his official duty. *Putney* v. *Fletcher*, 148 Mass., 247-248. We find no error under this reason of appeal.

The seventh reason of appeal is as follows:

"Because it appears by the petition that the petitioner's alleged request made to the administrator that the latter institute proceedings for the recovery of the real estate aforesaid, was made on the twenty-fourth day of January, A. D. 1914, without first presenting his claim to the administrator, verified by oath, or otherwise, and long before he filed in the probate office his claim, so verified, as required by statute, which filing, as appears by the petition, was on Feb. 6 1914."

The appellant apparently invokes the provisions of R. S., (1903) Chap. 89, Sec. 14. The section makes the presentation to the administrator, or filing in the Probate Court, within eighteen months after filing in the Probate Court of his affidavit of notice of appointment, of the claim of a creditor against the estate, a prerequisite to suit against the administrator. If the claim is not so presented or filed, suit thereon is forever barred except in certain cases not necessary to be now considered. This is the only penalty following such failure. The affidavit of notice was filed by the administrator January 21, 1914. The claim of plaintiff was filed only sixteen days later—a full compliance with the statute requirement.

The creditor applied, in that capacity, for the appointment of an administrator and upon hearing upon his petition the appellant was appointed. It is not contended that his request in January, 1914, that the administrator institute proceedings to set aside the conveyance or for the recovery of the real estate, was not made by appellee as a creditor of the estate; and long before either petition for removal was filed, his proof of claim was on file in the Probate Court. There can have been no doubt that appellee's request was made by him as creditor.

The remaining reason of appeal is:

"EIGHTH. Because the administrator filed in the probate court on Jan. 21, A. D. 1914, with a copy of his notice of appointment, his affidavit that he had given notice of his appointment as required by law and order of court; the petitioner's alleged claim against the

estate is not for a legacy or distributive share, nor does it fall within the provisions of sections 15 or 17 of Chap. 89 of the Revised Statutes; and more than twenty months after the filing of the affidavit aforesaid had elapsed before the making of the order and decree now appealed from. Wherefore petitioner did not have at the time of the issuance of said order and decree, and has not now an *enforceable* claim against the estate, and it is barred by the special statute of limitation. No other claims against the estate have been presented to the administrator or filed in the probate court."

It is not the opinion of the court that the matters arising under this reason of appeal are for decision in this proceeding. It involves the question of new assets—a question which will arise only in case and when the new administrator has in his hands the proceeds of the real estate alleged to have been fraudulently conveyed. The decree of the Probate Court removing the administrator is the decree from which appeal is taken.

In *Glines* v. *Weeks*, 137 Mass., 547, 548, 549, an appeal from decree of the Probate Court removing appellant from the office of administratrix, it is said, "But if it is a question that might properly be litigated, whether an equity of redemption does not exist, which is new assets, and so liable to be sold for the payment of the debts of the estate, the Probate Court might remove the administratrix, if she declined to apply to that court for a license to sell the equity of redemption.

"The debts of the estate are barred by the Gen. Sts., c. 97, §§ 5, 20, (Pub. Sts., c. 136, §§ 5, 9) unless, by the discovery of the bond in September, 1882, assets have come to the hands of the administratrix after the expiration of two years, within the meaning of the Gen. Sts., c. 97, § 6, (Pub. Sts. c. 136, § 11). *Aiken* v. *Morse*, ubi supra [104 Mass., 277]; *Tarbell* v. *Parker*, 106 Mass., 347. We think that it is a proper subject of judicial inquiry, if any person is willing to become administrator of the estate, whether there is not an equity of redemption, which is new assets, within the meaning of Pub. Sts., c. 136, § 111; and that for this reason the decree of the Probate Court should be affirmed." See *Putney* v. *Fletcher*, 148 Mass., 247, 248.

Decree of Probate Court affirmed.

ORREN A. MOULTON,
Trustee of the Estate of Moses S. Moulton,

vs.

FRED H. PERKINS.

York. Opinion June 7, 1917.

Account in set-off. Filing specifications. What accounts may be filed in set-off. Right to set-off where party had, directly or indirectly, transferred his account or note which he claims is a set-off. General rule applicable in filing accounts in set-off. Rule where claim alleged to be in set-off has been assigned as collateral.

The trustee in bankruptcy of the estate of Moses S. Moulton brings this action of assumpsit against defendant for the recovery of seven hundred and sixty-three dollars twelve cents, money had and received of his bankrupt. The writ is dated April 17, 1916.

A defendant claiming set-off must in general, in point of fact own and control it, so that his suing creditor is, as to that claim, his debtor; and he is bound to prove the same facts in relation to the set-off as though he had brought his action upon it.

Although the defendant parts with the possession and control of a claim against the plaintiff for a purpose which is contingent, and may thereafter be but temporary, yet while so deprived of it, he cannot set it off. Therefore the transfer by him, of a demand against the plaintiff to a third person, as collateral security of indebtedness by the defendant to such third person, will prevent the defendant from setting it off in an action against him by the plaintiff.

One may not take advantage of a matter in a set-off, unless it be a cause of action legally subsisting in his favor upon which he could bring and maintain an independent action.

Where a defendant objected to questions to a witness, and he did not set forth the ground of his objections that the contract between the parties in writing was the best evidence, the court's ruling permitting the questions was not erroneous.

Where, without motion to strike out testimony objected to on the ground that the contract between the parties was in writing and the best evidence, the defendant offered the contract, he was not aggrieved by the testimony.

Action of assumpsit by trustee in bankruptcy to recover of defendant the sum of $763,12. Defendant filed plea of general issue, and also filed an account in set-off. Specifications were filed by plaintiff, and at conclusion of the evidence the presiding Justice directed a verdict for plaintiff. Verdict for plaintiff in sum of $763.89. To ruling of court directing verdict and also as to ruling of court admitting certain evidence, defendant filed exceptions. Exceptions overruled.

Case stated in opinion.

Hinckley & Hinckley, for plaintiff.

Allen & Willard, for defendant.

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

BIRD, J. The trustee in bankruptcy of the estate of Moses S. Moulton brings this action of assumpsit against defendant for the recovery of seven hundred and sixty-three dollars twelve cents, money had and received of his bankrupt. The writ is dated April 17, 1916.

The firm of Hanson & Moulton, consisting of George W. Hanson and the plaintiff's bankrupt, in 1912, purchased of defendant certain timber for which Hanson and his partner Moulton, made and delivered to defendant a promissory note for $5,000. The note was joint and several commencing "I promise" and signed by each member of the firm, but without mention of the firm. The note concluded as follows: "it is hereby agreed that the signers and endorsers of this note waive demand, notice and protest, and guarantee the payment of same when due." Upon this note, at the date of the bankruptcy hereafter referred to, the amount due was thirty-four hundred sixty-eight dollars and thirteen cents.

The co-partnership was not successful financially and on June 8, 1914, Moses S. Moulton, having no further credit with the banks, induced the defendant long an employe of the firm to execute a demand collateral note, in usual form, of that date to the order of the Springvale National Bank for the sum of $2550 and give as collateral for its payment "64 shares Springvale Aqueduct Co., Certificate No. 17." The defendant acquired the certificate of stock pledged by the surrender of a certificate for a like number of shares owned by Moses S. Moulton who caused a new certificate therefor to be issued to

Perkins. The note was discounted at the payee bank by Moses S. Moulton, through his partner George W. Hanson, and the avails were used by the bank in reduction of the indebtedness of Moulton.

On the date of the note defendant and Moses S. Moulton executed in duplicate an agreement, reciting the assignment to defendant of the stock and the issue in his name of a new certificate which Perkins had assigned to the bank as collateral security for the note and agreeing that "said Moses S. Moulton is entitled to and shall have the said shares whenever he shall pay the said note for $2550 and interest thereon." Moulton paid the interest on the note quarterly in advance and had thus paid it up to June 8, 1915.

Early in June, 1915, the defendant, the bank having given him notice that the note must be paid, asked Moses S. Moulton, for his part of the duplicate agreement and, the latter failing to find it, to execute a written instrument either authorizing Perkins to sell the collateral or, assigning him his interest therein. From the evidence it is uncertain which. This request was refused, Moulton stating that he must go into bankruptcy, and that Perkins must take care of the interest as he could not. Later he gave to defendant his part of the written agreement of June 8, 1914. June 29, 1914, Moses S. Moulton and his partner Hanson, filed their petition in bankruptcy and on the third day of the following July were adjudged bankrupts both individually and as co-partners. On the 13th day of the same July the collateral was sold and from the proceeds of the sale, the note and interest paid and a balance of $763.12 handed to defendant. Thereafter, probably on the same day, Perkins announced the sale to Moulton and tendered him the sum of $763.12 saying "you can give me what you have a mind to." Moulton replied that he was in bankruptcy and "he (defendant) had better take the money and keep it, for they would call for it. If they didn't he could do what he had a mind to with it."

On the twenty-third day of July, 1915, defendant filed against the estate of the co-partnership of Hanson & Moulton, bankrupts, his claim in the usual form, for the balance due upon the $5,000 note of February 27, 1912, amounting to $3468.13, alleging that no part of the debt had been paid and that there were "no set offs or counter claims to the same." and on the same day the claim was allowed.

On the twenty-eighth day of February, 1916, the defendant executed an absolute assignment of the claim thus proved to the Sanford

National Bank, coupled with an irrevocable power of attorney in the premises. And the same day he revoked a power of attorney theretofore given to attorneys-at-law empowering them to act in relation to said claim. This revocation was filed in the bankruptcy court on the sixth day of March, 1916, as well as the assignment to the Sanford National Bank which, after due notice of its application therefor, was subrogated to the rights of defendant on the sixteenth day of the same month.

Under date of the twenty-eighth day of February, 1916, the Sanford National Bank executed an agreement with defendant, in which after reciting the assignment to it of the claim against "the estate of Hanson & Moulton in bankruptcy "It agrees that the assignment is made as collateral security, for certain notes held by the bank aggregating $500. and that all moneys received under the assignment over the amount sufficient to pay the notes, interest and expenses of collection" shall be paid over to said Fred H. Perkins by the said Sanford National Bank. Perkins to have the right to off set the same." This agreement does not appear to have been filed in the bankruptcy court when the assignment was filed, nor at any subsequent date.

To the action of the assignee in bankruptcy the defendant at the entry term moved for specifications and filed an account in set-off setting up the note for $5000 of February 7, 1912, as the several note of Moses S. Moulton, as an off set, to the amount of $3,468.13. At the next succeeding term, September, 1916, the defendant having pleaded the general issue and plaintiff having filed a replication to the account in set off alleging the note to be that of the firm of Hanson & Moulton and not that of Moses S. Moulton, the case was opened to a jury. At the close of plaintiff's evidence, the defendant offering none, a verdict was directed for plaintiff. The case is here upon exceptions to the admission of evidence and the order directing a verdict.

The bill of exceptions alleges that certain evidence was admitted subject to the objections of defendant to which admission the defendant "excepts because it was immaterial and because the contract between the parties was in writing which was the best evidence." We are in doubt if the defendant insists upon this exception but assuming that he does, we cannot consider the evidence immaterial. During the propounding of the questions and the giving of the answers included in the bill of exceptions, the defendant objected to

two questions, but the ground of his objections are not set forth. There is, therefore, no intimation that the presiding Justice was advised that the rule against secondary evidence was invoked. Consequently no error can be found in the ruling of the court. *Glidden* v. *Dunlap*, 28 Maine, 379; *Harriman* v. *Sanger*, 67 Maine, 442, 444. Later the defendant offered the contract which was admitted but without motion to strike out the testimony objected to. He does not show that he was aggrieved. *Harriman* v. *Sanger*, 67 Maine, 442, 445.

Upon the exceptions of defendant to the order directing a verdict for the plaintiff, the defendant urges that the surrender by Moses S. Moulton, the bankrupt, to defendant of the agreement by them made at the time, June 8, 1914, the note for $2550 was made and the stock transferred to the latter, was an abandonment by the former of all his rights under the contract and operated as a transfer of all his rights under that contract and to the shares of stock and their avails to defendant. The defendant was anxious to sell the stock which was collateral to the note he signed for the accommodation of the bankrupt that he might with the proceeds pay the note and asked the surrender by the bankrupt of the contract of June 8, 1914. Nothing of moment appears to have been said by either party either prior to or at the time of its delivery to defendant. But the subsequent acts of the parties are significant and cannot be disregarded. Immediately after the sale the defendant brought the sum remaining from the proceeds of the sale after payment of the note and interest—$763.12—and tendered it to the bankrupt, who refused to accept, saying as he testified, "I was in bankruptcy and he had better take the money and keep it, for they would call for it. If they did not, he could do what he had a mind to with it." We conclude that the evidence does not warrant the finding that it was the intention of the parties to transfer to defendant the absolute title to the surplus arising from the sale of the stock.

The defendant, however, says in argument, that admitting for the purpose of argument that Moulton did have rights which could pass to his trustee in bankruptcy that he then "sets up the further defense that he is entitled to off set against anything that may be found due from him to Moses S. Moulton" the latter's several liability upon the note for $5,000 of February 12, 1912,

The defendant had on the 28th day of February, 1916, assigned not only his claim as allowed, against the firm of Hanson & Moulton, as we have seen but he also assigned "all rights and demands which I now have upon or by virtue of said note against the said George W. Hanson or Moses S. Moulton or their trustee in bankruptcy and all my right, title and claim to all dividends or moneys which shall be coming to me from the estate of said George W. Hanson or Moses S. Moulton or either or both of them or their trustee in bankruptcy." . . . . This effected an absolute and complete assignment and transfer of defendant's claim against Moses S. Moulton individually and we think its character unaffected by the later agreement of the assignee purporting to bear the same date as the agreement of February 28, 1912. It does not re-assign the claim against Moses S. Moulton to defendant nor revoke the power of attorney given the bank by the unconditional agreement. Having thus parted with his title, he could not longer set off his claim against Moses S. Moulton in the suit of his assignee in bankruptcy.

A defendant claiming set-off must in general, in point of fact, own and control it, so that his suing creditor is, as to that claim, his debtor; and he is bound to prove the same facts in relation to the set-off as though he had brought his action upon it. Waterman on Set-off, 2d. Ed., 44, page 48. Although the defendant parts with the possession and control of a claim against the plaintiff for a purpose which is contingent, and may thereafter be but temporary, yet while so deprived of it, he cannot set it off. Therefore the transfer by him, of a demand against the plaintiff to a third person, as collateral security of indebtedness by the defendant to such third person will prevent the defendant from setting it off in an action against him by the plaintiff. Id. 48, page 54.

One may not take advantage of a matter in a set off, unless it be a cause of action legally subsisting in his favor upon which he could bring and maintain an independent action. See *Cutler* v. *Gilbreth*, 53 Maine, 176, 178; *Cutler* v. *Middlesex Factory Co.*, 14 Pick., 483, 484; *Milburn* v. *Guyther*, 8 Gill., 92, 94; 50 Am. Dec., 681, 683, 685; *Annan* v. *Horick*, 4 Gill, 325, 331, 332; 45 Am., Dec., 133, 135, 136; *Varney* v. *Brewster*, 14 N. H., 44, 54; *Weaver* v. *Rogers*, 44 N. H., 112; *Brooks* v. *Jewell*, 14 Vt., 470, 473; *Stephens* v. *Beard*, 4 Wend., 604, 606; *Rawley* v. *Rawley*, 1 Q. B. D., 460, 466; *Charlton* v. *Hill*, 5 C. & P., 147.

The court is of opinion that the set-off claimed by defendant cannot be allowed. Therefore, there was no error in the ruling of the court below in ordering a verdict for the plaintiff.

Exceptions overruled.

THE GRAND LODGE OF THE ANCIENT ORDER OF UNITED WORKMEN OF MAINE

vs.

IRENE R. CONNER, et als.

Somerset. Opinion June 13, 1917.

Fraternal associations. By-laws and regulations. Who may be made beneficiaries. How the same shall be governed. Rule where beneficiary named in policy is not in a certain designated class.

1. The constitution and laws of a fraternal beneficiary association enter into, and form a part of, its benefit contracts; and in the absence of waiver, or statutory limitation, the rights of all claimants of a benefit depend upon the contract between the association and the member, in which is embodied the constitution and laws of the association.
2. A person, not within any of the classes named in the by-law of the association to which the designation of beneficiaries is confined, cannot be legally designated a beneficiary.
3. When a statute limits the classes which may be made beneficiaries by a fraternal beneficiary association, the association may limit its benefactions to a part only of the classes named in the statute, or to a part of one class.
4. The phrase in the by-law of a fraternal beneficiary association, "if all the beneficiaries shall die during the lifetime of the member" means beneficiaries designated in accordance with the laws of the association.
5. When the by-law of a fraternal benefit association provides that in case a legally designated beneficiary dies, and the member has made no other legal designation, the benefit is payable to his heirs, upon his death, their right to the benefit becomes vested. Their right grows out of the contract, and they may contest the asserted right of an illegally designated beneficiary.

6. When a fraternal beneficiary association files a bill of interpleader against contesting claimants of a benefit, it waives any defenses it may have against paying the benefit to someone, but it does not, and cannot, waive the rights of the contestants.
7. If a fraternal beneficiary association may waive its by-laws, and, by continuing to receive assessments and in other ways recognizing a designation of a beneficiary as a legal one, validate an illegal designation, the principle would not apply in case the association had no knowledge of the illegality of the designation until after the member's death.
8. In this case, the heirs of the member are entitled to the fund.

Bill of interpleader to determine the rightful owners of a certain death benefit fund. At the close of the testimony, it being the opinion of the Justice presiding that questions of law involved in the above case were of sufficient importance to justify the same and the parties agreeing thereto, this cause was reported to the Law Court upon the bill, answer of Hattie E. Williams, and so much of the evidence as was legally admissible, the Law Court to determine the legal and equitable rights of the parties. Decree in accordance with opinion.

The case is stated in the opinion.

Walton & Walton, for plaintiff.

Charles O. Small, for James H. Welch, Hattie E. Williams, Charles Collins and Frank Welch.

George C. Webber and Ballard F. Keith, for Irene R. Conner.

W. H. Powell, for Ernest A. Welch, and Louvie Spencer.

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

HANSON, J. This is a bill of interpleader brought to determine to whom belongs a death benefit which was payable upon the death of Andrew J. Welch, who in his lifetime was a member of the plaintiff order. The defendant, Irene R. Conner, is the person named as beneficiary in Welch's benefit certificate. The other defendants are Welch's heirs. The fund was brought into court, and Mrs. Conner and the heirs were ordered to interplead, and have done so. The case comes before this court on report.

The Supreme Lodge of the Ancient Order of United Workmen is a fraternal beneficiary order of national jurisdiction. Under it, and subject to its control and its laws, are Grand Lodges, which have a

limited jurisdiction over the membership in limited areas, usually, single States. Grand Lodges have separate jurisdiction to collect moneys on death benefits, and to disburse them to beneficiaries. The classes of beneficiaries for whom benefits may be provided by Grand Lodges are limited, first, by the statutes of the State where the Grand Lodge exists, and, secondly, by the law of the Supreme Lodge, which declares that beneficiaries must "be of the class described in its General Law." The General Law referred to provides as follows:— "Each member shall designate the person or persons to whom the beneficiary fund due at his death shall be paid, who shall, in every instance, be one or more members of his family, or someone related to him by blood, or who shall be dependent upon him."

In 1882, Welch became a member of the order in a subordinate lodge in Old Town, Maine. Upon his application, the Grand Lodge of Massachusetts, which then had jurisdiction over the lodges in Maine, issued to him a benefit certificate, payable upon his death to his wife. Subsequently his wife died. And in 1890, he surrendered the first certificate in the manner required by the laws of the order. Upon his application, the Grand Lodge of Massachusetts issued to him a new benefit certificate payable to Nettie J. Richardson, who he declared was his daughter. In fact, Mrs. Richardson was not his daughter, nor in any way related to him by blood. Nor had she been legally adopted by him. She was his niece by marriage, the daughter of his deceased wife's sister. She had, however, been brought up by him as a daughter from early childhood. She had married before her aunt's death, and at the time the certificate was issued was living with her husband in her own home. And it seems that at that time, the only persons who could be designated as beneficiaries, under the by-laws of the Grand Lodge of Massachusetts were "wives, children, affianced wives, blood relatives, and persons dependent upon the member."

In 1901, the Grand Lodge of Maine was created by the Supreme Lodge. It had jurisdiction over the members of all lodges in Maine. It collected the benefit funds and paid the death benefits in Maine. By virtue of the Supreme Lodge law creating it, it became liable to pay the death benefits of all members of lodges in Maine who should die thereafter. The members were privileged to surrender the benefit certificates which had previously been issued to them by the Grand Lodge of Massachusetts, and receive new ones from the Grand Lodge

of Maine. But whether they did so or not, the Grand Lodge of Maine, and not the Grand Lodge of Massachusetts, was thereafter responsible.

In 1904, Mr. Welch surrendered his Massachusetts certificate and received a new one from the Grand Lodge of Maine payable to Nettie J. Richardson, described therein as "daughter." In 1906, he surrendered that certificate, as by the laws of the order he had a right to do, and received a new certificate payable to Irene Richardson, now Mrs. Conner, who was therein described as "granddaughter." In 1908, wishing to reduce the amount of the benefit, he surrendered that certificate and received a new certificate for a reduced amount payable like the former to Irene Richardson described as "granddaughter." And it is with this last certificate that we are chiefly concerned in this case. He died in August, 1914, never having made any other change. Neither the Grand Lodge of Massachusetts, nor the Grand Lodge of Maine, had knowledge that Mrs. Richardson was not his daughter, nor that Mrs. Conner was not his granddaughter, until after his death. Nor did Mrs. Conner know that her mother had never been legally adopted until this controversy arose.

The statute of Maine in force all of the time since 1897, and now R. S., (1916), Chap. 54, Sec. 1, provides that, "payments of death benefits," in fraternal beneficiary orders, "shall be to the families, heirs, blood relatives, adopted children, adopting parents, affianced husband or affianced wife of, or to persons dependent upon, the member." The by-law of the Grand Lodge of Maine from 1901 to the present time, prescribing who may be beneficiaries, is as follows: "The beneficiary, together with his or her relation to the member, shall be named in the beneficiary certificate, and shall be confined to the wife, children, child by legal adoption, such adopting parents, affianced wife, blood relatives of, or a person or persons dependent upon him." It is also provided by the by-laws that "if all the beneficiaries shall die during the lifetime of the member, and he shall have made no other legal designation, the benefit shall be paid to his widow, if living at the time of his death; if he leaves no widow surviving him, then said benefit shall be paid, share and share alike to his children, the grandchildren living at the time of his death to take the share to which their deceased parents would be entitled if living; if there be no children or grandchildren of the deceased member living at the time of his death, then said benefit shall be paid to his mother if living;" if

not, then to his father, "and should there be no one living at the death of the member entitled to said benefit under the provisions hereof, then the same shall be paid to his legal heirs."

Mrs. Conner claims the fund as the designated beneficiary. The other defendants claim it as heirs. They say that since 1890, after the death of Mrs. Welch, the first beneficiary, there has never been any legally designated beneficiary, that no one is now living other than themselves, entitled to the fund under the by-laws which we have recited, and therefore that the fund should be paid to them. Mrs. Conner replies that the heirs have no such relation to the fund as entitles them to be heard on the question whether she is legally entitled to the fund. Her contention is that the plaintiff by filing its bill of interpleader, bringing the money into court and submitting its disposition to the determination of the court has waived all the defenses which it might have made, and admits its liability; that she was a member of Mr. Welch's family, and that as such member the order had statutory authority to recognize her as a beneficiary: that being a member of the family, whether she was so connected with the family as to come within the limitations of the by-law, or not, was a matter solely between her and the society, that the society could waive the by-law, and that the heirs could be privy to the situation only on the condition that she as the named beneficiary had died before Mr. Welch's death, and he had made no other legal designation. She says, that as the conditions did not come to pass, the heirs have no interest.

We will first notice this last contention. Counsel for Mrs. Conner has cited many cases in which the courts have held that heirs and other persons not privy to the contract cannot contest the right of a named beneficiary to receive the benefit, and that the society by paying the money into court on a bill of interpleader waived any objections to payment to that beneficiary. But in most if not all of the cases cited the by-laws of the societies were essentially different from the one in this case. It is settled law that the constitution and laws of a fraternal beneficiary association enter into, and form a part of, its benefit contracts. Primarily, and in the absence of waiver, or statutory limitation, the rights of any and all parties to the benefit depend upon the contract, in which is embodied the constitution and laws of the association. *Grand Lodge A. O. U. W.* v. *Edwards*,

111 Maine, 359; *American Legion of Honor* v. *Smith*, 45 N. J. Eq., 466. The rights of the heirs in this case arise from the contract.

To say that the heirs could have no standing without showing that Mrs. Conner died during the lifetime of Mr. Welch assumes that Mrs. Conner was a legal beneficiary, and begs the question. The phrase in the by-law, "if all the beneficiaries shall die during the lifetime of the member" unquestionably should be construed as meaning legal beneficiaries. It cannot be supposed that the order intended to recognize the status of illegal beneficiaries. Mr. Welch at one time had a legal beneficiary, his wife. She died during his lifetime. Then, in accordance with the by-law, if he made no other legal designation, that is, designation in accordance with the laws of the order, under certain contingencies the benefit would be payable to his heirs. Upon his death, their right to the benefit, if they had any, became vested. They then had the right to show that Mr. Welch had made no other legal designation, and that the contingency had happened which entitled them to the fund. *Supreme Lodge N. E. O. P.* v. *Sylvester*, 116 Maine, 1. Nothing which the order could do could deprive them of this right. The order might indeed waive any defenses it had against paying the fund to any one. By filing its bill it admits a liability to someone. But it could not waive any vested rights which the heirs have.

The vital question then is whether Mrs. Conner was a legally designated beneficiary. She is not within any of the classes named in the by-law, to which the designation of beneficiaries is "confined." But Mrs. Conner contends that she is within one of the classes named in the statute to which payments "shall be" made, namely, "families." She says she was of Mr. Welch's family, and, therefore, that he could legally designate her as his beneficiary, The evidence, we think, tends to show that at the time this certificate was issued and afterwards, Mrs. Conner was not a member of Mr. Welch's family, but rather that for a short time he was a member of her family. But waiving this, we think the legal point is not well taken.

Although the statute says that benefits "shall be" paid to certain classes of beneficiaries, it does not mean that fraternal benefit societies may not limit their benefactions to a part only of the classes named in the statute, or to a part of one class. The statute limits the classes to whom benefits may be paid. The societies cannot go outside those classes, but they are not obliged to make beneficiaries

of all persons within those classes. They may limit them. This plaintiff, by its by-law, undertook expressly to limit the term "families" to wives and children, and "adopted children," to children "by legal adoption." It omitted "affianced husbands." We think it had a right to make these limitations, and that its law to this effect controlled the rights of the member, Welch, and of the beneficiary whom he designated. The case of *Massachusetts Catholic Order of Foresters* v. *Callahan*, 146 Mass., 391, is much relied upon by Mrs. Conner, on this question. But that case does not help. The statute empowered the order to make "relatives" of the member beneficiaries. But the society had not expressly limited the classes to whom benefits might be paid. A mother was held to be a proper beneficiary, although the society's constitution stated its "object" to be to make "suitable provision for the widow and the orphan."

There are cases which hold in effect that a fraternal society may waive its by-laws, and by continuing to receive assessments, and in other ways recognizing the designation as a proper one, may validate a designation of a beneficiary who is not entitled to be one. However this may be, the principle does not apply in this case. The plaintiff order had no knowledge of the untruth of the designation until after Mr. Welch's death. It did not waive what it did not know. *Marcoux* v. *Society, etc., St. John Baptist*, 91 Maine, 250.

We hold that Mrs. Conner was not a legally designated beneficiary, that is, she was not a beneficiary designated in accordance with the laws of the plaintiff society, and that the fund should be paid to the defendant heirs. Doubtless this result will not carry out the wishes of Mr. Welch. But we cannot concern ourselves with his wishes. We must give the legal effect to the contract.

A decree in accordance with the opinion will be entered by a single Justice.

So ordered.

ETHEL R. LIBBY

vs.

MAINE CENTRAL RAILROAD COMPANY and Trustee.

LEWIS F. LIBBY

vs.

MAINE CENTRAL RAILROAD COMPANY and Trustee.

Kennebec. Opinion June 14, 1917.

Interpretation of R. S., 1916, Chap. 57, Sec. 63. General rule as to admitting evidence showing that engines or locomotives have set other fires in same locality. Rule as to negligence of railroad company having any bearing on the question of liability for fire set along its tracks.

Two actions on the case based on Sec. 13, Chap. 52, R. S., for burning buildings and personal property therein contained on the night of May 28th 1915, by one of defendant's locomotives were tried together. They are before the court on motions to set aside verdicts recovered by the plaintiffs and on an exception to the admission of evidence.

The buildings were on a farm in Clinton, on the westerly side of the highway leading from Clinton to Burnham, easterly of and adjacent to the defendant's track. Shortly before the fire was discovered a heavily loaded freight was climbing the grade opposite the buildings, and the engine was having great difficulty in pulling its load, and was throwing off fire and live coals. The wind was unusually strong, and blew quartering in the direction of the buildings. The fire was partly on the roof and partly on the side of a small building nearest the track when discovered. This building which had formerly been an ice-house and was banked with old sawdust, on the end towards the track, had near it a quantity of dry grass grown up through some old wire, an old comforter and some old burlap laying on the ground. Before retiring Mr. Libby had closed up the building, and he was not smoking, and saw no fire. The buildings at the nearest point to the track were six hundred and fifty feet distant therefrom.

We cannot say that from the evidence presented the verdicts of the jury should be set aside. No other probable cause of the fire is suggested. The distance from the track raises the strongest doubt, but with the wind blowing as the evidence shows, that distance would be quickly travelled, and there is evidence in the case of live sparks travelling a greater distance than this.

The evidence as to dampness of the ground on the night in question is conflicting, but there is evidence that grass fires started from the burning buildings, which has tendency to prove that the fire may have started in the inflammable material surrounding the ice-house. An inspection of the wire mesh used in the spark arrester in the engine fails to satisfy us that dangerous sparks might not be forced through when the engine was laboring hard and the wind blowing almost a gale as described.

Subject to the defendant's exception evidence was admitted that other engines of the defendant had set fires in this vicinity about the time of the fire in question. The defendant contends that such evidence was inadmissible unless it was previously shown that the engines setting such fires were of the same type, equipment and construction as the engine supposed to have set the fire in question. This exception is not sustained. The evidence was relevant and admissible for the purpose of showing the capacity of locomotive engines to set fires by the emission of sparks or the escape of coals.

Action on the case to recover damages on account of fire caused by the defendant company, said actions being brought under R. S., 1903, Chap. 52, Sec. 73, (R. S., 1916, Chap. 57, Sec. 63). The two plaintiffs were husband and wife and the actions were tried together. In each case defendant filed plea of general issue. In case of Ethel R. Libby, verdict was rendered in sum of $3008, and in case of Lewis F. Libby, verdict in sum of $1143. In each case defendant filed motion for new trial, and also exceptions to admissibility of certain testimony. Motions to set aside verdicts overruled. Exceptions overruled.

Case stated in opinion.

Frank G. Farrington, and Andrews & Nelson, for plaintiffs.

Johnson & Perkins, for defendant.

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

MADIGAN, J. These two actions on the case, based on Sec. 73, Chap. 52, of the R. S., for burning buildings and personal property of Mrs. Libby, and personal property of her husband were tried together and the jury returned verdicts for the plaintiffs. On a general motion and exception to the admission of evidence they are before the Law Court.

The plaintiffs lived on a farm in the town of Clinton, on the westerly side of the highway leading from Clinton to Burnham, and easterly

of and adjacent to the tracks of defendant's railroad. The buildings consisted of a dwelling house, ell, shed, barn, and hog house. The house faced the highway on the east and was farthest removed from the track. The ell was west of the house and nearer the track. Extending southerly from the ell to the barn was the shed. Nearest to the track was the hog house, formerly an ice-house, which was on the westerly end of the barn. Across the end next to the track it was banked with sawdust, and back of it laid some old wire, through which the grass had grown up, withered, and died. Beyond this wire and dry grass, toward the track, perhaps a rod or two west of the hog house, an old comforter, surrounded by a lot of burlap, laid on the grass.

On the night of the fire, May 28, 1915, Mr. Libby closed the barn and other buildings between 7.30 and 8.00 o'clock. Back of the buildings there was a grade in the defendant's track, of forty-five feet to the mile. Four freight trains passed over the grade during the evening, one at about 9.55, one west bound at about 10.34, one east bound at about 10.55, and one east bound at about 1.20. The driver of the 10.55 train noticed no fire, but the driver of the next train, when about one mile from the buildings saw flames half on the side and half on the roof of the hog house. His warning was the first notice of the fire the family or the neighbors had.

It was fully established that freights have great difficulty in getting over this grade without extra engines, and that it is a frequent occurrence for them to throw off live sparks at this point. Mrs. Hunt, whose husband at the time was foreman of that section, testifies that about eleven o'clock she saw a freight train almost stuck on this grade, "just moving," it was making a noise and having a hard time, working very hard, and sparks came from the smoke-stack, quite a few good sized sparks. The wind was blowing a gale from the hardest part of the grade, exactly quartering, toward the Libby buildings. It was a common occurrence for freight trains to get stuck out there and sometimes they had to back up to Burnham. There is no question from either side as to the direction of the wind, or that it was blowing hard, and the crew do not deny that the engine was throwing off live sparks.

Circumstances indicate that this engine set the fire. No other explanation seems plausible. The defendant insists that a fire set at eleven would have made greater headway than this did. The

progress of fire depends on conditions. Lodging in the dry grass, catching in the old comforter, and smouldering in the sawdust banking, it might burn some time before getting vent. Sawdust, owing to its compactness, burns slowly but persistently. Some witnesses claim conditions were too damp, but two women walked through the grass with low shoes on, without wetting their feet, and grass fires started from the burning buildings. The distance, six hundred and fifty feet from the track to the buildings, is claimed to be too great for a live spark to travel. But a disinterested witness testifies that the day before the fire a live spark from an engine lit on him at a measured distance of fifty-five rods from the track. The experience of the jury enabled them to weigh all of this testimony.

The engines that passed the buildings previous to the fire were equipped with the Mudge Slater Spark Arrester, which the defendants contend makes it impossible for the engines to throw off dangerous sparks. Evidence of a test was given to prove this theory, but during that test there was little, if any wind. Were all of the other conditions the same as on the night of the fire? A coal burning engine must have draft to steam and the harder it works the more draft it must have, for lessening the draft lessens the power. The driver and fireman of this engine do not deny it was throwing off sparks on the grade. Why could it not throw off any spark that a powerful locomotive could during a high wind force through the screen in the spark arrester? The mesh in this screen is three-sixteenths of an inch long by three-fourths of an inch wide, seemingly large enough to emit dangerous sparks.

Several witnesses testified to other fires set about this time in this vicinity by engines of the defendant. Mr. Libby saw no fire when making his rounds in the evening, and he was not smoking and had no matches. The fire apparently caught from the outside and from the appearance when discovered started near the ground. It was not noticeable from the track at eleven, but was on the passing of the next train. In view of the testimony of Mrs. Hunt, and the other witnesses, who testify as to the conditions existing, and the location of the fire when discovered, and the further fact that the burlap and old comforter were destroyed, we do not feel that the jury were so far wrong in their conclusion that their verdict should be set aside.

Subject to the defendant's objection the court admitted evidence that several other fires had been set by the defendant's engines in this same locality and about this same time. The contention being that all of the engines that passed this locality on the night of the fire having been identified, before the evidence objected to would be admissible, the plaintiffs must first prove that the engines, which set the other fires must be shown to have the same equipment and the same fuel as the one which burned the buildings. We cannot agree with this view. These actions are not based on negligence, but are based on the statute making the defendant liable regardless of negligence, and it is not contended that any of the engines were propelled by electricity, or were oil burning, or that they did not burn soft coal. This evidence tended to show the dry and inflammable condition of the country at the time and that sparks from coal burning engines can set fires.

While the modified rule is not passed upon in the following cases, nevertheless the reasoning on the general principles of the admissibility of evidence of the character objected to seems applicable where the modified rule is invoked, but as heretofore observed this rule has never been adopted in this State. *Jones* v. *Maine Central Railroad*, 106 Maine, 442, says the following:—"Where in an action to recover damages caused by a fire alleged to have been set by the defendant's locomotive, held that the question involved was of reasonable inference from all the facts and circumstances, and that the evidence should be of such character that a reasoning mind could see the connection between cause and effect. Where the defendant having introduced expert evidence that its locomotives, equipped as they were with a wire netting over the smoke-stack, could not in the opinion, of the witnesses throw a spark beyond thirty feet from the rail, held that it was not error to permit the plaintiff in rebuttal to introduce testimony of specific instances where fires had been set by these locomotives at distances varying from 95 to 152 feet. The objection raised by the defendant that the evidence was too remote in time and place, and that the conditions were not shown to be similar to those surrounding the fire for which this action is brought, go to weight of the testimony and not to its admissibility."

Dunning v. *Maine Central Railroad*, 91 Maine, page 87. "In the trial of an action for damages by fire, alleged to have been communicated by a locomotive engine, when the question at issue is

whether as a matter of fact the fire was caused by any locomotive, evidence that other fires were caused by the defendant's locomotives, at about the same time and in the same vicinity, is relevant and admissible, for the purpose of showing the capacity of locomotive engines to set fires by the emission of sparks or the escape of coals. That other engines of the same company, under the same general management, passing over the same track at the same grade, at about the same time, and surrounded by the same physical conditions, have scattered sparks or dropped coals, so as to cause fires, appeals legitimately to the mind as showing that it was possible for the engine in question to do likewise. Such testimony is illustrative of the character of the locomotive, as such, with respect to the emission of sparks or the dropping of coals."

To the same effect is *Grand Trunk Railway* v. *Richardson,* 91 U. S., 454-470.

In *Texas and Pacific Railway* v. *Watson,* 190 U. S., 287. The fire was alleged to have been caused by the negligence of the Railway Company, in the use of a defectively constructed locomotive and in the careless operation thereof. Evidence was admitted that at or about the same time of a fire, and at the time of the passing of the locomotive, which it was charged occasioned the fire, the witnesses observed other fires at various points not far removed from the fire complained of. *Held,* that the evidence was competent as having a tendency to establish that the destruction of the plaintiff's property was caused by the locomotive in question, and as tending to show negligence in its construction or operation.

Smith v. *Central Vermont Railway Company,* 80 Ver., 216. "Although there is not a unanimity of decisions on the question, we think it may be said from the weight of authority that this kind of evidence is admissible as tending to show such a tendency, or capacity in the class of engines passing over the line to emit sparks as to be evidence tending to prove the possibility and a consequent probability that the fire in question was caused by one of the defendant's engines. And we see no good reason for any difference in the tendency of such evidence, whether it relates to other engines within a reasonable length of time, before or within a reasonable time after, the occurrence of which complaint is made." In this case the modified rule was urged before the court, but it was held that in any event it did not apply as the plaintiff could not definitely identify the engine that set the fire.

To the same general effect as Maine, Vermont and United States decisions are the Massachusetts decisions. *McGuire* v. *Platt*, 177 Mass., 125.

As the defendant does not claim that any of their engines are better equipped for arresting sparks than those that passed the plaintiff's buildings on the night of the fire, and as this one evidently could, and according to the evidence, did emit sparks, we can see no reason why the evidence should have been excluded, regardless of the modified rule contended for.

As no complaint is made about the amount of the damages we must hold that the defendant's motion and exception must be overruled and the verdicts stand.

TONES ZOBES *vs.* INTERNATIONAL PAPER COMPANY.

Oxford. Opinion June 20, 1917.

Duty of master in providing safe place for employees. Contributory negligence. Evidence to be considered as bearing on the question of contributory negligence.

In the basement of the defendant's mill at Rumford a room called the stone room contained a number of lockers in which certain of the laborers kept their clothing and lunch boxes. Adjoining and opening into this room was the bottom part of an elevator well, seven feet wide and thirteen feet long. The stone room had a cement floor, while the floor of the well was of dirt, over which more or less paper scraps and rubbish had been allowed to accumulate. To allow the floor of the elevator to be placed on a level with the floor of the stone room, the bottom of the well was some inches lower than the floor of the stone room. There were no wheels, pulleys, ropes or machinery in the bottom of the well, and the only means of lighting it was from the stone room. In this room were four openings for electric lights, besides one at the opening into the well. On the day of the injury for which recovery is sought in this action there was only one electric light, and no other light burning or in condition to burn in the stone room, and the one near the well was not in commission. There was no gate or

other barrier across the opening into the well, and nothing else to warn against entering the well except a printed notice in English which read, "Elevator. Employees not allowed to use. International Paper Co."

The plaintiff was a Russian who had been employed by the defendant four days. He could not read English and could speak it little, if any. On the morning of the accident in March, 1915, at about five o'clock, he had been at work since three in the afternoon, being a handler of pulp wood about the yard and in the mill, and working in two consecutive eight hour shifts. After finishing his lunch in the stone room he entered the well to urinate, and the elevator descended from the floor above, crushing him to the earth and inflicting serious injury to his spine. While there were toilets in other parts of the mill, there were none in this vicinity, and the plaintiff's uncontradicted testimony is that he did not know of their existence. The plaintiff testifies that he had seen another workman enter the well the day before for the same purpose, and as it was a soft, stinky place it did not occur to him as being an improper place. The elevator was seldom used and usually locked at night, and there is no evidence that the plaintiff knew the true purpose of the well.

Held: The well in the condition in which it was allowed to remain, unguarded and unlighted, was a trap for workmen of the class, to which the plaintiff belonged, and the defendant was at fault in allowing it to so remain.

2. The plaintiff was not guilty of contributory negligence.

3. For the damages sustained, viz, seven months in the hospital, a serious operation on the spine costing four hundred or five hundred dollars, and an apparently permanent injury to the spine which deprives him almost entirely of the use of his legs, four thousand dollars is fixed by the court, under stipulation of the parties, as damages.

Action on the case to recover damages sustained by plaintiff through the alleged negligence of defendant company in leaving an unguarded elevator shaft or well into which the plaintiff had gone and in which he received the injuries complained of in his writ. Defendant filed plea of general issue. At the conclusion of the evidence, the presiding Justice directed a verdict for defendant. To this direction, the plaintiff filed exceptions. The parties stipulated that if the Law Court was of the opinion that the direction of a verdict for the defendant was error, the Law Court should direct that judgment be entered for the plaintiff for such sum as the Law Court was of opinion that the plaintiff was entitled to recover. Exceptions sustained. Judgment for plaintiff. Damages assessed at four thousand dollars.

Case stated in opinion.

William A. Connellan, and Wilbur C. Whelden, for plaintiff.

William H. Gulliver, and Arthur L. Robinson, for defendant.

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

MADIGAN, J. A laborer in the employ of the defendant in March, 1915, entered the bottom of an open elevator well in the defendant's mill at Rumford to urinate, and was injured by a descending elevator. Coming to this country from a small rural town in Russia, he had worked for eight months piling boards in the Pullman yards in Chicago, after which he worked on a farm until entering the defendant's employ, where he had been four days at the time of the accident, his work with the defendant consisting in loading and unloading pulp wood in the yard and in the mill. He was twenty-five years of age, unable to read English, and speaking it very slightly.

The stone room, so called, in the basement of the mill contained a number of lockers in which employees kept their clothes and lunch boxes. While this room had four outlets for electric lights, and one before the shaft, but one light was in commission at the time of the accident. The well was seven feet wide and thirteen feet long, and opened directly into the stone room, from which came its only light. There were no wheels or machinery in the lower part of the well, the floor of which was clay, covered to a certain extent with waste and paper scraps, and some inches lower than the concrete floor of the stone room to the level of which the floor of the elevator could be brought. This elevator was little used at night and was kept locked so that when needed it was necessary to procure the key.

The plaintiff was working on two consecutive eight hour shifts, from three in the afternoon until eleven at night, and from that hour until seven in the morning. We do not understand that any special time was set apart for meals, but the laborers with whom he worked were accustomed to take certain time out for lunch. Having eaten at eleven, at five in the morning he went to the stone room to eat again. There were no toilets in the stone room, but in another part of the mill there were toilets, or troughs, of the existence of which the plaintiff testifies he had no knowledge. Not having had occasion to do more than urinate during the four days he had been at work, he never had searched or inquired for toilets. Having seen one of his fellows go to the well to urinate the day before, as it had a soft, stinky bottom he supposed it was not improper for him to do likewise. There was no gate or barrier across the opening into the well but above the door or on one side of it was a sign printed in English,

"Elevator, employees not allowed to use," signed by the corporate name of the defendant. Having finished his lunch, he entered the well for the purpose above stated, and the man who removed chips, needing the elevator, started it downward from the floor next above, crushing the plaintiff so seriously as to make necessary a serious operation to the spine, and leaving him thereafter in such a condition that his legs are practically useless for hard labor for the balance of his life.

Under the conditions disclosed by the evidence, we do not feel that this foreigner, with no knowledge of mills and machinery, knowing nothing of the existence of the elevator, ignorant of the language in which the warning sign was written, fitted by his life and training to be a mere hewer of wood and drawer of water, was guilty of contributory negligence. He would not, as suggested, hear the doors at the various floors opening as the elevator descended, since as shown by the testimony of the operator the elevator started from the floor next above, so there would be no doors to open; neither does it seem probable that he would retire to such a damp, ill-smelling place to slumber.

The defendant was at fault. For its roughest work it employed many illiterate laborers, of no high order of intelligence or refinement, of all nations and all tongues, needing for this work brawn and muscle and not brains. Their habits, customs and training should be taken into account, and their safety provided for. The shaft opening, though containing a serious hidden peril, was unguarded and unlighted. Located near the stone room which was the only rest room of the plaintiff, and in which the plaintiff was properly at the time, the well was a trap against the danger of which the plaintiff should have been guarded. The plaintiff's exceptions to the order of non-suit are therefore sustained.

According to the stipulation agreed to by the parties, the Law Court is to assess the damages. For seven months in the hospital, a serious surgical operation costing four or five hundred dollars, from which he received much benefit, and for the impairment of his ability to labor in the future because of the loss practically of all the use of his legs, we feel that $4,000 damages are not excessive.

Exceptions sustained. Judgment for plaintiff.
Damages assessed at $4,000.

WALTER I. WOODMAN,

Trustee in Bankruptcy of The National Boat and Engine Company, In Equity,

vs.

WILLIAM W. BUTTERFIELD.

Kennebec. Opinion June 21, 1917.

Rule as to offering evidence or proof in an appeal in equity. Rule where an insolvent corporation makes preferred payments to or for the benefit of its directors. Necessary acts on part of person elected as a director, to constitute acceptance of said office. Rule of law governing as to whether certain payments were or were not fraudulent. Meaning of word "insolvency." Rule where payments have been made by an insolvent corporation to parties holding the notes of the corporation upon which notes the director of the corporation was an indorser or guarantor.

In a bill in equity, wherein the plaintiff, as trustee in bankruptcy of the National Boat and Engine Company, seeks to recover of the defendant the amount of certain payments, and the value of certain bonds, alleged to have been obtained by him for his benefit from the corporation while he was a director thereof, and when it was insolvent, the alleged ground of recovery being that the obtaining and acceptance of said payments and bonds by the defendant or for his benefit were in violation of his fiduciary duty as a director of said insolvent corporation and in fraud of the rights of its creditors, the case being before the Law Court on defendant's appeal from the decree of the sitting Justice.

Held:

1. All questions presented by the record are open for consideration under an appeal in an equity cause, and such decree is to be directed by the appellate court as the whole record requires, and the appellee is free to urge in the appellate court his contention in regard to those claims on his part, presented by the record, which the decree below did not sustain.

2. It is the settled doctrine of this State where this action is pending, and the same doctrine is enforced by the highest courts of Illinois, the State where the alleged payments and transfers were made, that it is inequitable for a director of an insolvent corporation, whose position gives him an advantage in obtaining information of the affairs of the corporation, to protect his own claims against it to the detriment of its other creditors.
3. The mere fact of the election of a person a director of a corporation does not constitute him a director unless he has notice, or is chargeable with notice, of that fact, for in addition to his election there must be an acceptance of the office by him, express or implied.
4. The evidence is not sufficient to sustain the finding that the defendant was a director of the corporation prior to February, 1911, but is sufficient to establish the fact that he was a director of the corporation from and after February 1, 1911.
5. Clause (e) of Section 70 of the bankruptcy act of 1898 creates no new right of the trustee to avoid transfers of property made by the bankrupt, but gives to the trustee authority to avoid any fraudulent transfers of his property by the bankrupt "which any creditor" might have avoided; accordingly the question whether a particular transfer was or was not fraudulent as to creditors does not depend upon the bankruptcy act, but upon the laws of the State where the alleged transfers were made.
6. In deciding whether the corporation was insolvent at the time of the alleged payments and transfers we must accord to the term insolvent the meaning ascribed to it by the courts of Illinois, the State where the payments and transfers were made, which meaning makes the test whether the corporation was unable to pay its debts and obligations as they fell due in the usual and ordinary course of business.
7. The evidence amply justifies the conclusion that the corporation was insolvent during all the time the defendant was a director of it, and that he knew, or is chargeable with notice of that fact.
8. Where a corporation made payments in its usual course of business, although when it was in fact insolvent, to its outside creditors direct, who had no knowledge of its insolvency, and upon indebtedness for which a director of the corporation was secondarily liable as indorser or guarantor, when it does not appear that such payments were brought about by the procurement of such director, or that he knew that they were to be made, or when they were made, the trustee in bankruptcy of the corporation is not entitled to recover of such director the amount of such payments on the ground that they constituted fraudulent transfers of the corporation's property to him, even though it appears that the director ought to have known that the corporation was insolvent during the period when such payments were made.

Bill in equity brought by trustee in bankruptcy to recover of defendant certain moneys and property alleged to have been obtained by defendant for his benefit from an insolvent corporation of which

said defendant was a director. Cause was heard before a single Justice and from his ruling an appeal was entered to Law Court. Decree in accordance with opinion.

Case stated in opinion.

Woodman & Whitehouse, for plaintiff.

Williamson, Burleigh & McLean, William D. Washburn, and William Carpenter, for defendant.

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

KING, J. Bill in equity wherein the plaintiff, as trustee in bankruptcy of the National Boat and Engine Company, seeks to recover of the defendant the amount of certain payments, and the value of certain bonds, alleged to have been obtained by him for his benefit from the corporation while he was a director thereof, and when it was insolvent. The ground for recovery is alleged to be, that the obtaining and acceptance of said payments and bonds by said defendant or for his benefit were in violation of his fiduciary duty as a director of said bankrupt corporation and in fraud of the rights of its creditors and stockholders. The case is before us upon an appeal by the defendant from the decree of the sitting Justice.

No special finding of facts, or summary of the issues involved, was filed with the decree. The record is voluminous. It contains many uncontroverted facts and circumstances which are material to a clear understanding of the particular issues between the parties, and important to be considered in the determination of those issues. We will, therefore, at the outset briefly state some of those unquestioned facts and circumstances.

In 1907 the defendant became connected with the Racine Boat Manufacturing Company, a corporation doing business at Muskegon, Michigan. He was a large stockholder, a director and the secretary of that company. The other directors were Walter J. Reynolds, his wife Rose E. Reynolds, Paul B. McCracken and Frank A. Wilson. Reynolds was its president. The capital stock of the company was ultimately $200,000, substantially all owned by the directors. The defendant, together with Reynolds and McCracken, indorsed notes of the company to a large amount. January 8, 1909 that corporation made and delivered to Butterfield a trust deed or mortgage of its

property to secure him for his then existing indorsements for the company amounting to $160,000, for such future indorsements as he should make for it, and for any notes given to him by the company. That trust deed was never recorded, and it was withheld from record for the reason that, if recorded, it would impair the credit of the company; but there was an understanding between the other directors and Butterfield that the trust deed was to be recorded whenever Butterfield should determine that the company "was on its last legs."

In September, 1910, the National Boat and Engine Company was organized, under the laws of Maine, for the purpose of taking over the property and business of the Racine Company, and of various other companies and concerns carrying on a similar business. The plan of consolidation was for the new corporation to take over all the assets of the constituent companies and concerns at an appraisal to be made, and to assume all the liabilities of each. The difference between the assets and liabilities of each constituent was to be paid to it, or to its stockholders, in the bonds, the preferred stock, and the common stock, of the new company, in such proportions as the plan of consolidation provided for.

J. Q. Ross, attorney for the Racine Company, Reynolds its president, and H. S. Beardsley, of New York, appear to have been active promoters of the consolidation, and Butterfield was fully informed as to the plans and purposes of the consolidation from the beginning of the negotiations. He says that it was agreed at the outset between Ross, Beardsley, Reynolds and himself that no mention should be made, in carrying out the consolidation, of the unrecorded trust deed which he held of the Racine Company's property, and that it was further understood between them that after the new corporation had issued its bonds the trust deed was to be exchanged for enough of those bonds, to be held in escrow, to cover all his contingent liability on notes of the Racine Company and all of its direct liability to him. The consolidation was carried out as planned. Reynolds became president, Beardsley treasurer, and Ross secretary of the new corporation, and each was a member of its board of directors. All the assets of the Racine Company were transferred to the new or National Company by conveyances warranting the title thereto, and without mention of the unrecorded trust deed held by Butterfield. At the time of the transfer Butterfield was liable as indorser or guarantor of the

Racine Company's paper to the amount of about $100,000, according to his testimony, and that company was also indebted to him for about $24,500 on notes given by it to him.

The National Company authorized an issue of not exceeding $3,000,000 of first mortgage bonds, to bear date October 1st, 1910, and to be secured by a trust mortgage to the Astor Trust Company, of New York City, as trustee, covering all its property real and personal, present and future. The mortgage was executed, and on January 18, 1911 was accepted by the trustee. Some of the bonds were sold and others were used as collateral.

The National Company used the same office as the Racine Company, in Muskegon, Michigan, until December. 1910, or January, 1911, when it changed its general office from Muskegon to Chicago. At a special meeting of the board of directors of the National Company held at the Congress Hotel in Chicago on the 21st day of December, 1910, Butterfield was elected a director of the corporation. He attended the next meeting of the board of directors held at Chicago on March 13, 1911. At that meeting the business affairs and the financial status of the corporation were presented and discussed, and a resolve was passed that when necessary to borrow money in order to obtain funds to meet bills or accounts payable or to extend the time of payment on notes payable, the officers of the Company might use the bonds of the company as collateral at a rate not to exceed two for one.

At the time of the consolidation Butterfield held two notes of the Racine Company, one for $14,500, dated August 4, 1910, maturing February 4, 1911, with interest paid to its maturity, and the other for $10,000, dated September 6, 1910, maturing December 6, 1910, with interest paid to its maturity. Various payments were made to him and for his benefit on account of those notes prior to April 6, 1911. On that day Butterfield received $6750, at par value, of the bonds of the National Company. He admits that he received those bonds in full settlement of the balance then due on his two notes against the company, as then adjusted between him and Reynolds, its president. And on or about the same date, he received $3650, at par value, of the bonds of the National Company.

It has already been mentioned that there was an understanding between Butterfield, Reynolds, Ross and Beardsley, that, after the consolidation was completed, a sufficient amount of the bonds of the

new company should be exchanged for that unrecorded mortgage which Butterfield held covering the Racine Company's property. In furtherance of that understanding, and in May, 1911, bonds of the National Company to the amount of $88,000 were placed in the hands of Cross, Vanderwerp, Foote & Ross, as trustees, to secure Butterfield on his indorsements of the notes of the Racine Company, then amounting to about $44,000, and which indebtedness the National Company had assumed.

At a meeting of the board of directors of the National Company held August 25th, 1911, a resolve was passed directing the president to admit in writing, for the company and in its name, its inability to pay its debts and its willingness to be adjudged a bankrupt on that ground; and the petition in bankruptcy was filed against it August 28, 1911.

It appears that Butterfield, having paid the notes of the Racine Company on which he was liable as indorser or guarantor, sought to have the $88,000 of bonds, held by Cross, Vanderwerp, Foot & Ross, proved as a claim against the bankrupt estate. The claim was disallowed on the ground that the trust deed, for which the bonds were exchanged, not having been disclosed in the consolidation proceedings, was invalid as against the bankrupt corporation, and its surrender did not constitute a valid consideration for the delivery of the bonds in exchange for it; and that such delivery was voidable for the further reason that it constituted a fraudulent preference of a director at a time when the bankrupt was insolvent and known to be so by the claimant. *Butterfield* v. *Woodman*, 216 Fed., 208, affirmed, as to that part of the decision, in *Butterfield* v. *Woodman*, 223 Fed., 956.

The plaintiff's claims presented by the record may be thus briefly stated:

First. That Butterfield became a director of the National Boat and Engine Company on December 21st, 1910, when he was elected to that office; that the company was then, and thereafter continued to be, insolvent, and that he as a director of the company should have known that fact, and did know it; that between December 21st, 1910, and April 6, 1911, various payments were made by the company to him directly, or for his benefit, in reduction of the two notes which he held against the company, and that the plaintiff is entitled to recover of him in this action those payments, with interest thereon, upon the ground that they were fraudulent transfers of the company's property to him.

Second. That the $6750 of bonds received by Butterfield on April 6, 1911, in settlement of the balance due him on his two notes of the company, were the property of the company, and that the value of those bonds at the time they were converted by him, with interest thereon, is recoverable of him in this action upon the same ground of an unlawful and fraudulent transfer of the company's property to him.

Third. That the $3650 of bonds received by Butterfield on or about April 6, 1911, belonged to the company, and that their value at the time he converted them, with interest, is recoverable of him in this action for the same reason.

Fourth. That divers sums of money were paid by the National Company after December 21st, 1910, in reduction of the amounts of various notes which that company had assumed and upon which Butterfield was liable as indorser or guarantor, and that the amount of those payments with interest is recoverable in this action upon the same ground that they constituted fraudulent transfers of the company's property for the benefit of Butterfield while a director of the company, and when it was insolvent.

After hearing, the sitting Justice decreed:

(1) The bill is sustained as to the bonds of the National Boat and Engine Company delivered to the defendant of the par value of $3650.00.

(2) The bill is sustained as to $3500.00 received by the defendant from the National Boat and Engine Company between December, 1910 and February, 1911, as payments to him on his liability on certain promissory notes of said company.

(3) The bill is not sustained as to the bonds of the National Boat and Engine Company, delivered to the defendant by Reynolds, of the par value of $6750.00, these bonds becoming the property of Butterfield on delivery.

(4) If the bonds specified in item 1 cannot be delivered in specie to the trustee in bankruptcy, a master may be appointed to ascertain their market value, at the time they were demanded, for which sum only, Butterfield is hereby made liable to the trustee.

The plaintiff now claims, in accordance with the principles affirmed in *Trask* v. *Chase*, 107 Maine, 137, and in *Pride* v. *Pride Lumber Company*, 109 Maine, 452, 457, that, inasmuch as all questions presented by the record are open for consideration under the appeal, and such

decree is to be directed by this court as the whole record requires, he is free to urge before this court his contention in regard to those claims on his part, which the record presents, but which the decree below did not sustain. We think he has that right.

In support of each and all of his claims contended for in this action, the plaintiff invokes the rule, which rests in the soundest wisdom and is supported by the great weight of authorities, that an insolvent corporation is not permitted to prefer a creditor who is also a director of the corporation. The rule is sustainable upon the principle that it is inequitable for a director, whose position gives him an advantage in obtaining inside information of the affairs of the corporation, to protect his own claims against it to the detriment of its other creditors. That rule is the settled doctrine of this State where this action is pending, and where the bankrupt corporation was created. (*Symonds* v. *Lewis*, 94 Maine, 501, and *Pride* v. *Pride Lumber Company*, supra), and it is also adopted and enforced by the highest court of Illinois, the State where the alleged transfers were made. *Beach* v. *Miller*, 130 Ill., 162, 22 N. E., 464. That rule, therefore, must be applied in this case in deciding whether or not the alleged payments by the corporation to the defendant constituted fraudulent transfers of its property to him as one of its creditors.

We will consider the plaintiff's claims in the order in which we have hereinbefore stated them.

1. The alleged payments made on account of the two notes which the defendant held against the corporation, exclusive of the bonds which he received in the final settlement of those notes.

When did the defendant become a director of the National Boat and Engine Company? He was elected as such at a meeting of the directors held December 21, 1910. He admits that he had previously expressed to Reynolds his wish to become a director of that company, because of his interest in its affairs, but he claims that he had no knowledge that he had been elected a director until sometime in February, when Reynolds notified him of his election. He said: "It was the first part or the middle of February. I couldn't remember. . . . . Q. You think it was the first part of February? A. Possibly. . . . . Q. So that from the early part of February on you admit that you did know it? A. Sometime in February I knew that I had been elected." The mere fact of the election of a person as a director of a corporation does not constitute

him a director unless he has notice, or is chargeable with notice, of that fact. In addition to the election there must be an acceptance of the office, express or implied, Cook on Corporations, 7th Ed., Section 624.

The sitting Justice sustained the plaintiff's bill as to $3500 received by the defendant from the National Boat and Engine Company "between December, 1910, and February 1911," as payments to him on his notes against the company. That decision implies that he found that the defendant was a director of the corporation from December, 1910—presumable from the time of his election to that office on the 21st of December. His decision as to questions of fact necessarily involved in the case is not to be reversed unless it clearly appears that such decision was erroneous. We are unable to find any evidence in the case tending to show that the defendant had any knowledge prior to February, 1911, that he had been elected a director of the corporation. He testified that he had no information of that fact until sometime in February, there was no testimony to the contrary, and it was not shown that he did anything prior to February from which it could be inferred that he considered that he was a director of the corporation. We are therefore constrained to the conclusion that the sitting Justice erred in finding that the defendant was a director of the corporation prior to February, 1911, and, therefore, chargeable with those obligations and duties which arise out of the fiduciary relations which the law regards as existing between a director of a corporation and its stockholders and creditors. He admits that he was informed of his election as director sometime in February, 1911, and that it may have been in the first part of that month. We think it may be reasonably held that he knew as early as the beginning of February, 1911, that he had been elected a director, and that from and after that time he was chargeable with the duties and obligations of a director of the corporation.

Was the corporation insolvent during the time the defendant was a director of it, and did he know or have reason to know that it was insolvent? In the decision of that question as involved in this case we are not controlled by the definition of insolvency contained in the bankruptcy act. This bill in equity is brought under the provisions of Clause (e) of Section 70 of that act. That clause of the bankruptcy act creates no new right of the trustee to avoid transfers of property made by the bankrupt, but merely gives to the trustee authority to

avoid any fraudulent transfers of his property by the bankrupt "which any creditor" might have avoided; and therefore the question whether a particular transfer was or was not fraudulent as to creditors does not depend upon the bankruptcy act, but upon the laws of the State where the alleged transfers were made. *Holbrook* v. *International Trust Co.*, 220 Mass., 150, 154; *In re Mullen*, 101 Fed., 413; *Trust Co.* v. *Trustees of Wm. F. Fisher & Co.*, 67 N. J., Eq. 602.

The alleged fraudulent payments and transfers by the bankrupt to the defendant, the value of which the trustee here seeks to recover, were made in the State of Illinois. It follows, therefore, that in deciding whether the corporation was insolvent at the time the alleged transfers were made, we must accord to the term insolvent the meaning ascribed to it by the courts of Illinois. And in *Atwater* v. *Bank*, 152 Ill., 605, 38 N. E., 1017, 1018, that court said: " 'Insolvency', when applied to a person, firm or corporation engaged in trade, means inability to pay debts as they fall due in the usual course of business." And that is the meaning ascribed to the term "insolvent" by common Law Courts, and courts of equity. *Clay* v. *Towle*, 78 Maine, 86; *Morey* v. *Milliken*, 86 Maine, 474.

The history of the National Boat and Engine Company, and a consideration of its financial condition, as disclosed by the record, shows that from its beginning it was practically insolvent in the sense of that term which makes the test the inability of the corporation to meet its existing obligations in the usual course of business as they become due. According to the report of the appraisers the new company assumed at the outset of its brief business existence the combined liabilities of all the constituent companies and concerns amounting to an indebtedness of $345,724.22. That indebtedness was immediately pressing for payment, and naturally so, because the holders thereof discovered that the property of their principal debtors had been transferred. But the new company immediately conveyed "all its property, real and personal, present and future" to secure an issue of bonds many of which were at once actually issued. It seems plain, therefore, that the new corporation became at once financially embarrassed. Its immediate and pressing obligations were more than a third of a million dollars, it had no available assets, and it must have been without credit. Its condition was helpless and hopeless. As early as December, 1910, it was in need of funds to meet its pay-roll, and Butterfield then came to its aid by borrowing for it,

on his own collateral, $1000 for that purpose. We entertain no doubt that the sitting Justice was amply justified by the evidence in finding that the corporation was insolvent during all the time Butterfield was a director of it. But his learned counsel urge that he did not know or have reason to know its condition. We think otherwise. He was perfectly familiar with the whole plan of the consolidation. He knew that the new company had assumed the debts of the constituents, and he knew that all the assets which the new company took over were immediately conveyed to secure a $3,000,000 issue of bonds, and that many of them were issued at once. In December, not long after the corporation was organized, he responded to its call for aid in meeting its pay-roll. He secured frequent and material payments in reduction of his two notes which the company had assumed, and he requested with urgency, culminating in a threat of legal proceedings, that his indirect liability as indorser on paper which the company had assumed should be secured by a deposit of bonds of the company as collateral. He was present and took part in the meeting of the directors of the company on March 13, 1911, when the resolve was passed "that when necessary to borrow money in order to obtain funds to meet bills or accounts payable, or to extend the time of payment on notes payable," the officers were authorized to use the bonds of the company as collateral at a rate not to exceed *two for one*. And on April 6, 1911, he accepted, at their *par value*, at least $6750 worth of the company's bonds in settlement of the balance of his notes for which the company was liable, and he did so with full knowledge that the company had found it very difficult to sell its bonds, and at much less than par. Considering the facts and circumstances disclosed we are of opinion that the defendant knew or ought to have known, during all the time he was a director of the company, that it was insolvent.

He admits that he received, on account of his notes, a payment of $1200 on February 3, 1911, and another payment of $1500 on February 6, 1911. For these, with interest thereon from the dates of payment, we think he is liable in this action, upon the ground that they constituted unlawful transfers of the company's property to him as a director-creditor of the corporation. We do not find from the evidence sufficient proof that he received any other payments thereon between February 1st, 1911, and April 6, 1911, when a final settlement of the balance due on the notes was made.

2. The transfer to him of the $6750 of bonds on April 6, 1911.

He claims that these bonds were the property of Mr. Reynolds from whom he received them. We have had considerable doubt as to that. But the sitting Justice so found, and we think it has not been shown that his finding is clearly erroneous. On April 4, 1911, Reynolds wrote the defendant in reference to a settlement of the latter's claims against the Racine Company, which the National Company had assumed, and in that letter said, "but for the sake of good fellowship I am willing to sacrifice *my own securities* for the purpose of getting this entire matter adjusted without litigation," and he therein offered to turn over to the defendant $5000 of his bonds and $1000 of his preferred stock. Butterfield did not accept that offer. He testified that on April 6, 1911, he and Reynolds reached an adjustment of the balance due him, in settlement of which he received the $6750 of bonds at par, supposing that they were Reynold's bonds. Reynolds did not testify in this case. There may be some significance in the language of the receipts which the defendant gave on April 6 for both lots of bonds. As to the $6750 worth, the receipt reads, "Received from *W. J. Reynolds* the following National Boat & Engine Company Bonds:" (describing them); but as to the $3650 worth it reads, "Received of *W. J. Reynolds, President of the National Boat and Engine Company,* the following securities:" (describing those bonds). We therefore think the decree as to the bonds of the par value of $6750 should not be reversed.

3. The transfer of the $3650 of bonds on or about April 6, 1911, as represented by the defendant's receipt of that date.

When first inquired of in respect to receiving those bonds the defendant said he had no distinct memory about it, but was inclined to think that after the settlement Reynolds borrowed that amount of bonds of him, and that the receipt represented the return of them, saying "whatever it was, it was on an exchange basis and didn't multiply or increase the $6750 bonds." The plaintiff filed a petition to reopen the hearing to introduce evidence that the defendant had and retained both lots of bonds, and in his affidavit in answer to that petition, which affidavit is made a part of the record, the defendant states that he was mistaken in his testimony as to the $3650 of bonds, but that he is now satisfied that the bonds were delivered to him as being those to which he was entitled on the purchase by the National Company of the assets of the Racine Company, of which he was a

stockholder. And he further says in his affidavit that according to his best recollection the $3650 of bonds was "the exact amount" that he received as a stockholder of the Racine Company under the plan of consolidation. We note in the report of the appraisers as to the Racine Company that they show the net worth of that company—the excess of assets over liabilities, to be $808,146.42, and they state, "Plan of Purchase: Bonds $90,350, Preferred Stock 361,510, Common Stock $356,290, total $808,150." If that was the plan of purchase of the net worth of the Racine Company, then it would seem that $3650 would not be "the exact amount" of the defendant's share of bonds coming from the consolidation, since it appears from his own testimony that he owned at least a quarter of the capital stock of the Racine Company. We strongly suspect, after a carful study of the evidence, that *both* lots of bonds were received as payment of the real balance found due Butterfield in the adjustment between him and Reynolds on April 6, 1911. According to a statement put into the case, which both parties seem to concede is substantially correct so far as it shows payments to Butterfield on his notes, there was due Butterfield, after the February payments of $2500 were credited, $11,937,89. The defendant did not satisfactorily explain how that was reduced to $6750. He said it was "a final settlement of give and take of all differences to that date", but he could not recall any particular items or matters that reduced the balance of $11,937,89 to $6750. We find in the record evidence of an entry on the books of the company under date of January 25, 1911, tending to show a payment of $1500 on "notes payable W. W. B." That payment was not on the aforesaid statement, which was prepared by some official of the company and sent to Butterfield *prior* to the February payments, for he put those February payments on the bottom of the statement in pencil. The last of the other payments listed on the statement is "1-20-11, 1000." If that payment of Jan. 25, 1911 be deducted from the $11,937.89 there will be a balance of $10,437.89, which might be changed somewhat by interest accrued on the one side and the other up to April 6, 1911. And the total of the two lots of bonds is $10,400, a significant fact in this connection, we think. In our opinion no error is shown in holding the defendant liable for the value of the $3650 of bonds at the time he converted them, with interest thereon. He received them from the company, and his explanation of the transaction is not convincing.

4. Such payments as were made by the National Boat and Engine Company, while the defendant was a director thereof, on notes the payment of which the company had assumed and upon which the defendant was liable as indorser or guarantor.

There is evidence that some such payments were made to the holders of the notes, but not to Mr. Butterfield, and it is not contended that the holders of the notes had any knowledge that the National Company was insolvent when the payments were made. It is true that those payments reduced the defendant's contingent liability for debts which the company had assumed. But the evidence does not show that he procured the payments to be made. Neither does it satisfactorily appear that he knew when the payments were made, or even that they were to be made.

We think it would be going too far, to hold that a director of a bankrupt corporation is liable to pay to its receiver, or to its trustee in bankruptcy, an amount equal to the payments which the corporation may have made in its usual course of business, although while it was in fact insolvent, to its outside creditors direct who had no knowledge of its insolvency, but upon indebtedness for which the director is secondarily liable as indorser or guarantor, when it does not appear that such payments were brought about by the procurement of the director, or that he knew they were to be made, or when they were made; and even though it appears that the director ought to have known that the corporation was insolvent during the period when such payments were made. See *Butterfield* v. *Woodman*, 223 Fed., 956, 961. And we are therefore of opinion in this case that the plaintiff is not entitled to recover the amounts of alleged payments made by the corporation to the holders of notes for which the corporation was liable and upon which the defendant was indorser or guarantor.

Let the decree below be modified in accordance with this opinion.

So ordered.

JAMES H. STAIRS *vs.* BANGOR POWER COMPANY.

Penobscot. Opinion June 25, 1917.

Writ of entry. Plea of disclaimer. Proof necessary under claim of adverse possession.

Writ of entry for the recovery of a tract of land in Old Town bounded westerly by the Bennoch road, and easterly by the thread of Pushaw Stream extended southerly from the southerly line of land of Frank Lancaster through its northerly mouth, so called, to its point of intersection with the thread of Stillwater River and thence by the thread of Stillwater River to the line of Gilman Falls Avenue. The case is reported to the Law Court for the determination, upon the evidence legally admissible, of all the rights of the parties and the order of final judgment.

As the principles of law involved are well established, the questions to be determined are of fact alone.

The court concludes upon the evidence that the main Pushaw Stream extended to the south end of the island which lies south of Irving Point and that the mouth of Pushaw Stream referred to in the deeds is the mouth between the south end of the island and a point on the west bank of the river northerly of Pushaw road and not the mouth north of the island.

The court also finds that neither by the deeds of Daniel White and John Bennoch through Alexander Gray and his grantee, Richard Lancaster, nor by adverse possession does the plaintiff show title to the island or to the strips of land one rod wide along the Stillwater River or Pushaw Stream.

Under the deed of William H. White, one of the two sons and heirs at law of Daniel White, deceased, of a strip of land one rod in width upon Stillwater River or stream and a strip of land one rod in width on Pushaw Stream from the mouth of the same to the south line of land of Frank Lancaster, the plaintiff is entitled to one-half of the interest therein of John White or thirty-two and one-half one hundredths of each of said strips, but shows no title to the island.

Writ of entry to recover a certain tract of land in the city of Old Town, Penobscot County. Defendant filed plea of general issue, together with brief statement and also filed disclaimer as to part of the realty claimed in plaintiff's writ. At close of testimony, by consent of the parties case was reported to Law Court upon so much of

the evidence as legally admissible, the Law Court to determine all the rights of the parties and render final judgment thereon. Judgment in accordance with opinion.

Case state in opinion.

Morse & Cook, for plaintiff.

Ryder & Simpson, and C. J. Dunn, for defendant.

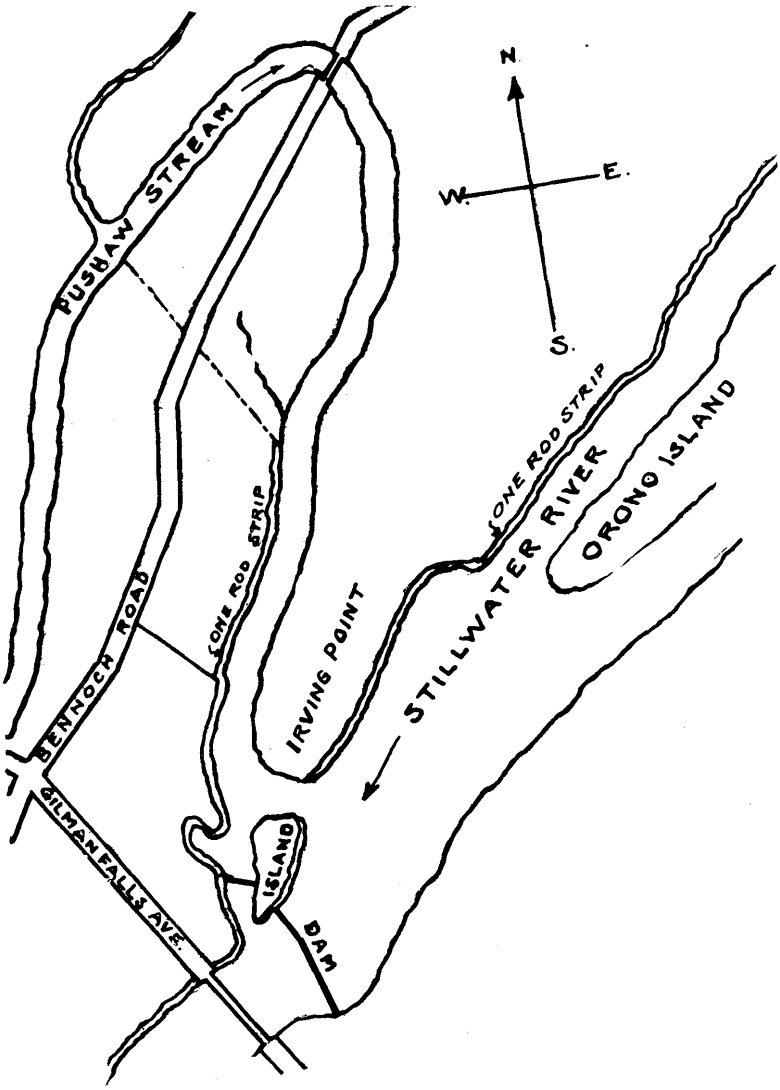
SITTING: SAVAGE, C. J., CORNISH, KING, BIRD, HALEY, PHILBROOK, JJ.

BIRD, J. The plaintiff by this writ of entry seeks the recovery of land described as follows: Commencing at the thread of the northerly branch of Pushaw Stream, so called, at a point where the thread of said stream intersects the thread of the Stillwater branch of the Penobscot River; thence northwesterly up the thread of said Pushaw Stream about twenty rods to a point where the southerly line of land formerly owned by Frank Lancaster intersects the thread of said stream; thence westerly on the southerly line of said Frank Lancaster's land to the Bennoch road, so called; thence southerly along said Bennoch road to Gilman Falls Avenue; thence easterly along said Gilman Falls Avenue to the thread of the Stillwater branch of the Penobscot River; thence northeasterly along the thread of said Stillwater branch of the Penobscot River to the point of beginning.

The defendant pleaded the general issue and, by way of brief statement; "that it claims and was in possession of only a part of the premises described in plaintiff's writ when said action was commenced viz: A strip of land one rod in width on the west side of Pushaw Stream and the Stillwater branch of the Penobscot River extending along the southerly line of land formerly owned by Frank Lancaster as alleged in plaintiff's writ to Gilman Falls Avenue, so called. "Said defendant further says; that it was not on the day of the date of plaintiff's writ and never since has been and is not now, tenant of the freehold in, or in possession of so much of the premises described in plaintiff's writ as lies west of a strip of land one rod in width on the west side of Pushaw Stream and Stillwater branch of the Penobscot River extending from the southerly line of land formerly owned by Frank Lancaster as alleged in plaintiff's writ to Gilman Falls Avenue, so called."

The case is reported to the Law Court upon so much of the evidence as is legally admissible; "that court to determine all the rights of the parties and order final judgment."

The following sketch illustrates the location.



It is admitted "that on the first day of January, 1845, Daniel White, deceased, was the owner in fee simple of 65 undivided 100ths part of the land described in the plaintiff's writ, and John Bennoch, deceased, was the owner in fee simple of 35 undivided 100ths part of said land. The above admission is not to preclude either party from introducing deeds for the purpose of construction only."

The principles of law involved are, if not elementary, amply established by authority. The questions to be determined are questions of fact. They are stated by defendant to be, "1. What is the main branch of Pushaw Stream? 2. The plaintiff has shown title to the land described in his declaration in two ways; By title deeds and again by adverse possession."

To discuss extensively the evidence upon either of these two points would be profitless. The court concludes upon the evidence afforded by the plan of 1805, the construction of the deeds offered and admitted and the oral evidence, including that of the engineers, that the main Pushaw Stream extended to the south end of the island which lies south of Irving Point and that the mouth of Pushaw River referred to in the deeds is the mouth between the south end of the island and a point on the west bank of the river northeasterly of Pushaw Road, or Gilman Falls Avenue, as otherwise called, and not the mouth north of the island, as claimed by plaintiff, which the court concludes was artificially formed.

The plaintiff claims title by sundry mesne conveyances from Daniel White and John Bennoch through Alexander Gray and his grantee, Richard Lancaster. We do not find the plaintiff's contention supported by the deeds. He also claims title by adverse possession but the acts relied upon to show open, notorious, exclusive and uninterruptedly continuous possession for the requisite period are not, in the opinion of the court, sufficient to give title by adverse possession. *Richards* v. *Richards*, 84 Maine, 1. Plaintiff shows no title to the island or the strips of land along the Stillwater River or Pushaw Stream, either by the deeds above considered or by adverse possession. *Derby* v. *Jones*, 27 Maine, 357, 362.

The plaintiff, however, offers the deed of release of William H. White, one of the two heirs-at-law of Daniel White, deceased, "of a strip of land one rod in width upon Stillwater Stream and a strip of land one rod in width on Pushaw Stream from the mouth of the same" to a point several rods northerly of the island. The strips so con-

veyed were expressly excepted in the deed of Daniel White and John Bennoch to Alexander Gray. The plaintiff, therefore, shows title to thirty-two and one-half one hundredths in common and undivided of the strips, one rod in width, on both Pushaw Stream and Stillwater River, but no title to the "island." The defendant's dam encroaches upon both these strips and plaintiff is entitled to judgment against it for such fractional proportion of both strips.

Judgment for plaintiff for thirty-two and one-half one hundredths, in common and undivided of a strip of land one rod in width upon the westerly side of Pushaw Stream from the south line of land of Frank Lancaster to a point on the westerly side of Pushaw Stream, southwest of the south point of the "island", and thirty-two and one-half one hundredths, in common and undivided of a strip of land one rod in width on the westerly side of Stillwater River from the northerly point of the "island" to Gilman Falls Avenue.

So ordered.

STATE OF MAINE *vs.* W. C. DAVIS.

Cumberland. Opinion June 29, 1917.

Motion in arrest of judgment. Rule where bill of exceptions does not clearly set out the issue. Rule as to motion in arrest of judgment "because verdict is against the law and evidence."

Indictment charging defendant with violation of R. S., (1903), Chap. 119, Sec. 16.

A bill of exceptions must present each issue of law in the clear, distinct and summary manner required by statute and where an issue is not so presented by the bill of exceptions it cannot be considered, even though the transcript of the evidence be made part of the bill and shows the irregularity or error complained of.

A motion in arrest of judgment addresses itself to the record alone and the evidence is no part of the record.

A motion for arrest of judgment cannot serve as a motion for new trial on the ground that the verdict is against law and evidence.

When the evidence in support of a criminal prosecution is so defective or so weak that a verdict of guilty based upon it cannot be sustained, the jury should be instructed to return a verdict of not guilty.

Indictment under R. S., 1903, Chap. 119, Sec. 16, (R. S., 1916, Chap. 120, Sec. 16). At close of testimony, respondent filed motion asking that a verdict of not guilty be directed by the court. This motion was overruled and respondent filed exceptions. After verdict of guilty respondent filed motion in arrest of judgment. Presiding Justice overruled the motion and respondent seasonably excepted. Judgment in accordance with opinion.

Case stated in opinion.

Jacob H. Berman, County Attorney, for the State.

Henry C. Sullivan, for respondent.

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

BIRD, J. The indictment in this case charges the defendant with violation of R. S., (1903) Chap. 119, Sec. 16, (R. S., 1916, Chap. 120, Sec. 16), punishable by imprisonment for any term of years. At the

close of the evidence at the trial a motion was made for the direction of a verdict for defendant which was refused. After verdict of guilty, the defendant moved in arrest of judgment, because 1, "the indictment does not allege or set forth any substantive crime—;" 2. "because the indictment does not set forth or allege any facts sufficient to constitute the substantive crime, etc., 3. "because the verdict is against the law and the evidence." This motion was also overruled.

The bill of exceptions, upon which alone the case is before this court, sets out the two motions, their refusal and the reserving of exceptions thereto. It concludes:—"The report of the evidence given at said trial, which is filed herewith, is hereby expressly referred to and made part of this bill of exceptions.

"To all which rulings and instructions and refusals to instruct the said respondent excepts and prays that his exceptions may be allowed."

The defendant urges that during the trial the jury were allowed to separate (but to this order of the court no objection appears to have been made nor exception noted) and that his exceptions should be allowed upon this ground. This alleged irregularity in the course of the trial, assuming it can be reached by exceptions, cannot be considered. The bill of exceptions is entirely silent as to any such ground. Such a bill of exceptions is insufficient, even when the transcript of the evidence is made part of the bill and the transcript shows the irregularity. *McKown* v. *Powers*, 86 Maine, 291; *Richardson* v. *Wood*, 113 Maine, 328, 330; *Borders* v. *B. & M. R. R.*, 115 Maine, 207.

The defendant at the close of the evidence asked a directed verdict, as already seen. The request was refused and defendant reserved exceptions. After verdict, he moved in arrest of judgment for alleged defects in the indictment and because the verdict was against the law and the evidence. The exceptions to the denial of the motion in arrest by reason of defects in the indictment is not argued. If the last, or third reason alleged, can be ground for a motion in arrest, it precludes the consideration of the exceptions to the refusal to direct a verdict, as it is in effect a motion for new trial. The motion waives the exceptions. *State* v. *Simpson*, 113 Maine, 27. But a motion for arrest of judgment cannot be maintained upon the ground that the verdict is against law and evidence. Like a demurrer, a motion in arrest addresses itself to the record alone and evidence is no part of

the record. We conclude, therefore, that the motion in arrest in this case is not for these reasons, to be treated as a motion for new trial and thus bring the case within the rule of *State* v. *Simpson*, supra.

Upon a careful reading of the evidence, the unpleasant details of which it is undesirable and unnecessary to rehearse, it is the opinion of the court that the exceptions to the refusal to order a verdict, as moved by defendant, be sustained. The evidence is not such as warranted a verdict of guilty. When the evidence in support of a criminal prosecution is so defective or so weak that a verdict of guilty based upon it cannot be sustained, the jury should be instructed to return a verdict of not guilty. A refusal to so instruct is a valid ground of exception. *State* v. *Cady*, 82 Maine, 426, 428; *State* v. *Simpson*, 113 Maine, 27, 28; *Mickle* v. *U. S.*, 157, Fed., 229; See also Whar. Cr. Pl. & Pr. (8th Ed.), Sec. 812.

The exceptions are sustained.

CHARLES P. LEMAIRE, In Equity,

vs.

RALPH W. CROCKETT, ALFRED W. ANTHONY and FRANCOIS X. MARCOTTE.

Androscoggin. Opinion July 3, 1917.

Constitutional Law. Referendum. Right of legislature to attach Emergency Clause to Act passed by it where the right of Home Rule is lodged in the municipality. When and under what conditions the Emergency Clause may be attached.

1. That under Art. IV, Part Third, Sec. 1, of the constitution full power has been conferred upon the legislature "to make and establish all reasonable laws and regulations for the defense and benefit of the people of this State not repugnant to this constitution nor to that of the United States.
2. That, as a necessary corollary to this fundamental proposition, the legislature has the constitutional power to designate the instrumentality which shall execute and carry into effect the laws made for the benefit of the people under this section.
3. That the legislature may entrust their execution to a board created by itself and to be appointed in a designated way, or to the municipality where the power is to be executed, and it may substitute one instrumentality for the other whenever it sees fit.
4. That by Chap. 293 of the Private and Special Laws of 1880, the right to appoint and control the police department of Lewiston had been delegated by the legislature to the city itself and had so remained up to the passage of the act of 1917.
5. That thereby the city had been given the right of local self government so far as its police department was concerned, which is but another name for home rule. The legislature had the power to withdraw that right at any time and confer the administration of the police department upon some other board or commission as it did by the act of 1917, but so long as the act of 1880 remained in force the right of home rule in this respect existed.
6. This right of home rule is not absolute and indefeasible, but if at the time the infringing act is passed, the right is lodged with the municipal government, that is sufficient to forbid the attaching of the emergency clause and that was the situation here.
7. That there is a clear distinction between the legislative power to pass the act making the transfer and the power to attach to it the emergency clause and pass

it as an emergency measure, causing it to take effect immediately on approval. The first is permitted. The second is expressly prohibited. The emergency clause in this commission act is therefore declared to be invalid.

8. This invalidity affects only the emergency clause. The act itself was within the constitutional power of the legislature and is valid. The two are clearly separable. The one stands, the other falls.

9. The sitting Justice did not err in overruling the demurrer.

Bill in equity brought by the plaintiff, as Mayor of the city of Lewiston, against the three defendants acting as members of the Police Commission appointed under an Act of the legislature of 1917, to which Act was attached the Emergency Clause so called. The defendants filed answer and also demurrer to plaintiff's bill. The cause was heard upon bill, answer and proof. The sitting Justice overruled defendants' demurrer and ruled pro forma that the Act was constitutional and that the bill be dismissed with costs; to which ruling an appeal was entered to the Law Court. Decree in accordance with opinion.

Case stated in opinion.

McGillicuddy & Morey, for plaintiff.

Ralph W. Crockett, for defendant.

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

CORNISH, C. J. This is a bill in equity brought by the plaintiff, as Mayor of the city of Lewiston, against the three members of the Police Commission appointed under an act of the Legislature approved March 8, 1917, entitled "An Act to provide a Police Commission for the city of Lewiston and to promote the efficiency of the Police Department thereof." The bill asks this court to declare that the Legislature had no constitutional power to pass the act with the emergency clause attached, that the act is rendered thereby invalid; that all appointments already made by the defendants are of no effect and that the defendants be enjoined from interfering with, controlling or directing the police force of the city of Lewiston.

The defendants filed an answer to the bill with a demurrer inserted therein. The sitting Justice ruled as follows: "To sustain this bill would be to rule in effect that the police commission act is unconstitutional in that it infringes the right of home rule. But according

to the established and uniform course of procedure in this State, a statute will be presumed by a single Justice to be constitutional until the contrary has been established by the Law Court." He accordingly ruled pro forma that the act was constitutional, and dismissed the bill, at the same time overruling the demurrer.

Two questions are involved. First, whether the act violates section sixteen of the thirty-first amendment to the constitution, that an emergency bill shall not include an infringement of the right of home rule for municipalities, Second; if it is such a violation, whether the act is wholly unconstitutional, or only the emergency clause is invalid, leaving the act itself valid and subject to the referendum if invoked.

Section 16 of Article 31 of the constitution of this State, adopted by the people in 1908, and commonly known as the emergency clause of the initiative and referendum provides as follows:

"Sec. 16. No act or joint resolution of the Legislature, except such orders or resolutions as pertain solely to facilitating the performance of the business of the legislature, of either branch, or of any committee or officer thereof, or appropriate money therefor or for the payment of salaries fixed by law, shall take effect until ninety days after the recess of the legislature passing it, unless in case of emergency (which with the facts constituting the emergency shall be expressed in the preamble of the act), the legislature shall, by a vote of two-thirds of all the members elected to each house, otherwise direct. An emergency bill shall include only such measures as are immediately necessary for the preservation of the public peace, health or safety and shall not include (1) an infringement of the right of home rule for municipalities" &c. The last clause is the one vitally involved here. Did the act creating this Police Commission, and taking the entire management and control of the police department of the city of Lewiston away from the municipal officers where this power had resided since 1880, and giving it to a Commission of three appointed by the Governor, constitute an infringement of the right of home rule, as prohibited in the constitution? If it did, the legislature was expressly prohibited by the constitution from attaching to it the emergency clause, thereby taking from the people the right to invoke the referendum, and causing the act to go into effect immediately upon its approval by the Governor.

In our opinion this act did infringe upon the right of home rule under the facts of this case, and therefore the emergency clause was invalid.

The constitution of this State confers upon the Legislature "full power to make and establish all reasonable laws and regulations for the defense and benefit of the people of this State not repugnant to this constitution nor to that of the United States." Art. IV, Part Third, Sec. 1. As was said in the opinion of the Justices, 99 Maine, 531, "one of the main purposes of this general grant of power was to vest in the Legislature a superintending and controlling authority, under and by virtue of which they might enact all laws, not repugnant to the constitution, of a police or municipal nature and necessary to the due regulation of the internal affairs of the Commonwealth." The exercise of such a power is absolutely indispensable in a well governed community.

A necessary corollary to this fundamental proposition is this, that the Legislature has the constitutional power to designate the instrumentality which shall execute and carry into effect the laws made for the benefit of the people under this section. It may entrust their execution to a board created by itself and to be appointed in a designated way or to the municipality itself where the power is to be executed. The latter is the more common method. But having adopted one method the Legislature is not forever bound thereby but may substitute another, whenever it sees fit. *Commonwealth* v. *Plaisted,* 148 Mass., 375-386.

In this instance it is obvious that prior to the passage of the Police Commission bill in 1917, the right to regulate and control the police department of Lewiston had been delegated by the Legislature to the city itself. It had been made a matter of local self government, which is but another name for home rule. "Home Rule" has been defined to be what the term itself clearly indicates "the right of self government as to local affairs." Words and Phrases 2nd series, page 902. "Home rule means that, as to the affairs of a municipality which affect the relation of citizens with their local government, they shall be freed from State interference, regulation and control; that the system of public improvements, the building of streets and alleys, the appointment of officers, the designation of their duties and how they shall be performed and all other matters purely of local interest, advantage and convenience shall be left to the people for their own determination." *People* v. *Johnson,* 34 Col. 143.

It is true, as was said in *Andrews* v. *King*, 77 Maine, 224, that the officers in the police department are essentially State officers in that it is their duty to preserve the public peace, the peace of the State, and the people of the whole State are interested to have such legislation as will secure the most efficient administration of the department. What that legislation shall be, however, is for the Legislature to determine, and as the court also said in the same opinion, while the appointment is usually delegated to the municipal government it is competent for the Legislature to entrust it to the Governor.

In the case at bar this power had long prior to 1917 been delegated to the municipal government.

By Chapter 293 of the Private and Special Laws of 1880, entitled "An Act to promote the efficiency of the police force of the city of Lewiston" it was provided that the police officers of that city, including the marshal and deputy marshal, should be appointed by the Mayor with the advice and consent of the Aldermen, and the Mayor was given the power to suspend any policeman, which suspension should be in force until the next meeting of the Aldermen. By this act the Legislature delegated to the municipality the appointment of its own police force and conferred upon it the sole right to administer the affairs of the police department. So long as that right, so delegated, continued, and that act remained unmodified and unrepealed, the city of Lewiston had the right of home rule so far as its police department was concerned. The Legislature still had the power to withdraw that right and confer it upon some other board or commission, as it did by the Act of 1917 under consideration, but so long as the act of 1880 remained in force, the right of local self government in the police department existed. This right of home rule is not, as we have seen, and need not be, absolute and indefeasible in order to bring its infringement as an emergency act within the inhibition of section sixteen. If at the time the infringing act is passed the right is lodged with the municipal government, that is sufficient to forbid the attaching of an emergency clause, and that was the situation here.

That the Commission Act infringed upon the previously delegated right of local self government is obvious. It took the control of the police department from the municipality and conferred it upon a commission appointed by the Governor in express and decisive terms. Section 4 of the Act reads as follows:

"The board of police commissioners hereby created shall have full power and authority, subject to the provisions of this act, to organize and establish the police force of the city of Lewiston and to make all rules and regulations for the government, control and efficiency of the same. Said board shall have and exercise all the powers and be charged with all the duties relative to the organization, appointment and control of said police force now conferred or imposed upon the Mayor, the municipal officers or the city council of Lewiston, and such other powers as are given them by the terms of this act." The Legislature had the constitutional right to make this transfer, but Section 16 of the 31st Article of the constitution expressly forbids an emergency clause to be attached to such a bill. There is a clear distinction which must not be overlooked, between the legislative power to pass the act and the power to pass it as an emergency measure. The first is permitted. The second is prohibited. The attempt to do so in this case was futile. The emergency clause is clearly invalid.

This invalidity however affects only the emergency clause and the date when the law may take effect. Instead of becoming a law immediately upon approval by the Governor, it will not take effect until ninety days after the recess of the Legislature thus becoming a non-emergency act and permitting, in the meantime, the invoking of the referendum. The act itself is valid. It was within the constitutional power of the Legislature to pass it. The emergency clause is invalid. The Legislature was expressly prohibited from attaching it. The two are clearly separable. The one stands, the other falls. *Riley* v. *Carico*, 27 Okl., 33-37.

So far as the demurrer is concerned we would only add, that both parties desire the decision of the case on its merits apart from technicalities. And were technicalities to be considered we think the bill would lie. Quo warranto would not be the proper remedy because the defendants are not exercising the duties of an office to which the plaintiff claims title; nor has the plaintiff any adequate and complete remedy at law. We think the sitting Justice did not err in overruling the demurrer.

The entry must be,

Appeal sustained.
Bill sustained with costs.
Decree in accordance with the opinion.

JOHN E. DOHERTY, et al.

vs.

MARY S. RUSSELL.

Knox. Opinion July 5, 1917.

Real Action. Life tenants. Husband and wife. Divorce as affecting life interest of husband and wife, or either of them. Abandonment of rights in real estate. Necessary proof to establish adverse possession as between co-tenants.

1. In the absence of a decree affecting her property rights in the divorce proceedings the defendant's interest as a life tenant in the property involved in the suit remained unaffected by the decree of divorce. Such decree terminated the marriage relation. The property rights of the husband prior to the divorce became his individual property after the divorce, and the separate property of the wife became her individual property. As to conveyances to them both, each holds the legal title to one-half under such circumstances. The property rights of the parties are not affected by the decree unless they are brought before the court in some appropriate manner.
2. The defendant had the right, divorce having been had, to remarry, and such marriage did not affect her rights as a tenant for life, and co-tenant with her former husband.
3. The defendant's life estate was not extinguished by abandonment. She did abandon her husband, and intended to, but the record fails to show satisfactory evidence of an intention on her part to abandon her interest in the real estate. Abandonment includes both the intention to abandon and the external act by which the intention is carried into effect. The intention is the first and paramount inquiry; there can be no abandonment without the intention to abandon, and the burden of showing an abandonment rests upon the one who asserts it.
4. Nor has the defendant been deprived of her rights as life tenant of the demanded premises by disseizin or adverse possession. It follows that the plaintiffs as remainder-men are not justified in asserting their claim upon the reasons set up, for the right of action of the remainder-man or reversioner does not accrue until the death of the tenant for life.

Writ of entry to recover certain land in South Thomaston, County of Knox. Defendant filed plea of general issue. Case reported to Law Court upon agreed statement of facts, upon which the court is

to determine the legal rights of the parties and all questions of law arising therefrom, and to render final judgment in accordance therewith. Judgment in accordance with opinion.

Case stated in opinion.

Frank B. Miller, for plaintiffs.

L. M. Staples, for defendant.

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

HANSON, J. Real action, reported to this court upon the following agreed statement of facts:

"Cornelius Hanrahan of Rockland, Maine, died April 15th, 1893 testate, his last will and testament being duly proved and allowed by the Probate Court of the County of Knox on the third Tuesday of May, 1893. The 6th and 43rd items of said will, and which are the only items applicable to the purpose of this case, are as follows:

6th. I give, bequeath and devise to J. W. Simmons and his wife, the use and occupancy of the farm and buildings thereon where they now reside, in said South Thomaston, for and during their natural lives and the survivor of them for the period of his or her natural life, and all the stock and farming tools on said farm and all fire wood and fuel on said premises necessary for their family use. The provision, however is made to said Simmons and his wife on condition that they or the survivor of them, shall make no strip or waste of the wood land, nor shall they or the survivor of them, cut the same for the purpose of selling it in the market, and said parties, Simmons and his wife, shal keep the taxes on said farm and property fully paid from year to year, so long as the same may be occupied by them or either of them.

43rd. I give, bequeath and devise the rest, residue and remainder of my estate, real, personal and mixed, wherever found and however situated to my sister, Mary Doherty to have and to hold the same to her, her heirs and assigns forever.

No disposition of the Simmons farm at the termination of the life estate was made by said Hanrahan in his will other than what appears by said 43rd item.

Mary Doherty died Jan. 14, 1912, testate, and her will has been duly proved and allowed by the Probate Court of said Knox County. With the exception of one dollar given to each of her several heirs,

all her estate, both real and personal was devised and bequeathed to her two sons, John E. Doherty and Wm. Doherty, the plaintiffs in this action.

John W. Simmons was in possession of the premises at the time said Hanrahan will was probated, and remained continuously in possession until his death on the 23rd of April 1916.

On the 26th of September, 1896 a divorce was granted John W. Simmons from Mary S. Simmons who was his wife at the time of the execution and probating of the will of said Hanrahan for the cause of desertion. Mary S. Simmons subsequently contracted a marriage with one Edward G. Russell, with whom she is now living.

During the month of July 1916 the said Mary S. Russell, formerly Mary S. Simmons, entered upon the premises described in full in the declaration annexed to the writ in this action, cut and removed grass therefrom, and undertook to enter and occupy the buildings thereon.

John W. Simmons remarried after the divorce decreed him and was living with his wife on the premises at the time of his death. The widow has administered the estate, her first and final account having been filed and allowed by the Judge of Probate of said Knox County. Mrs. Simmons is not now in possession of the premises, she having removed therefrom shortly after the death of her husband."

The plaintiff's attorney claims that the defendant's interest in the life estate was extinguished, 1st, by desertion and subsequent remarriage, or 2nd, by abandonment of the premises, but we are unable to adopt either view.

The testator made life tenants of husband and wife; the language used created a life tenancy in one as well as in the other, the husband by name, the defendant by designation as "his wife", fixing her identity as firmly as if her individual name had been used instead of the words employed by the scrivener, and no other construction is possible from reading the whole will. The case is unique; nevertheless, the principles involved in its solution are well settled.

From the agreed facts it appears that the defendant deserted her husband and co-tenant some twenty-three years prior to the assertion of her present claim to the premises, and that her husband thereupon, for the cause of desertion, divorced her.

In the absence of a decree affecting her property rights in the divorce proceedings her interest as a life tenant in the property

involved in the suit remained unaffected by the decree of divorce. Such decree terminated the marriage relation. The property rights of the husband prior to the divorce became his individual property after the divorce, and the separate property of the wife became her individual property. As to conveyances to them both, each holds the legal title to one-half under such circumstances. 5 R. C. L. 862, 11 L. R. A. (N. S.) 103.

The property rights of the parties are not affected by the decree unless they are brought before the court in some appropriate manner. Id. See *Carey* v. *Mackey*, 82 Maine, 516.

As to remarriage, we are persuaded that, since the conveyance was to her as an individual she had the right, divorce having been had, to remarry, and that such marriage did not affect her rights as a tenant for life, and co-tenant with her former husband. Nor does her remarriage and resumption of possession accompanied by her second husband jeopardize her rights any more than the remarriage and occupancy of the property by her first husband and his second wife affected his rights. The terms of the will indicate no barrier to such act on the part of either, nor does the will prohibit the defendant taking possession the day her husband died and, if unmarried, remarrying immediately. It is clear that anything lawful not prohibited by the will, the life tenant may legally do.

ABANDONMENT:

The same elements enter into the consideration of counsel's claim that the "defendants life estate was extinguished by abandonment," and our conclusion is reached from a study of the same facts, and necessarily so. The defendant did abandon her husband, and her marital relations and intended to, but did she at the same time intend to abandon her property rights? That question must be answered clearly by the facts in the case, before the plaintiffs may prevail, and, as found in the claim to desertion and remarriage, we look in vain in the record to discover satisfactory evidence of an intention on her part to abandon her interest in the real estate. The plaintiffs insist that leaving the property in the sole possession of her husband for twenty-three years, and making no claim during the period is conclusive upon the question of abandonment, and cites the following cases as decisive in favor of their position. "Abandonment is the relinquishment of a right, the giving up of something to which one is entitled—it must be by the owner without being pressed by any duty,

necessity or utility to himself but simply because he desires no longer to possess the thing." *Middle Creek Ditch Co.* v. *Henry*, 39 Pac., 1954, 1958; 15 Mont., 558.

"To constitute an abandonment of a right there must be a clear unequivocal and decisive act of the party, showing a determination not to have the benefit intended." *Banks* v. *Banks*, 77 N. C., 186.

"There must be not only an intention to abandon but an actual abandonment." *Stevens* v. *Norfolk*, 42 Conn., 377; *Hickman* v. *Link*, 116 Mo., 123.

"A seizin once acquired is presumed to continue until it is shown that there has been an ouster or disseizin, or an abandonment." *Smith, Admr.*, v. *Booth Bros., Hurricane Isle Granite Co.*, 112 Maine, 297.

And we adopt the citations as authority here, and concur in the conclusions as being the settled law.

It is not questioned that abandonment includes both the intention to abandon and the external act by which the intention is carried into effect. Cyc., Vol. 1, page 4. *Livermore* v. *White*, 74 Maine, 452. In determining whether one has abandoned his property or rights, the intention is the first and paramount inquiry; there can be no abandonment without the intention to abandon. 1 R. C. L. 5. An intention to abandon will not be presumed, and the burden of showing an abandonment rests upon the one who asserts it. 1 Cyc., 7. See *Adams* v. *Hodgkins*, 109 Maine, 361; *Batchelder* v. *Robbins et als.*, 95 Maine, 59; *McLellan* v. *McFadden*, 114 Maine, 242. It will not be said as matter of law, that an absence from the land for any specified time amounts to an abandonment, even though such a fact might be strong evidence of abandonment. 1 R. C. L., 7, 135 A. S. R., 903. Note.

Non-user is not of itself sufficient to show an abandonment of a right; nor will neglect for more than twenty years to assert a title to an undivided interest in land, by one who has a valid title, operate as an abandonment, where there is no adverse possession. 1 Cyc., page 6; *Great Falls Co.* v. *Worster*, 15 N. H., 412; *Livermore* v. *White*, 74 Maine, 452; *Adams* v. *Hodgkins*, supra. Words and Phrases 2nd series, page 8; 1 Cyc., 1975.

Was there adverse possession? After divorce the former spouses may ordinarily, hold adversely to each other. 1 R. C. L., 756 and cases cited. Mr. Simmons, the husband, occupied the property just

the same after the separation as before. He occupied the whole property in defendant's absence as he had a right to do. Having the right to occupy the whole, what was there left to hold adversely, what part did he select and determine to hold in hostility to the defendant's rights? What could he add to his prior holding and right of occupancy?

It is difficult to see what new right or privilege he could assert or enjoy unless it were the right to live without the society of the defendant and that she had accorded him. He made no claim even to additional rights and performed no act which may be said to be in hostility to the defendant's title, except to secure a divorce and remarry, and these alone are not sufficient to establish adverse possession.

It is well settled that a life tenant cannot, by his declaration, acts, or claims of a greater or different estate, make it adverse so as to enable himself or those claiming under him to invoke the statute. 1 Cyc., 1057, and cases cited.

All statutes of limitations are based on the theory of laches, and no laches can be imputed to one who has no remedy or right of action; and to hold the bar of the statute could run against the title of a person so circumscribed would be subversive of justice and would be to deprive such person of his estate without his day in court. *Mettler* v. *Miller*, 129 Ill., 630.

It is not questioned that one co-tenant may oust the others, and set up an exclusive right of ownership in himself, and that an open, notorious, and hostile possession of this character for the statutory period will ripen into title as against the co-tenants who were ousted. 1 R. C. L. 7; See *Soper* v. *Lawrence*, 98 Maine, 277, quoting *Richardson* v. *Richardson*, 72 Maine, 409.

In *Mansfield* v. *McGinniss*, 86 Maine, 118, an action under the statute by one tenant in common of an undivided tract of land against a co-tenant for cutting trees upon the land, without giving the statute notice, the defendant claimed to have disseized the plaintiff and thus to have acquired a title to the whole tract by an adverse possession for more than twenty years; the court say, "as between co-tenants, evidence of long continued, visible, uninterrupted and even exclusive occupation by one co-tenant, is not enough to bar the rights of the other co-tenants. There must be evidence from which an ouster, a putting out, and keeping out, of the other co-tenants can be inferred."

No such evidence appears in the case stated.

It is therefore the opinion of the court that the defendant has not abandoned her rights as life tenant of the demanded premises, nor has she been deprived of the same by disseizin or adverse possession. It follows that the plaintiffs as remainder-men are not justified in asserting their claim upon the reasons set up, for the right of action of the remainder-men or reversioner does not accrue until the death of the tenant for life. 1 R. C. L., 743; *Hooper* v. *Leavitt*, 109 Maine, 70.

Judgment for the defendant.

JOHN H. MCCARTHY, JR., Admr.

vs.

THE INHABITANTS OF THE TOWN OF LEEDS.

JOHN H. MCCARTHY, JR., Admr.

vs.

THE INHABITANTS OF THE TOWN OF LEEDS.

Androscoggin. Opinion July 16, 1917.

Liability of towns under R. S., 1916, Chap. 24, Sec. 92. Non-registration of Automobiles. Liability of towns as to trespassers on account of defects in ways. Meaning of word "traveler." Rule as to question of negligence entering into liability of towns on account of defective ways.

Two actions against a municipality to recover damages for the loss of life of two minor children, alleged to have been caused by the failure of the defendant to keep a certain bridge in proper and reasonable repair. The children were passengers in an automobile which was not registered in the name of the owner, and were riding with the owner.

Held:

1. Independent of statute there is no liability on the part of municipalities for injuries caused by defective highways.
2. The remedy being purely statutory the rights of the traveling public and the liability of the municipality are limited by the scope of the statute.
3. The statute (R. S., 1903, Chap. 23, Sec. 56), requires that highways shall be kept in repair so as to be safe and convenient for travelers.
4. In order to be within the protection of the statute one must be a lawful traveler, and one who is traveling in defiance of a statutory prohibition is not a lawful traveler.
5. Public Laws 1911, Chap. 162, Sec. 11, provides that "No motor vehicle of any kind shall be operated by a resident of this State, upon any highway . . . unless registered as provided in this chapter" etc. The Legislature had the power and the right to enact this prohibitive legislation and to proscribe the use of an automobile not properly registered.
6. It is not a question of causal connection between the violation of the statute and the happening of the accident. The true theory is that the unregistered car was forbidden to pass along the highway and over the bridge. The municipality was not obliged to furnish any railing for its protection.
7. The non-liability of the municipality applies as well to passengers as to the owner. The question of contributory negligence is not involved. All the occupants of the car are under the same disability. The logic of the situation prevents any discrimination.

Actions brought under R. S., 1903, Chap. 23, Sec. 76, (R. S., 1916, Chap. 24, Sec. 92) to recover damages of defendant town on account of death of plaintiff's intestate through an alleged defect in a bridge of the defendant town. The cases were both reported to the Law Court upon certain agreed statements and stipulations, based in part upon the evidence in case of *McCarthy* v. *Inhabitants of the Town of Leeds,* reported in 115 Maine, 134. Judgment in accordance with opinion.

Case stated in opinion.

McGillicuddy & Morey, for plaintiff.

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

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

MADIGAN, J., does not concur.

CORNISH, J. These two actions were brought against the defendant town under R. S., (1903) Chap. 23, Sec. 76, to recover damages

for the loss of life of two children aged seven and nine respectively, alleged to have been caused by the failure of the defendant to keep a certain bridge over Dead River in said town in proper and reasonable repair.

On the day of the accident, July 22, 1913, one John H. McCarthy was riding in his automobile and was sitting on the front seat beside the chauffeur. On the rear seat were the two little girls, his grand-nieces. When the automobile reached the bridge, one of the forward wheels, according to the declaration in the writs, struck a raised plank, thereby deflecting the machine from its course and turning it against the railing which proved to be weak and unable to withstand the impact. The automobile with its occupants was precipitated into the river. Mr. McCarthy was rescued but the children were drowned. The automobile was not registered in the name of the owner, and this fact is the pivotal point in the case.

Suit was brought by Mr. McCarthy in his own behalf against the town to recover damages for injuries to himself and his property, and judgment was rendered for the defendant on the ground that as the automobile was not registered in the owner's name he was prohibited from using it on the highway and the town owed him no duty to keep the way safe and convenient for him to travel upon. *McCarthy* v. *Leeds*, 115 Maine, 134.

The two suits at bar were subsequently brought by John H. McCarthy, Jr., as administrator of the estates of the two children, the plaintiff claiming that these two passengers have a right of action against the town even if the owner did not. In our opinion they, as well as the owner, are barred from recovery.

It must be distinctly borne in mind that this is not a common law action of negligence against an individual or a corporation, but a statutory remedy against a municipality, and the rights of the traveling public and the liability of the municipality are limited by the scope of the statute. Independent of statute there is no liability whatever on the part of municipalities for injuries caused by defective highways. The liability is a creature of the statute, *Haines* v. *Lewiston*, 84 Maine, 18; *Colby* v. *Pittsfield*, 113 Maine, 507, and it does not extend beyond the express provisions. *Peck* v. *Ellsworth*, 36 Maine, 393.

What then is the measure of that liability? It is this, "Highways, town ways and streets legally established, shall be opened and kept

in repair so as to be safe and convenient for travelers with horses, teams and carriages." R. S. (1903), Chap. 23, Sec. 56. The word "travelers" is the significant word for our consideration. As was said by this court in *McCarthy* v. *Portland*, 67 Maine, 167: "To enable the plaintiff to recover, he must have been a 'traveler'. That is not all. He must have been traveling for some purpose or other for which streets are required to be constructed and kept in repair. A person may be a traveler but not such within the contemplation of the statute which gives compensation for an injury occasioned by a defect in the highway. He may be within or without the protection of the statute and still be a traveler." It was accordingly held in that case that one who uses the highway for the express purpose of horse-racing is not a traveler to whom the municipality owes the statutory duty of keeping its street in repair. Children using a street as a playground cannot be regarded as travelers. *Stinson* v. *Gardiner*, 42 Maine, 248. See also *Richards* v. *Enfield*, 13 Gray, 344; *Higgins* v. *Boston*, 148 Mass., 484.

Further, in order to be within the protection of the statute, one must be a lawful traveler. One who is traveling in defiance of a statutory prohibition is unlawfully upon the highway. Take for instance traveling on Sunday, prior to the passage of Chapter 129 of the Public Laws of 1895. This court repeatedly decided that when a person received an injury through a defect in the highway while he was traveling on the Lord's Day, except in case of necessity or charity, he could not recover. *Bryant* v. *Biddeford*, 39 Maine, 193; *Hinckley* v. *Penobscot*, 42 Maine, 89; *Cratty* v. *Bangor*, 57 Maine, 423. The Maine rule as to non-recovery in such cases was also the rule in Massachusetts. *Bosworth* v. *Swansey*, 10 Met., 363; *Jones* v. *Andover*, 10 Allen, 18; *Connolly* v. *Boston*, 117 Mass., 64; *Davis* v. *Somerville*, 128 Mass., 594; and in Vermont, *Johnson* v. *Irasburgh*, 47 Vt., 28. In this Vermont case the ground on which the rule rests is clearly set forth. New Hampshire held the contrary *Sewell* v. *Webster*, 59 N. H., 586.

Precisely the same principle is involved in the case at bar where the intestates were traveling in an unregistered automobile. Such a vehicle is proscribed. Public Laws 1911, Chap. 162, Sec. 11, (R. S., 1916, Chap. 26, Sec. 28) reads: "No motor vehicle of any kind shall be operated by a resident of this State upon any highway, town way, public street, avenue, driveway, park or parkway unless registered as provided in this chapter" etc. The Legislature had the power and

the right to enact this prohibitive legislation for the protection of its citizens. The registration of a car and the display of its number-plate serve to identify the owner in case of injuries caused by negligent conduct in its operation. Here, as in the case of the violation of the Sunday law, it is not a question of causal connection between the violation of the statute and the happening of the accident. The same causes would be at work to produce an accident on Monday, or Tuesday, as on Sunday. So in the case at bar the mere non-registration can hardly be regarded as a contributing cause. The railing of the bridge had no more strength to withstand the impact of a registered than of an unregistered car. The decision does not rest upon the common law principle of causal connection. The true theory is that this unregistered car was expressly forbidden by statute to pass along the highway and over the bridge. The municipality was not obliged to furnish any railing whatever for its protection. This is the ground on which *McCarthy* v. *Leeds*, 115 Maine, 134, was decided, and it is the logical ground on which this class of cases against municipalities rests.

But the learned counsel for the plaintiff urges that even if Mr. McCarthy senior, the owner of the car, cannot recover, the ban does not prevail against the children who were merely passengers. He discusses the lack of contributory negligence on their part and what is true, that the doctrine of imputed negligence does not obtain in this State. But neither of these questions is involved here. The question of contributory negligence as related to the non-registration is beside the mark. It is not a question of age or intelligence or knowledge or intention on the part of the occupants. It is a question of fact. It is a matter purely of statutory prohibition. All the occupants are under the same disability. The very logic of the situation prevents any discrimination between them. The statute does not relieve the town from keeping its streets in repair merely for the owner of an unregistered auto and those who know the situation, and impose that duty upon it as to those passengers who have no such knowledge. Nor does the absence of the doctrine of imputed negligence aid the plaintiff. Our decision is not based on the doctrine of negligence, as we have already stated. It is based wholly upon the statutory "thou shalt not."

To illustrate: It is conceded that the right to use the highways of the State is not absolute and that the Legislature has the right to limit and control their use whenever, in the exercise of the police

power, it is necessary to promote the safety and general welfare of the people. It can prescribe what vehicle shall use the highways and what shall not. It can absolutely close certain streets to certain traffic. *Commonwealth* v. *Kingsbury*, 199 Mass., 542. In the exercise of this power certain streets in the town of Eden were closed to the use of automobiles by Chapter 420 of the Private and Special Laws of 1903. At the entrance to these streets, under the provisions of the act, sign-boards were to be erected bearing these words: "No automobiles allowed on this road." This act was held constitutional. *State* v. *Mayo*, 106 Maine, 62.

In 1909 the prohibition was extended territorially to all the ways and streets in the towns of Eden, Mount Desert, Tremont and Southwest Harbor on the island of Mount Desert. Private and Special Laws 1909, Chapter 133. This act was also held constitutional. *State* v. *Phillips*, 107 Maine, 249. Suppose an automobile, in defiance of those statutes, had been operated in the forbidden district, and one or more of the occupants had been injured through some defect in the highway. Could it with reason be claimed that any liability whatever rested upon the municipality within which the accident happened, or that it made any difference whether the injured party was the owner or the chauffeur or the passenger, and whether such passenger knew of the non-registration or not? Certainly not. Those towns were freed from all responsibility when the prohibition was placed upon this kind of traffic.

Now instead of prohibiting all automobiles from using certain streets and ways, the Legislature has seen fit to debar all unregistered automobiles owned by residents from using any of the streets and ways throughout the State. Figuratively speaking, signs are erected on every highway, after the pattern of the Eden act, bearing the inscription "No unregistered automobiles are allowed on this road." Whenever that sign is disregarded the occupants travel at their peril.

The non-liability to passengers as well as to owner has been settled in Massachusetts. In *Feeley* v. *Melrose*, 205 Mass., 329, three suits were brought against the defendant city, one by the owner and two by female passengers in an unregistered car. On this point the opinion holds, "If the automobile, in which the female plaintiffs were riding, was not registered according to the requirements of law, it was unlawfully upon the way; those who were using it were not travelers but trespassers; and it would follow that they could not maintain

this action. . . . Each one of the plaintiffs must fail of recovery in that event. It would not help the individual plaintiffs that they may not have known that the automobile was not duly registered; they did not know that it was, and it was at their own peril as to the city and as to third persons that they undertook to use a vehicle the use of which was prohibited by law." To the same effect is *Dean* v. *Boston Elevated Railway*, 217 Mass., 495.

Our conclusion therefore is that these actions cannot be maintained. If the present statute is too drastic the remedy should come by legislative amendment.

Judgment for defendants in each case.

MADIGAN, J. Dissenting.

That those innocent of an intentional wrong should be held trespassers on the highways established for the benefit of the public does not seem reasonable. A machine may be operated contrary to the provisions of the statute, but why must all passengers therein be classed as outlaws? Few violations of statutory prohibitions entail such drastic punishment. A sleigh without bells, a carriage without lights, a wagon with narrow tires, if forbidden, should be in the same class; but must we hold all in such vehicles trespassers and therefore without protection from defective highways or the negligence of other travelers? If certain appliances were required by law on trolley-cars would we hold all passengers in an offending trolley as trespassers?

Massachusetts, which is one of the few States holding as Maine does, applies a different rule to the unlicensed chauffeur than to the unregistered car. Can we say a machine in perfect condition unregistered, but driven by a licensed driver, is more dangerous than a registered car driven by a man whose license has been revoked for reckless driving? Under the rule adopted in the majority opinion at our peril we accept a ride with a friend, or enter a public bus. The women and children in the sight-seeing cars in the cities, and public cars running from town to town, may be without remedy in case of injury. License-plates are no indication of compliance with the law. They frequently are changed from car to car. Only by making sure that the maker's number agrees with that on the State license is there

reasonable assurance of safety. If by change of ownership the license has lost its efficacy within an hour the car and its occupants are beyond the pale of the law. The cruelty of our interpretation is brought home to us in the case of these innocent children. If the accident instead of proving fatal had rendered them cripples for life, they would have been without redress for the criminal negligence of some town official. We say the law says "Thou shalt not," and therefore travelers are trespassers though the failure to pay a State license has not the slightest connection with the accident. Is it a necessary sequence, or is it thus because we say it is? Why might not the penalty here, as in other instances of violation of law, stop with fine or imprisonment? Conditions in our State and highways are no different than in States taking the contrary view and, as it seems to me, fairer and juster rule.

LUCINDA M. CHELLIS *vs.* JEROME W. COLE, et al.

DANIEL S. CHELLIS *vs.* JEROME W. COLE, et al.

York. Opinion July 16, 1917.

Fraud. Misrepresentation in sale of stock as to its value. Rule as to liability for statements of opinion made in regard to value where the statements were not true.

Both of these actions are for fraud in the sale of stock in White's Express Company, a New York corporation, doing business in New York City and Brooklyn. By agreement they were reported to the Law Court upon so much of the evidence as is legally admissible, the Law Court to render final judgment thereon.

Daniel S. Chellis was about sixty years old, and had lived for many years, with his wife the other plaintiff, on a farm in a small country town in York County. They had on deposit in the Limerick National Bank in said county five thousand dollars, four thousand in his and one thousand in her name. The defendant, Mills, was from New Haven, and a stranger to the plaintiffs, while Cole was a neighbor, and was known to them as a successful trader and business man.

In March, 1911, the defendants drove to the plaintiffs' home, where Cole introduced Mills to the plaintiffs. They requested to be taken into the house as they wished to do some business with the plaintiffs. On this and successive visits several hours were spent by the defendants in the Chellis home persuading the plaintiffs to buy stock in the express company which Mills claimed to represent. He made many representations as to the assets, liabilities, and general financial condition of the company which, had his statements been true, would have shown the stock to be a perfectly safe investment. While a printed statement of the company's affairs was referred to, the accuracy of all therein contained was vouched for by Mills as being true within his own knowledge, because of a careful investigation of the company by Mills and an expert on which they had spent some weeks. Cole repeatedly assured the plaintiffs that the stock was a good investment, the company a safe place to put their money, better than the banks, and as secure an investment as some bonds which he owned and which he exhibited to them. During his visits Cole made many other assuring and alluring statements of a similar nature, all tending to allay any doubts in the minds of the plaintiffs and to induce them to credit the representations made by his companion.

On the strength of the representations and assurances so made Daniel Chellis withdrew four thousand dollars from the bank and his wife one thousand dollars, which they invested in the stock of the express company. At least one thousand dollars of this money was received by Cole.

It is plain that this stock when purchased was worthless and the company insolvent at the time the representations were made. In a few months the company was adjudged a bankrupt paying a dividend of ten per cent with a possible final dividend of five per cent.

For the damages suffered by the plaintiffs Mills is liable. Cole cannot escape legal responsibility on the ground that his expressions were mere statements of opinion. On his judgment the plaintiffs relied and but for his assurances the plaintiffs would not have been defrauded. The rule of caveat emptor cannot be invoked as a shield to protect him in making false or reckless expressions of opinion. He posed as a disinterested friend and neighbor on whose judgment and opinion this old couple could safely rely. Even if his views were given in the form of opinions, they should have been honest and truthful and not reckless.

The defendants seek to avoid liability on the ground that the stock was redeemable by the company at par if presented and the plaintiffs had never presented it for redemption. This was not a right which stockholders had, but was a right reserved by the company to call in the stock on or before a certain date. Moreover as the company was insolvent any effort to have the stock redeemed would have been futile.

Judgment must therefore be rendered for the plaintiffs for the amounts out of which they were defrauded.

Action on the case to recover damages on account of deceit, false representation and fraud on the part of the defendants in representing the value of certain stock sold to the plaintiffs by the defendants Cole and Mills. The two actions were tried together. Defendants filed plea of general issue. By agreement both cases were reported to the Law Court upon so much of the evidence as is legally admissible, the Law Court to render final judgment thereon. Judgment in accordance with opinion.

Case stated in opinion.

J. Merrill Lord, and Matthews & Stevens, for plaintiffs.

Emery & Waterhouse, for defendants.

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

MADIGAN, J. Both of these actions are for fraud in the sale of stock of White's Express Company, a New York corporation, doing business in New York City and Brooklyn. By agreement they were reported to the Law Court upon so much of the evidence as is legally admissible, the Law Court to render final judgment thereon.

Daniel S. Chellis was about sixty years old, and had lived for many years with his wife, the other plaintiff, on a farm in a small country town in York County. They had on deposit in the Limerick National Bank in said county five thousand dollars, four thousand in his and one thousand in her name. The defendant, Mills, was from New Haven, and a stranger to the plaintiffs, while Cole was a neighbor, and was known to them as a successful trader and business man.

On March 21, 1911, the defendants drove into the yard of the plaintiffs' home, and Cole introduced Mills to Mr. Chellis, and asked him to take the defendants into the house, as they wished to have some talk with them, Chellis and his wife. On that and two or three succeeding days on which the visits were repeated several hours were spent in trying to induce the plaintiffs to buy stock in the express company which Mills claimed to represent. A lengthy statement purporting to show the exact state of the company's assets and liabilities was exhibited and explained. Mills vouched for the truth of everything therein contained, stating that with an expert he had recently spent some weeks making a complete examination of the affairs and condition of the company. He further represented that its property was fully insured, and its business was so flourishing that the officers were obliged to build additional buildings constantly, and that the company owned all of its real estate and terminals. The plaintiffs were repeatedly assured that everything about the company was all right and that the stock was an excellent investment.

Because of the representations and allurements and advice of the defendants Daniel Chellis bought four hundred shares of the stock, paying therefor four thousand dollars, and his wife bought one hundred shares, paying therefor one thousand dollars. Four quarterly dividends at the rate of seven per cent per annum were paid, but the evidence clearly shows there was nothing in the condition of the company to warrant any one of these dividends. There is not the least doubt that the company was hopelessly insolvent when the stock was sold to the plaintiffs, and in the latter part of 1911 the company was in the hands of a receiver, and early in 1912 it was in bankruptcy. A dividend of ten per cent was paid the creditors with the prospect of a possible further final dividend of five per cent. The representations made to the plaintiffs by Mills were untrue in fact, and of his liability therefore there is no question. *Wheelden* v. *Lowell*, 50 Maine, 499; *Goodwin* v. *Fall*, 102 Maine, 353; *Litchfield* v. *Hutchinson*, 117 Mass., 195.

The defendants contend that Cole is not liable because at the most his expressions were merely those of opinion. His conduct and statements were the controlling influence whereby the plaintiffs were defrauded. He was known to the plaintiffs to be a shrewd and successful business man, and was not supposed by them to be interested in the sale of the stock. On three occasions he drove with the defendant, Mills, in a buggy, a distance of four miles, to their home, sat by and participated in Mill's conversation. He repeatedly assured the plaintiffs that the stock was all right, that it was a safe investment, that they would make no mistake in taking their money from the bank and buying this stock, that it was just as good as the bonds, which he exhibited to them. A check for $1000, given by Daniel S. Chellis for a portion of this stock, made payable to the order of Chas. E. Mills, Agent of White's Express Company, was endorsed by Mills as agent, to Cole, who evidently received cash for the same at the bank, as the check bears no further endorsement. While it is not necessary for the maintenance of this action to show collusion between Cole and Mills, this unexplained as it is, is strong presumptive evidence that Cole was personally secretly profiting by the sale of this stock to the defendants. In *Adams* v. *Collins*, 196 Mass., 422, we find the following: "The defendant contends that the evidence showed his statement was made as a matter of opinion and not as a representation of a fact, and that he was not liable therefore, but he was the third party with no interest so far as appears in the trade and he was bound to act honestly and in good faith, not only in regard to matters of fact but also in regard to matters of opinion. If he undertook to express an opinion, he was bound to give his honest opinion. He had not the same latitude as a seller for the reason that the buyer in dealing with the seller would naturally be supposed to be on his guard, whereas he would not be on his guard in dealing with a disinterested third person. Being liable for a false representation as to his opinion, as well as for a false representation in respect to a matter of fact, it is immaterial which the allegations were construed by the presiding judge to be." Also *Medbury* v. *Watson*, 6 Met., 259. "There is a marked and obvious distinction between the cases in which there is a false affirmation by the vendor to the vendee, where the maxim 'caveat emptor' applies, and those upon the false representations of a third person with regard to the value of the property. In the one, the buyer is aware of his position; he is dealing with the

owner of the property, whose aim is to secure a good price, and whose interest is to put a high estimate upon his estate, and whose great object is to induce the purchaser to make the purchase; while in the other, the man who makes the false assertions has apparently no object to gain, he stands in the situation of a disinterested person, in the light of a friend, who has no motive nor intention to depart from the truth and who thus throws the vendee off his guard, and exposes him to be misled by the deceitful representations." Also *Andrews v. Jackson*, 168 Mass., 266. In this case the defendant was turning over in part payment of land, certain notes of a third party. The defendant represented that the notes were as good as gold, and told the defendant he had lent money to the maker, saying:—'Do you suppose I would lend my money to anyone that was not good?' Held, that the evidence was sufficient to warrant a finding that the false representations were actionable."

The court says that "It is true that such a representation may be and often is a mere expression of opinion, but we think it may be made under such circumstances and in such a way as properly to be understood as a statement of fact upon which one may rely."

In *Safford* v. *Grout*, 120 Mass., 20, the representation was that the maker of a note was of ample means and ability to pay said note and that the note was good. The court says that these were statements of facts susceptible of knowledge, as distinguished from mere matters of opinion or belief. In the case at bar made under the circumstances that it was made, the statement of Cole that the stock was a safe investment, that it was as good as his bond, that it was safer than the bank, is seemingly an approval of all representations made by Mills as to the assets and liabilities of the company. These statements were made in conjunction with those made by Mills. The value of the stock depended upon the amount of stock paid in and upon the available assets and liabilities. A statement that the stock was good and a safe investment was equivalent to an assertion that the express company was solvent. The plaintiffs relied upon him and not upon Mills, who unassisted by Cole never would have defrauded the plaintiff. Under the decisions above quoted Cole is equally liable in these actions.

But the defendants say that there was an existing contract between the plaintiffs and the White's Express Company, by virtue of which the plaintiffs were entitled to redeem their stock at any time and

receive for each share of stock the sum of $11.50, and as the stock had never been tendered to the White's Express Company, the actions are premature and not maintainable. This contention is based upon the following clause in the certificates of preferred stock. "This stock is subject to redemption at $11.50 per share." The prospectus of the express company exhibited to the plaintiffs at the time of the sale and on file in the case as plaintiffs exhibited No. 27, interprets that clause as follows: "The Company reserves the express right to call in the preferred stock at 115, which is $11.50 a share with accumulated and accrued dividends, in whole or in part, on or before January 1, 1916." As this placed the call of the stock at the option of the express company and not at the option of the plaintiffs, the plaintiffs certainly could not have been at fault. Furthermore it is clear that the company was bankrupt when the stock was sold, and was in no better condition when it ceased paying the dividends, which must have come from money belonging to the creditors and not to the stockholders. Any attempt to have the stock redeemed by White's Express Company must therefore have been a waste of energy. These actions are not for breach of contract, but are actions of deceit based on false representations in regard to the stock sold to the plaintiffs. The measure of damages is the difference between the actual value of the stock at the time of the purchase and its value if it had been what it was represented to be. The tender of the stock to the express company was therefore unnecessary. *Andrews* v. *Jackson*, 168 Mass., 269; *Morse* v. *Hutchins*, 102 Mass., 439.

Judgment against both defendants in favor of Daniel S. Chellis for $4,000 with interest, from date of writ.

Judgment against both defendants in favor of Lucinda Chellis for $1,000 with interest, from date of writ.

JOHN MCKINNON, by POPE D. MCKINNON,
His Father and Next Friend,

vs.

BANGOR RAILWAY & ELECTRIC COMPANY.

Contributory negligence. Burden of proof.

Penobscot. Opinion July 21, 1917.

Action on the case to recover damages for injuries received by the plaintiff, as he alleges, through the negligence of the defendant.

Held:

1. The plaintiff, in order to recover, was bound to show not only defendant's negligence but affirmatively that no want of due care on his part contributed to the injury.
2. In actions of this kind, it is true that every negligent act upon the part of the plaintiff will not necessarily bar him from the recovery of damages. The rule has been stated many times "that he who last has an opportunity to avoid the accident, notwithstanding the negligence of the other, is solely responsible. If due care on the part of either at the time of the injury would prevent it, the antecedent negligence of one or both parties is immaterial, except as it may be as one of the circumstances by which the requisite measure of care is to be determined."
3. Notwithstanding the negligence of the plaintiff in falling upon the fender of the defendant's car, the plaintiff was powerless to help himself; from that time a new relation existed between the parties, and it was the duty of the defendant, if it's servants having charge of the car knew of his position, or by the exercise of due care would have known the dangerous position the plaintiff was in, to use the same degree of care which a reasonable, careful and prudent man ought to use under the same circumstances; and if, with the exercise of reasonable care, they could have prevented the injury, it was their duty to do so, and failure on their part to so act would be negligence which would entitle the plaintiff to recover.
4. Where the negligent acts of the parties are distinct and independent of each other, the act of the plaintiff preceding that of the pefendant, it is considered that the plaintiff's conduct does not contribute to produce the injury if, notwithstanding his negligence, the injury could have been avoided by the use of ordinary care at the time by the defendant.

Action on the case to recover damages for injuries received through the alleged negligence of defendant company. Defendant filed plea of general issue. Verdict for plaintiff in the sum of $9916. Defendant filed motion for new trial and also exceptions to refusal of court to give certain requested instructions. Judgment in accordance with opinion.

Case stated in opinion.

E. P. Murray, and W. R. Pattangall, for plaintiff.

Ryder & Simpson, for defendant.

SITTING: CORNISH, C. J., HALEY, HANSON, MADIGAN, JJ.

HALEY, J. An action on the case to recover damages for injuries received by the plaintiff, as he alleges, by reason of the negligent operation of the defendant street railroad. The verdict was for the plaintiff, and the case is before this court upon motion and exceptions.

The record discloses that on the morning of February 22, 1915, at about half past ten o'clock, a car of the defendant company, called an Old Town car, on the track of the defendant at Bangor, came up Exchange street and down State street, in a westerly direction, on the northerly track, towards Hammond or Main street; that when it arrived at a point near what is called the old post office, it had a slight collision with a jigger that had failed to get off the track, although the motor-man was constantly ringing the gong. The car stopped and a crowd commenced to gather, while the motor-man and conductor were taking the names of the witnesses who saw the collision, at which time a Highland street car of defendant came up Exchange street and turned the corner into State street about 180 feet away. The motor-man of the Highland street car saw the car ahead at a standstill as his car headed straight down State street and applied his brakes. State street, from Exchange street where the car stopped, is down grade. The day was warm and the snow was melting and running down along the car-rails into State street. The rails were slippery. When the brakes were applied the wheels of the Highland street car ceased turning, but the wheels skidded on the rail by reason of the rail being what the railroad men call "greasy." The car was about 31 feet long and weighed eleven tons. The motor-man next reversed his power, but the car-wheels got no grip on the rails and the car kept on, the motor-man ringing his gong continuously.

The conductor came forward and worked the lever on the sand box, which threw sand upon one rail of the track. The car would check up a little and then slide ahead again, but failed to stop. The car was a vestibule car, and in the vestibule there was a pail of sand with a small shovel in it. When the Highland street car was within a short distance of the stationary car, the plaintiff, a boy about ten years old, whose attention had been attracted by the car colliding with the jigger, ran from the sidewalk on the southerly side of State street diagonally across the street, and without seeing the Highland street car or looking to see if any car was coming he ran against the left hand corner of the Highland street car, fell, and was caught up by the projecting car fender and carried on until the Highland street car bumped into the stationary car. The motor-man of the Highland street car saw the boy appear at the corner of his car and saw him fall out of sight, whether on the fender, the ground or under the car the motor-man could not tell. The Highland street car was then moving very slowly, probably not more than four miles an hour, and there is some testimony showing it was not over two miles an hour. The motor-man's efforts to stop the car failed, although he was using his brake and reversing the power constantly from the time he came around the corner and the car began to skid, during which time the conductor was working the lever, sanding the rail that the wheels might catch so that the car would go backwards. When the cars came together the impact was not hard enough to break the glass or injure the cars. The plaintiff was caught between the two cars, his head was badly cut, his right hand and forearm crushed so that his arm had to be amputated a little below the elbow. Neither the conductor of the Highland street car nor the conductor or motor-man of the Old Town car knew of the boy's presence until after he was hurt. It also appeared that the defendant had a sand car which was used to sand slippery places upon it's tracks upon notice of their existence, but no sand had been put upon the State street tracks by the sand car on the morning in question.

There was also testimony tending to show that water running on the rails would wash the sand off, especially after a car had passed along and pulverized the sand on the rails, and that the condition of the car-rails as to slipperiness changed in a few minutes, being dependent upon the street traffic, water, moisture, frost, wind and atmosphere. There is but little dispute as to the facts, the principal

dispute being the distance of the Highland street car from the Old Town car when the plaintiff fell upon the fender of the Highland street car. The undisputed facts that the plaintiff, in the middle of the day, stepped from the sidewalk and attempted to cross a public street upon which the trolley-cars were running in plain sight, and without looking where cars were coming from, or the rate of speed at which they were traveling, or without looking for the car that was coming down the street, or without paying any attention to the ringing of the gong which was being rung all the time, heedlessly ran against the fender of the car and was thrown on the meshes of the car fender, shows beyond question that the plaintiff was not in the exercise of due care, that his want of due care was negligence that contributed to the injuries that he received, and as the plaintiff was bound to show not only the defendant's negligence, but affirmatively that no want of due care on his part contributed to his injury, *Colomb* v. *Street Railway*, 100 Maine, 418; *Mullen* v. *Railway*, 164 Mass., 452, his contributory negligence and want of due care is a bar to this action unless, as the plaintiff contends, that rule does not apply to this case.

The plaintiff claims that, admitting he was negligent in running on to the car so that he fell upon the fender, yet the defendant is liable because it's servants could, after the motor-man saw the plaintiff on the fender, or by the exercise of reasonable care might have seen him, have stopped the car and thereby have avoided the collision.

In actions of this kind it is true that every negligent act upon the part of the plaintiff will not necessarily bar him from the recovery of damages. The rule has been stated many times, "that he who last has an opportunity of avoiding the accident, notwithstanding the negligence of the other, is solely responsible."

"If due care on the part of either at the time of the injury would prevent it, the antecedent negligence of one or both parties is immaterial, except as it may be as one of the circumstances by which the requisite measure of care is to be determined. In such a case the law deals with their behavior in the situation in which it finds them at the time the mischief is done, regardless of their prior conduct." *Iron & Steel Co.* v. *Worcester & Nashua Railroad Co.*, 62 N. H., 162. Notwithstanding the negligence of the plaintiff in falling upon the fender of the defendant's car, the plaintiff was powerless to help himself; from that time a new relation existed between the parties,

and it was the duty of the defendant, if it's servants having charge of the car knew of his position, or by the exercise of due care would have known the dangerous position the plaintiff was in, to use the same degree of care which a reasonable, careful and prudent man ought to use under the same circumstances, and if, with the exercise of reasonable care, they could have prevented the injury, it was their duty to do so, and failure on their part to so act would be negligence which would entitle the plaintiff to recover." *Weitznan* v. *Nashua Electric R. Co.*, 53 N. Y., Supp., 903. In other words, when a plaintiff, by his negligence, has placed himself in a dangerous position, the defendant, advised of his situation, is not for that reason legally justified in failing to use reasonable care to avoid injuring him. *McKeon* v. *Railroad Co.*, 20 App. Div., 47 N. Y., Supp., 374. Where the negligent acts of the parties are distinct and independent of each other, the act of the plaintiff preceding that of the defendant, it is considered that the plaintiff's conduct does not contribute to produce the injury, if, notwithstanding his negligence, the injury could have been avoided by the use of ordinary care at the time by the defendant. *Atwood* v. *Railway Company*, 91 Maine, 399; *Ward, Admr.*, v. *Maine Central Railroad Co.*, 96 Maine, 136; *Butler* v. *Railway*, 99 Maine, 149; *Moran* v. *Smith*, 114 Maine, 55. But that doctrine does not apply to the facts of this case, as they fail to show negligence on the part of the defendant independent of and subsequent to the plaintiff's negligence. At the time the plaintiff fell upon the fender the motorman and conductor were using all means at their command to stop the car. It's speed had been reduced to between two and four miles an hour, and with the efforts they were making, but for the slippery or greasy condition of the rails caused by the melting snow and slime which ran off from the street on to the tracks, they would have been able to stop the car almost instantly. The condition of the rails was caused by the action of Nature but a few minutes before the accident, and was remedied by the action of Nature as the running water shortly washed the rails clean. The plaintiff claims that the rails should have been sanded, but the evidence shows that the sand would have washed away immediately. The conductor did not see the plaintiff or know of his position upon the fender until after the accident. The motor-man testifies positively that he did not, that he was trying to stop the car by putting on the power and reversing that he might make the wheels catch upon the rails and stop the car

from skidding, he saw the boy fall close to the car, he could not tell where, and from that time to the time the car ran into the Old Town car both the conductor and motor-man were doing their utmost to stop the car with proper appliances furnished for that purpose. There is no evidence of any negligence on the part of the defendant independent of and subsequent to the plaintiff's negligence that caused the plaintiff's injuries.

The case of *Weitznan* v. *Nassau Electric Co.*, 53 N. Y., Supp., 905, cited by the plaintiff, differs from this case in that the plaintiff in that case offered to prove that the car, upon the fender of which the plaintiff's intestate fell, could have been stopped within twenty feet from where the motor-man first saw the child approaching dangerously near the track. The court refused to admit the testimony, and therefore a new trial was granted.

In this case there is no evidence that the motor-man saw the child until it fell upon the fender, and the evidence shows clearly and conclusively that the efforts of both the conductor and motor-man could not have stopped the car before the collision.

In *Green* v. *Metropolitan Str. Ry. Co.*, 72 N. Y., Supp., 524, the plaintiff fell upon the fender of the car, and the car traveled a distance estimated at nearly 100 feet before it stopped, and the plaintiff was jolted off from the fender and run over, and the testimony proved that the car could have been stopped within 20 or 25 feet. It was held that the defendant was liable, but in that case there was no effort made to stop the car within the distance within which it could have been stopped. In this case the servants of the defendant made proper effort to stop the car.

As the evidence clearly shows that the plaintiff was guilty of negligence in falling upon the fender of the defendant's car, and that his negligence contributed to the injuries he received, and as the defendant was guilty of no independent subsequent negligence after the plaintiff's negligence, but that it's servants did all that an ordinary prudent person would or could have done under the circumstances to stop the car, which was a suitable car for the business for which it was being used, it follows that the motion must be sustained. It is unnecessary to consider the exceptions in detail as they are all practically covered by the statements of the law as applied to the motion for a new trial.

Motion sustained.
New trial granted.

MARY J. GARNSEY *vs.* JULIA A. GARNSEY, Adm'x.

York. Opinion July 21, 1917.

Joint and several promissors. Rules. Consideration. Effect of a mere naked promise to release obligors.

Action of assumpsit on a contract signed by two sons of the plaintiff. The plaintiff is the widow of Amos Garnsey, whose will was proved and allowed April 5, 1898 in the Probate Court for York county. Frederic A. Garnsey and Almon E. Garnsey, two sons of the testator, were appointed as executors without bonds, as requested in the will. Julia A. Garnsey, the present plaintiff and the widow of Amos Garnsey, waived her rights as widow and in lieu thereof accepted the agreement signed by the two sons, upon which this action is brought.

Held:

1. That the agreement between the plaintiff and the two executors and trustees, of which the plaintiff waived the right to have her share in the estate of her husband, was sufficient consideration for the execution by the executors and trustees of the agreement to pay the widow according to the terms of the agreement declared upon.
2. A mere statement by the widow that she intended to release, or did release, the signers of the agreement without any consideration moving from any one for the promise did not discharge the debt and obligation incurred by the agreement. The debt was created by contract for a sufficient consideration. It can be discharged by contract for a sufficient consideration, but a naked promise to release without consideration is not a discharge.
3. That if the plaintiff did not know that suit had been brought upon the agreement, she had power to ratify the act of bringing the suit, even if she did not give authority in the beginning.

Action of assumpsit to recover certain amounts due under an agreement signed by the two sons of the plaintiff. Plea of general issue, together with brief statement, was filed by Julia A. Garnsey, one of the defendants. At the close of the evidence, in accordance with the agreement of the parties, this case was reported to the Law Court upon the writ, pleadings and so much of the evidence as legally admissible, the Law Court to render such final judgment therein as the legal rights of the parties require. Judgment in accordance with opinion.

Lucius B. Swett, and Mathews & Stevens, for plaintiff.

Allen & Willard, for defendant.

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

HALEY, J. An action of assumpsit on a contract in writing of the following tenor:

"Sanford, Maine, May 2, 1898.

For value received we jointly but not severally promise to pay to our mother, Mary J. Garnsey, annually, during her life, an amount equal to the interest paid by the Kennebec Light & Heat Company on $3800 face value five per cent bond, maturing in the year 1918.

F. A. GARNSEY.
A. E. GARNSEY."

The action is brought by Mary J. Garnsey, the promisee named in the contract, against Almon E. Garnsey, one of the signers, and Julia A. Garnsey, administratrix of the estate of Fred A. Garnsey, the other joint promissor. The case is before this court upon report.

The plaintiff is the widow of Amos Garnsey, whose will was proved and allowed April 5, 1898, in the Probate Court for York county, and Frederic A. Garnsey and Almon E. Garnsey, two sons of the testator, were appointed as executors, without bonds as requested in the will. Julia A. Garnsey, the administratrix of Frederic A. Garnsey, is made defendant, and Almon E. Garnsey, one of the executors of Amos, is the other defendant. The will of Amos Garnsey, by item 1 devised and bequeathed to his two sons, they being all his legal heirs, all the securities which he owned at the time of his decease, including stocks, bonds, notes and other securities of a similar character, to be held by them, or the survivor of them, in trust for the following purposes:

"1. To pay the income thereon as it accrues, to my wife, Mary Jane Garnsey, in her life for her own use and disposition."

"2. Upon the decease of my said wife to divide the securities between my two sons, or their heirs by right of representation. I give my said trustees power to reinvest any monies, which may come into their hands in payment of the securities, upon consultation with their mother, and with her written consent, to change any investments, which they and she shall deem it for the interest of all concerned." . . . . . .

"II. All the rest and residue of my estate of whatever name or nature or wherever situate, I give, devise and bequeath to my two sons, Frederic A. Garnsey and Almon E. Garnsey, in equal shares, to them, their heirs by right of representation and assigns forever."

The inventory returned shows $12,700 real estate, personal estate $41,600, and the bonds of the Kennebec Light & Heat Company mentioned in the agreement were not included in the inventory, but they were a part of the estate of Amos Garnsey, and were converted by the two executors and the proceeds used to pay indebtedness of the estate. The will expressed the wish that the parties legally interested under the will make a division of the property according to the terms of the will, and prevent or dispense with proceedings in the Probate Court. The parties interested under the will were the two sons and the widow. There were no other heirs, and it is evident that they attempted to adjust the matters without having the estate fully administered upon. The will was proved and allowed April 5, 1898, and there was no account filed in the Probate Court until November 21, 1913, some fifteen years after the will was proved, and that account was never settled.

It is objected that there was no consideration for the agreement. The consideration is clearly proved. The two executors converted the bonds mentioned in the agreement, and, according to the claim of counsel and the testimony, they used the proceeds to pay debts and claims upon real estate which was devised to them at the death of their mother. The plaintiff, as the widow of Amos Garnsey, had a right to waive the provisions of the will, and to claim one-third interest in the real estate, which was undoubtedly worth four thousand dollars, and also entitled to a third of the rights and credits after the debts of the estate were paid. But, instead of doing that, she gave her approval of the will by releasing $3800 worth of bonds so the executors might pay the debts of the estate and preserve it for themselves as residuary legatees. By the agreement between the plaintiff and the executors and trustees, the plaintiff waived the right to have them hold $3800 worth of bonds, and she be paid the income therefrom during life, and accepted in lieu thereof the personal obligations of the two executors and trustees to pay her the amount she would have received as interest on the bonds, and thereby they were permitted and authorized to convert those bonds into money, which they did and reduced the indebtedness upon the real estate that was

to descend to them at the death of their mother by the provisions of the will of their father. That was a sufficient consideration for the execution by the executors and trustees of the agreement to pay the widow according to the terms of the agreement declared upon.

It is the claim of the defendant, Julia A. Garnsey, administratrix, that the plaintiff has released her as administratrix of her husband from the contract, even if there was a sufficient consideration when given by the two sons to the mother. She testifies at one time the plaintiff told her she did not want her to pay the obligation, "didn't expect me to pay; she didn't need it and I needn't worry anything about it; she was going to give it to me. She said she was going to give it to Almon, she was giving it to me; she intended to use us just alike; that on several times the plaintiff stated that she did not expect her to pay it, and didn't want her to." Upon the other hand, the plaintiff is positive she never told her she did not expect her to pay anyting on it and did not want her to, and that she never said any such thing, and that she did expect it.

The circumstances of the case tend to support the testimony of the plaintiff. But, even if she did say that which Julia A. Garnsey claims she said to her, it was not a release of the estate of Fred A. Garnsey from the obligation that he had signed. It was, at most, if the defendant's version is right, a mere verbal promise without consideration and of no binding effect. In order for it to release the estate of Fred A. Garnsey from the contract made and signed by him, it was necessary to be a promise upon a sufficient consideration. There was no consideration moving from any one to Mary A. Garnsey to release the estate of Fred A. Garnsey from his contract. A mere statement by a creditor that he intends to release, or that he does release, a debtor, there being no consideration moving from any one for the promise, the debt is not thereby discharged. The debt was created by contract for a sufficient consideration. It can be discharged by contract for a sufficient consideration, but a naked promise to release without consideration is not a discharge.

It is urged that this suit is prosecuted by the defendant, Almon E. Garnsey, one of the joint promissors, without the consent of his mother. The plaintiff is an old lady and has to rely upon some one. He is her only son, and it does appear that she relies to a certain extent upon his advice. She signed, of her own free will, the notice to the other defendant that the note must be paid. There is no

pretense of any duress or any fraud to induce her to sign that demand. She appears in court and prosecutes the suit. It is true she says she did not know until lately, referring to the time of trial, that a suit had been brought, but she ratified the act of her son if she did not give authority in the beginning, and we have no doubt from the testimony that she authorized the suit to be brought at the time it was brought. The promise declared upon was the joint promise of Almon E. Garnsey and Fred A. Garnsey, and by a judgment against both defendants either of the defendants can pay and have contribution from the other. The payments agreed to be paid were not interest, but yearly payments. They were payable annually, and each payment bore interest from the day it became due. *Swett* v. *Hooper*, 62 Maine, 54; *Whitcomb* v. *Harris*, 90 Maine, 211. The mandate must be judgment for plaintiff for $190 annually for the years declared upon, with interest at five per cent on the payments when they became due to the date of the writ, and interest on the total from the date of the writ to the date of judgment of the May term, 1917, to be cast by the clerk.

Judgment for plaintiff.

ANNA R. FARNHAM *vs.* JOHN D. CLIFFORD.

Androscoggin. Opinion July 28, 1917.

Automobiles. Liability of parent for son using automobile. Admissions by parent of liability for injuries sustained through negligence of son. Evidence.

An action on the case for personal injuries alleged to have been sustained by the plaintiff as a result of a collision of the carriage in which she was riding with the automobile of the defendant. At the time of the accident the defendant was living in the city of Lewiston. The family consisted of himself and wife, two boys and two girls, the sons being more than twenty-one years of age and practicing lawyers in the city of Lewiston. The defendant was the owner of the automobile which he had purchased for the pleasure of himself and family and which the family had permission to take and use whenever they so desired.

On the evening of the accident, the defendant was not in town, and on that evening one of his sons, who was living with him as a member of his family, took the car without an express permission and while operating it, on account of his negligence collided with the team of the plaintiff, and as a result of that collision the plaintiff was injured. There was sufficient evidence in the case that authorized the jury to find that at the time the defendant's son was using the machine, he was either doing it as the agent or servant of the defendant or using it in the defendant's business, for the defendant told the husband of the plaintiff that his car he had bought for the pleasure of his family and for business; that they had a right to take it whenever they saw fit, without asking; and he furthermore told the husband of the plaintiff that so far as the liability extended, he was responsible.

Held:

1. That was a direct admission of facts essential to establish his legal liability.
2. After the accident, with full knowledge of the facts, he admitted his liability.

Upon the stand, he did not deny he so admitted. The admission of the defendant was open to explanation and contradiction. It was subject to rebuttal, explanation and comment, and the fact that the defendant was a witness in his own behalf, after the testimony had been given as to his admission of his liability, and did not contradict or explain the statement but allowed it to pass as true and unchallenged, authorized the jury to find that he knowingly made the admission and that his admission was true.

Action on the case to recover damages for injuries sustained through the alleged negligence of the defendant, the result of a collision of the carriage in which the plaintiff was riding with the automobile of the defendant. A plea of general issue was filed by defendant. Verdict for plaintiff in the sum of $3747.68. Defendant filed motion for new trial and also certain exceptions. Judgment in accordance with opinion.

Case stated in opinion.

McGillicuddy & Morey, for plaintiff.

Andrews & Nelson, for defendant.

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

HALEY, J. An action on the case for personal injuries alleged to have been sustained by the plaintiff June 13, 1914, as a result of a collision of the carriage in which she was riding with the automobile of the defendant. The case was tried at the September term, 1916, in Androscoggin county, and the jury returned a verdict for the

plaintiff for the sum of $3747.68, and the case is before this court upon a motion for a new trial and upon exceptions.

At the time of the accident the defendant was living in the city of Lewiston. His family consisted of himself and wife, two boys and two girls, the sons being more than twenty-one years of age and practicing lawyers in the city of Lewiston. The defendant was the owner of an automobile, which he had purchased for the pleasure of himself and family and which the family had permission to take and use whenever they so desired. On the evening of the accident the defendant was not in town, and on that evening one of his sons, who was living with him as a member of his family, took the car, without any express permission as far as positive testimony goes, and while operating the automobile did it so negligently that it collided with a team in which the plaintiff was riding, about three miles out of Lewiston on the road to New Gloucester. As a result of that collision the plaintiff was injured and brings this action against the defendant.

It is the contention of the attorney for the defense that there is no evidence whatever that John D. Clifford, Jr., the son who was driving the automobile at the time of the accident, had ever acted as chauffeur for his father, or had ever driven for any other member of his father's family, and that there is an entire lack of evidence as to whether he was out on business or pleasure the night of the accident. The motion and exceptions practically go to the same proposition, that there is no evidence in the case that the son was employed in his father's business while driving the machine at the time of the accident; that it was for his sole pleasure; that the relation of master and servant did not exist; that such relation can not be inferred from the ownership of the car, and that, although it may have been the business of the father to furnish an automobile for the use of his family, yet, there is no evidence in the case that the son was so using it, or for what purpose he was using it; that it does not appear sufficiently that he was performing the business of his father, or that the relation of master and servant existed. The defendant testified that the son did not own the auto, and never did; that he himself was in absolute control of the machine; that nobody else had the control; that its control never passed from him; that he bought the machine for the pleasure of himself and family; that John D. Jr., the son, had the right to take the machine out on any pleasure ride that he might wish; that he did not have to ask permission; that he bought it for

the family's pleasure to take it when they liked, and he could take the machine that night, just as he had always taken it, without asking, and that, aside from the ownership of the machine, John had the right to the use of it just as he pleased.

If the evidence stopped there it may be that the position of the defendant's counsel would be sustained; but there was in the case evidence that authorized the jury to find that, at the time the defendant's son was using the machine, he was either doing it as the agent or servant of the father, or using it in the defendant's business, for the defendant told the husband of the plaintiff "that his car he had bought for the pleasure of his family and for business; that they had a right to take it whenever they saw fit without asking", and he furthermore told him "so far as the liability extended he was responsible." That was a direct admission of facts essential to establish his legal liability, and, if the defendant's position is sound, then that admission covered the situation which defendant's counsel urges was necessary to exist for defendant to be charged. After the accident, with full knowledge of the facts, he admitted his liability. Upon the stand he did not deny he so admitted; but leaves it for his counsel to argue, without explanation, why the admission was not true. The admission of the defendant was open to explanation and contradiction. It was subject to rebuttal, explanation and comment, and the fact that the defendant was a witness in his own behalf, after the testimony had been given as to his admission of his liability, and did not contradict or explain the statement, but allowed it to pass as true and unchallenged, authorized the jury to find that he knowingly made the admission, and that his admission was true. As stated in *Robinson* v. *Stewart*, 68 Maine, on page 62, "the statement and admissions of Stewart, as testified to by the plaintiff, not having been denied or in any way modified, must be taken as true." The defendant having admitted his liability, and when a witness in his own behalf not having explained or modified his admission, it is useless to discuss the rights of the parties upon the theory that facts existed that the defendant, by his admission, shows did not exist.

The motion also asks that the verdict be set aside because the damages awarded by the jury are excessive. There is no question but that the plaintiff was severely injured by reason of the accident, and that she was taken to a hotel and remained there some three weeks, and that she has been under medical treatment ever since.

There is a dispute as to the nature of her injuries and whether she will ever recover or not; but there is no question but that she was injured as claimed and that she had not recovered at the time of the trial. The plaintiff produces three eminently respectable physicians, including the physician who treated her from the time of the injury to the time of the trial, who have made examinations, and they all give an opinion which, if believed, authorized the jury to find that the woman received injuries from which she will never recover. Upon the other hand, the defense produces three eminently respectable physicians who admit that, at the time of the trial, the plaintiff was suffering from the apparent effects of the injury received at the time of the accident, but they gave it as their opinion that she is not suffering from the same injury that the physicians for the plaintiff give their opinion she is suffering from, and that she will in a short time probably recover from the effects of the injury.

The physical condition of the plaintiff was one of the issues submitted to the jury, and we have no right to say that the testimony of the three physicians upon one side or the other should be weighed differently than the jury found it. They were authorized to find that the testimony of the physicians for the plaintiff outweighed the testimony of those for the defendant, and if, in their opinion, the testimony of the defendant's physicians outweighed the testimony of the physicians of the plaintiff, they had the right to so find. But, with the testimony so evenly balanced upon the question of the permanency of the injuries, it was a question for the jury as to the weight to be given the testimony, and we have no right, under the circumstances, to disturb their finding and the mandate must be,

Motion and exceptions overruled.

MADELINE B. COOMBS, et al., by Guardians,

vs.

CORNELIA G. FESSENDEN, et al.

Androscoggin. Opinion July 25, 1917.

Deeds. Presumption as to delivery where deed is found in possession of grantee. Declarations of grantor in absence of grantee relative to conditions attached to passing of deed. Delivery of deeds. Self-serving writings or paper as bearing on the question of legal delivery of deeds.

This is a writ of entry brought to determine whether a deed under which the defendants claim was duly delivered. The plaintiffs are the heirs of William C. Coombs who had acquired the real estate as a result of a partition. William told an attorney that he was about to sell the property to his mother and requested that a deed be prepared to carry out his intention. The attorney met mother and son at the mother's home, where both parties resided, and the first draft not meeting with the mother's approval a second deed was prepared. This instrument being satisfactory it was executed and then handed by the son to the mother. Mother and son both died within a short time after this occurrence and the deed, unrecorded, was found in a trunk in which the mother kept her papers.

To show by their subsequent conduct in dealing with the property the parties had not intended to transfer the title at the time the manual possession of the deed passed from the son to the mother, the plaintiffs were permitted to introduce in evidence certain receipts for rent signed by the son, and an assignment of wages given by a tenant to the son to secure rent. While these papers were connected with the demanded premises the mother's name nowhere appears in any of them, and there is no evidence to show that she had any knowledge of the manner in which he was dealing with the property. To the admission of this evidence the defendants seasonably excepted.

Held:

1. The circumstances attending the execution and delivery of the deed, as above detailed, being uncontrolled by contradictory evidence of strong probative force, conclusively proved that the deed was duly delivered with the intention of passing the title to the premises therein described.
2. The receipts and assignment of wages are entirely self-serving and therefore inadmissible. Their admission was clearly prejudicial to the interests of the defendants.

Writ of entry to recover certain lands in the town of Lisbon Falls, Androscoggin County. Verdict for plaintiff. Defendant filed exceptions to the admissibility of certain evidence, and also to the refusal of the presiding Justice to give certain requested instructions. Exceptions sustained.

Case stated in opinion.

Oakes, Pulsifer & Ludden, for plaintiffs.

Ralph W. Crockett, for defendants.

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

MADIGAN, J. In a former trial of this case the defendants recovered a verdict, which was set aside by the Law Court, 114 Maine, 347. A second trial resulted in favor of the plaintiffs and the matter is now before us on exceptions. The plaintiffs assert title to the demanded premises as the heirs of William C. Coombs, who received a deed of the same as the result of a partition between the heirs of John Coombs, the father of William. The defendants' title is based on a warranty deed, in common form, dated July 1, 1909, running from William to his mother, Marcia Coombs, the delivery of which the plaintiffs deny, thus raising the issue in dispute.

William died a few hours after the mother and we lack the benefit of any light they might have shed on the controversy. The attorney who drew the deed says he acted at William's request. A first draft was unsatisfactory to the mother and a second draft meeting with her approval was executed and acknowledged by William, handed by the attorney to William, who in turn handed it to his mother. After her death the deed was found in a trunk in which the mother kept her papers.

The decision in *Coombs* v. *Fessenden,* supra, is based on the refusal of instructions that the jury might find the attorney's testimony to be true and still find for the plaintiff on the question of legal delivery of the deed, provided they were satisfied from all the evidence in the case that, although the deed was physically transferred from the grantor to the grantee, nevertheless the parties did not intend that the title and ownership of the property should immediately pass to Mrs. Coombs. A careful examination of the evidence in this case fails to overcome the presumption that when the manual possession

of this deed passed from the son to the mother, both parties intended to effect an immediate transfer of the title, in accordance with the terms of the deed.

In the absence of controlling evidence of strong probative force the circumstances are sufficient to conclusively establish that the deed was delivered with the intention of passing the title to the premises demanded. "When the grantor gives physical possession and control of the document to the grantee, either actually or constructively, or directly states that he delivers the instrument wherever it may be, and so puts it in the power of the grantee to take it, or does both of these things and there is no proof of an intent not to transfer the title, a delivery complete in the first instance is made." Reeves on Real Property, Sec. 1110. "Where a deed, with the regular evidence of its execution upon the face of it, is found in the hands of the grantee, the presumption is that it has been duly delivered." *Ward et al.* v. *Lewis et al.*, 4 Pick., 518.

"The production of a bond by the obligee from his own possession tended to show that it had been delivered to him." *Valentine* v. *Wheeler*, 116 Mass., 478. "If an unrecorded deed of land is found, at the death of the grantee in his pocket book in his possession, the presumption is that it was duly delivered to him." *Butrick* v. *Tilton*, 141 Mass., 93.

To overcome this presumption the plaintiffs introduced several receipts for rent of the demanded premises, given by William after the execution of the deed, also an assignment to secure rent. The mother's name nowhere appeared in any of these papers and there was no evidence that she ever saw them or knew the manner in which William was dealing with the tenants. While evidence of the conduct of the grantor in relation to the property is admissible on question of title the participation and knowledge of both parties must clearly appear. This evidence lacks the essential mutuality and is self-serving and consequently inadmissible.

"Receipts, bills of parcels and other papers, signed by one party to a suit, and offered by an opposing party, are received like other contracts as showing the declaration or engagements of the opposite party. But they cannot be received when offered by the maker of them, unless there be proof that they have been in the hands or in some way connected with the opposing party, and they are then received as exhibiting his assent, or showing his connection with the

transaction." *Boody* v. *M'Kinney*, 23 Maine, 517. "The rule of law is well settled that after a conveyance of real estate the declaration of the grantor in disparagement of his grant, made in the absence of the grantee, are never admissible in evidence against the grantee." *Chase* v. *Horton*, 143 Mass., 118. "The declaration and acts of a grantor after the completion of a sale are not admissible for the purpose of defeating the title, which by solemn contract he had passed to and perfected in another," *White* v. *Chadbourne*, 41 Maine, 149. "The declarations of a supposed grantor are not to be received after his death as evidence against the party claiming under the deed." *Bartlett* v. *Delprat*, 4 Mass., 707. "The rule that the acts and declarations of a grantor, after he has divested himself of the estate, shall not be admitted to impeach the title of the grantee, is well settled and not to be departed from." *Winchester* v. *Charter*, 97 Mass., 140. Defendants' exceptions to the admission of this evidence must therefore be sustained.

As a basis for a verdict this question was submitted to the jury. "Was the deed of William C. Coombs dated July 1, 1909, intended by the parties to it to take effect at that time as a conveyance of the title of the land described in it by the delivery of it to the grantee." With this question and as explanatory of the issue the presiding Justice, in his charge instructed the jury as follows: "When it appears that there has been a delivery, that is, a manual delivery, from hand to hand, of a deed, there arises a presumption that the title passes, that is, that the parties intended the effect to be just what their acts would indicate. But it is not a conclusive presumption; because deeds are delivered from party to party for various reasons, at various times, without the parties intending at the time to pass the title. They may intend to pass it at some future time but not then, that is, the deed is passed over without intention on the part of the parties to it that it shall take effect then as a conveyance of the title. Sometimes a man may make a deed perhaps, and intend delivery with an intention that it shall take effect when he dies, or on the happening of some condition, or upon the condition of payment, and not to take effect otherwise, and delivery of a deed, passing from hand to hand upon condition, does not convey title. It must be a delivery of the title from one to the other at the time. Now there being no question raised that this deed was actually passed from William C. Coombs, the sole and only question to be considered is what was the intent of the parties? Did they mean that the title was to pass then or not?"

And also the following:—"There is no question but it was passed over, as far as that goes, but was it intended to take effect at that time as a conveyance?"

While to the trained legal mind this question and these instructions would present no difficulties, we fear that they were misleading to the jury and therefore prejudicial to the interests of the defendants. For as heretofore observed, no admissible evidence was introduced to control the presumption that this deed was transferred to the mother with the intention of thereby vesting in her the title to the demanded premises.

"It is indispensable to the delivery of a deed that it shall pass beyond the control or dominion of the grantor. Otherwise it cannot come rightfully within the power and control of the grantee. Their interests are adverse and both cannot lawfully have control over the deed at the same time. The grantee does not necessarily acquire the right the moment it leaves the possession and control of grantor, but he cannot have it before. Neither can the grantor transfer his property after his decease by deed. The statute of wills or of descent then govern all property not disposed of during the life of the owner. To be sure a free hold estate may be conveyed to commence in future when it is so declared in the deed. *Wyman* v. *Brown*, 50 Maine, 139, and the grantor may reserve full power and control over the land thus conveyed during his natural life. *Brown* v. *Smith*, 52 Maine, 141; but not over the deed." *Brown* v. *Brown*, 66 Maine, 316.

"So far as the grantor is concerned any acts or words, whereby he in his life time parts with all right of possession and dominion over the instrument, with the intent that it shall take effect as his deed and pass to the grantee, constitute a delivery of a deed of conveyance; and nothing else will suffice." *Brown* v. *Brown*, 66 Maine, 316.

A father assigned certain mortgages to his son, with instructions that in case he died, to put them on record at once. The son placed them in a safe to which he and his father both had access, the father continuing to collect the interest on the mortgage notes. The court says; "We are satisfied that the transfer of the property was not to take effect until after the father's death, as this is contrary to the statute of wills the assignments are to be treated as nullities. *Shurtleff* v. *Frances*, 118 Mass., 154.

"To make a delivery good and effective, the power of dominion over the deed must be parted with." *Cook* v. *Brown*, 34 N. H., 400.

Hubbard v. *Greely*, 84 Maine, 340, is both clear and exhaustive. "The authorities all agree that a deed cannot be delivered directly to the grantee himself, or to his agent or attorney, to be held as an escrow; that if such a delivery is made, the law will give effect to the deed immediately, and according to its terms, divested of all oral conditions. The reason is obvious. An escrow is a deed delivered to a stranger, to be delivered by him to the grantee upon the performance of some condition, or the happening of some contingency and the deed takes effect only upon the second delivery. Till then the title remains in the grantor. And if the delivery is in the first instance directly to the grantee, and he retains the possession of it, there can be no second delivery, and the deed must take effect on account of the first delivery, or it can never take effect at all. And if it takes effect at all, it must be according to its written terms. Oral conditions cannot be annexed to it. It will, therefore, be seen that a delivery to the grantee himself is utterly inconsistent with the idea of an escrow. And it is perfertly well settled, by all the authorities, ancient and modern, that an attempt to thus deliver a deed as an escrow, cannot be successful; that in all cases, where such deliveries are made, the deeds take effect immediately and according to their terms, divested of all oral conditions.

"The law reasonably provides that the instrument delivered shall be conclusive with respect to its contents, and the intention of the parties; and in the same manner, and in view of the same considerations, that the act of delivering the instrument shall be equally conclusive; that the danger to be apprehended from fraud and false swearing, as well as from the infirmity of human memory, are as great in the one case as in the other; that if a condition could be annexed to the delivery of a deed, when made to the obligee himself, or to his agent or attorney the very essence of the transaction would be left to depend on the memory and truthfulness of the bystanders; and that there is manifest wisdom in the rule that in such transactions the law will regard, not what is said, but what is done."

"It is easy to see," said the court, in *Miller* v. *Fletcher*, Gratt., 403 (21 Am., Rep. 356), "that the most solemn obligations given for the payment of money would be of but little value as securities, if they might, at a future day, be defeated, by parol proof of con-

ditions annexed to their delivery, and not performed; and that a doctrine of this kind would, perhaps, be still more mischievous, if applied to deeds of real estate; that if such a doctrine should prevail the title of the grantee would be liable to be defeated at any time by evidence of non-performed parol conditions annexed to the delivery of the deed; and in such cases there would be no safeguards against perjury or the mistakes of the 'slippery memory' and all titles would be as unstable as sands before the seashore."

Hill v. *McNichol*, 80 Maine, 209, is an instance where the history of the deed and the conduct of the parties subsequent to the date of its supposed delivery absolutely negative any intention of the parties to deliver the deed and thereby transfer the title. As is said in that case, "an intention that it shall be a delivery must exist in the minds of both parties." One Abner Hill was conducting, with his sons, a large business. In 1860 and 61 he executed a deed of certain property to one of his sons, Monroe Hill, who in 1862 executed a deed of the same premises to his mother, Elizabeth Hill. The latter deed was never seen or heard of until within a few days after Monroe Hill died when it was taken from a drawer in a bureau at the Hill house, where Monroe lived with his parents, and hurriedly sent by special messenger to the Registry of Deeds. It appears that both Abner and Monroe Hill kept papers and transacted some business in this house. There was no evidence in the case of any previous possession of the deed by Mrs. Hill more than a presumption arising from her possession at the time she sent the same for record in 1867. The evidence in this case of Mrs. Hill's connection with this property, subsequent to transferring the deed from Monroe to her, of conveyances in which she joined subsequent to the date of such deed, which are absolutely inconsistent with any claim of title by her, was so strong that it was considered by the jury and the court as absolutely disproving any intention of the parties to pass any title from Monroe to his mother by the deed, under which she asserted title. The question of intention, which is the essential element of a valid effectual delivery, is a matter of evidence and, in *Hill* v. *McNichol*, the evidence absolutely disproved any such intention.

In this case, however, as already stated, we find no evidence to show that both grantor and grantee did not intend an effectual valid delivery of the deed from the son to the mother. The testimony of the attorney clearly shows it. The deed was found in her papers

and there is no admissible evidence in the case to disprove it. While a deed might pass from the manual possession of the grantor to that of the grantee for some temporary purposes, such as examination or as the basis for survey, or a legal opinion as to the title, there is in such cases no intention of delivery for the purpose of passing title and neither party could claim a delivery. In this case, however, there is no such evidence and there is no evidence to rebut the presumption arising from the mother's possession or to disprove the testimony of the attorney who witnessed the execution and delivery of the instrument. As we feel the question submitted and the instructions tended to cloud the real issue in the minds of the jury and to divert their attention from the salient points of the evidence and the law applicable to the case, the defendants' exceptions must be sustained. We do not feel it necessary to discuss the remaining exceptions.

Exceptions sustained.

MARTHA W. SMITH, by Conservator, *vs.* GEORGE A. TILTON.

Somerset. Opinion August 24, 1917.

Rule as to giving requested instructions upon matters not made an issue by pleadings. Issues raised by pleadings. General rule as to what issues instructions to juries should cover. Rule as to court refusing to become parties to contracts violating morality or law of public policy. Rule where the rights of third parties are involved.

On exceptions to refusal of the presiding Justice to give certain instructions in the charge to the jury.

Held:

1. Instructions to the jury should be confined to the issues made by the pleadings.
2. The requested instruction did not relate to any issue made by the pleadings.

Action of assumpsit to recover of defendant the sum of six hundred dollars paid by plaintiff to defendant. Plaintiff filed bill of specifica-

tions, in which she alleged certain fraudulent representations upon which she based the right to recover the money so paid to defendant. Defendant filed plea of general issue, and also a brief statement "That the plaintiff, Martha W. Smith, in order to obtain a home which she preferred, gave the six hundred dollars mentioned in her writ and declaration, to her son Harry P. Smith, to enable him to purchase a farm of the defendant, upon which the plaintiff, aforesaid, then desired and expected to live with her said son. The same was received by the defendant as a part of the consideration for said farm which he, the same day, conveyed to the said Harry P. Smith, all being done in the presence of said plaintiff." Verdict for plaintiff in the sum of $605.40. Defendant filed exceptions to refusal of court to give certain requested instructions. Exceptions overruled.

Case stated in opinion.

Butler & Butler, for plaintiff.

Walton & Walton, for defendant.

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

PHILBROOK, J. Action for money had and received.

The plaintiff is the widow of Prescott A. Smith, who died testate. By the terms of his will all his personal property was bequeathed to his widow, "the same to be hers absolutely," as the will states. She was also devisee of a life estate in all his real property, with the power to sell and dispose of the same, or any part thereof, if necessary for her comfortable support and maintenance. After her decease, if there had been no disposal as above provided for, the use, income and occupation of the home farm were devised to the only child of the testator, Harry P. Smith, for the term of his natural life. At the decease of the latter the home farm was bequeathed to the person or persons who would be the nearest relatives of the testator, according to the laws of descent, other than any and all issue of the son Harry and his wife Grace Butler Smith, which issue was expressly excluded as beneficiaries under the will.

When the conditions of the instrument became known, the son was naturally disappointed as to the provisions made for himself and his disinherited children, and made threats to contest the father's testament. It is obvious from the record that the plaintiff, with a maternal love of son and grandchildren which is quite natural,

sympathized with Harry in his disappointment. The matter became the subject of domestic discussion and members of the legal profession were consulted with a view to ascertaining whether the terms of the will, so far as they affected Harry and his children, could be avoided. The plaintiff stated in her testimony that she got her son and this identical defendant to consult attorneys and find out if it could be done, saying also that if it could be she so desired for the children's sake and to please Harry. The necessity of selling the real estate was clouded by the fact that the personal property bequeathed to the plaintiff amounted to about twenty-four hundred dollars, which sum included about eighteen hundred dollars deposited in a local bank, and also by the further fact that exclusive of this bequest the plaintiff, at the time of her husband's decease, had about four hundred dollars of her own money on deposit in a bank.

The defendant owned a farm which Harry desired to purchase. There was talk among the interested parties to the effect that if the widow could give a good title to the home farm then the defendant would convey his farm to Harry and receive in part payment thereof the deed of the home farm from the plaintiff. Hence the question of necessity of sale of the home farm by the plaintiff became the stumbling block which must be removed from the pathway leading to the power to give good title to that farm by the plaintiff. She says that she told the defendant and her son to ascertain, by consulting a certain attorney in whom she professed to have confidence, whether and how these transactions could be carried out successfully. Finally, she says, that defendant told her they had seen this attorney and had been advised by him that she would not be obliged to reach her last dollar before she could sell the home place and that if most of the money was put out of sight it would enable the trade to be accomplished and carried through more quickly. She says that she relied upon this advice and the statement of the defendant that it had been given and paid the defendant six hundred dollars, "to get it out of sight, so that trade could be completed quicker; so I would be able to sell the home place."

She now says that she was deceived and defrauded by the defendant, that the alleged advice reported to her from her attorney was in fact never given, and seeks to recover the six hundred dollars which she paid him.

The defendant denies the deceit and fraud and alleges as further matter of defense that the plaintiff gave the six hundred dollars to her son to enable him to purchase the defendant's farm, and that the same was received by him as a part of the consideration for said farm which he, the same day conveyed to the son, all being done in the presence of the plaintiff.

It does not appear from the record that plaintiff ever executed a deed of the home farm to the defendant, her sole effort being to recover the money paid to the defendant under the claim already described.

The defendant requested the following instruction: "That if the defendant falsely represented to the plaintiff that Mr. M., her attorney, said it would be legal for her to do so, yet if she thereupon placed the $600 sued for in this action, in the hands of the defendant with intent to get it out of sight and for the purpose of giving the false impression that it was necessary for her to sell the real estate of her deceased husband, thereby depriving others of their rights, and preparatory to so doing, then she cannot recover the same back from the defendant." The presiding Justice declined to give this instruction and allowed exceptions. The case is before us upon these exceptions and upon no other ground. The requested instruction was evidently based upon the familiar principle that if a person commits a fraud he cannot ask the law to help him get back his money which he fraudulently paid away. But we have carefully examined the declaration and brief statement, as well as the plea and special matter of defense, and do not find that fraud on the part of the plaintiff was made an issue by the pleadings. As we have already stated, the plaintiff's declaration raises the issue of fraud on the part of the defendant. The defendant denies this allegation and raises a further and substantive issue, namely, that the plaintiff gave the six hundred dollars to her son to enable him to purchase a farm of the defendant and that the same was received by the defendant as a part of the consideration of said farm. The defendant was evidently content to rest his defense upon these pleadings but plainly they did not raise the issue of fraud, or fraudulent conduct on the part of the plaintiff.

In many jurisdictions the law seems to be well settled that instructions should be confined to the issues made by the pleadings. We borrow the language from some of the leading cases.

Instructions of the court should confine the attention of the jury to the issues made by the pleadings. *Holt* v. *Pearson*, 41 Pac. Rep., 560, citing as authority *Torry* v. *Shively*, 64 Ind., 106; *Conlin* v. *Railroad* Co., 36 Cal., 404; *Frederick* v. *Kinzer*, 17 Neb., 366; *Glass* v. *Gelvin*, 80 Mo., 297. Instructions to juries should be confined to the issues made by the pleadings. *Jacksonville Electric Co.* v. *Batchis*, 44 So. Rep., 933, citing as authority *Walker* v. *Perry*, 51 Fla., 344; *Hinote* v. *Brigman, etc.*, 44 Fla., 589. It is an established principle of law that the instructions to a jury must be based upon and applicable to the pleadings. *Kirby* v. *Rainer-Grand Hotel Co.*, 69 Pac., Rep., 378. We think this principle is sound, workable, and in the interest of justice in the trial of causes, and so we hold that the refusal to give the requested instructions, it not being pertinent to any issue raised by the pleadings in the case at bar, was entirely proper.

We do not overlook the contention of the defendant that courts owe it to public justice, and to their own integrity, to refuse to become parties to contracts essentially violating morality, or public policy, even if objection be not made by the parties interested. But this principle, in our minds, does not apply here. Rights of third parties, namely, the collateral heirs of the testator, were involved. The recovery of this money by the plaintiff may enable her to live without the necessity of sale of the real estate which, if not sold, will descend by the will to those collateral heirs. The defendant should not be allowed to keep this money if so doing would fraudulently deprive those heirs of what would rightfully be theirs. We think this is not a case where courts are required to interfere of their own volition in the interests of public policy or the integrity of judicial tribunals.

Exceptions overruled.

ANNIE E. KING *vs.* HERBERT THOMPSON,
Administrator Estate of A. Frank Pulsifer, and Trustees.

Kennebec. Opinion August 28, 1917.

Rule as to auditor's report making out prima facie case. Right of either party to action to impeach or support auditior's report. Rule as to right of plaintiff to recover under count for money had and received for services, or labor performed, other than that set out in the account annexed in the writ.

Where a declaration contains two counts of which one is for work and labor according to an account annexed for the sum of $3099.71 and the second is an omnibus count with a specification that under it the plaintiff will show that defendant owes her for labor some $3099.71 according to the account annexed the second count is also in effect a count upon an account annexed for work and labor.

Under the second count the claim of plaintiff is restricted and his right of recovery limited by his specification.

The party reading an auditor's report may, as well as his adversary, produce evidence in addition to it, and may prove items not allowed by the auditor, or offer proof to contradict any part of it, without destroying the prima facie effect of its findings unless they are thus successfully impeached or disproved.

Under a count for work and labor according to an account annexed, evidence of other services or of the general performance of work and labor for the defendant not addressed to the items specified in the account annexed, does not warrant a finding for the plaintiff upon such account.

An objection to a portion of the evidence upon which an auditor has based his conclusion cannot be taken as matter of right, except to recommit the report to the auditor before trial.

No exception lies to the admission in evidence of an auditor's report, objected to for the first time at the trial before the jury, upon the ground that his conclusions were based on incompetent evidence.

Although an auditor's report has once been accepted and been used at one trial, when a new trial had been granted, it is within the discretion of the court to order a recommitment of the report to the auditor.

Action of assumpsit to recover the sum of $3099.71 on account of services rendered by plaintiff to defendant's intestate. Defendant filed plea of general issue, and under brief statement filed plea of

statute of limitations. Verdict for plaintiff in the sum of $3138.34. Defendant filed motion for new trial, and also exceptions. Motion for new trial not considered. Exceptions sustained and new trial ordered.

Case stated in opinion.

George W. Heselton, for plaintiff.

A. S. Littlefield, for defendant.

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

BIRD, J. This is an action of assumpsit originally brought against A. Frank Pulsifer. An auditor was appointed and after hearing before him, defendant died intestate and his administrator, before trial by the jury, became the party defendant. The writ is dated March 18, 1914.

The declaration contains two counts. The first count is upon account annexed for the sum of three thousand ninety-nine dollars and seventy-one cents and the second is the general omnibus count with the specification that under it "the plaintiff will show that the defendant owes her for labor done between the date of April 29, 1884 and the date of the purchase of this writ, some three thousand ninety-nine dollars and seventy-one cents, according to the account annexed."

The latter commences with a charge under date of April 29, 1884, and ends with one under date of November 22, 1913. Charges are made in each of the months between these dates except fourteen. Each charge is made under a specific date and is for either one day's or one-half day's labor or work in nursing the wife of intestate, who was the mother of plaintiff, or housework at the uniform rate of one dollar per day. The second count therefore is substantially an account annexed for work and labor. *Carson* v. *Calhoun,* 101 Maine, 456, 458; *Gooding* v. *Morgan,* 37 Maine, 419, 423; See also *Pettingill* v. *Pettingill,* 64 Maine, 350, 358, 359. *Cape Elizabeth* v. *Lombard,* 70 Maine, 396, 400, is not authority to the contrary. Nor is the dictum in *Dexter Savings Bank* v. *Copeland,* 72 Maine, 220, 222. The specifications necessary for a valid attachment of real estate may be relied upon by the defendant equally with those filed by plaintiff under Rule XI. Primarily the former are for the informa-

tion of creditors and purchasers, *Saco* v. *Hopkinson*, 29 Maine, 268, 271; see also *Fairbanks* v. *Stanley*, 18 Maine, 296, 302, *Jordan* v. *Keen*, 54 Maine, 417, but obviously it cannot be held that the defendant may not equally rely upon them. In *Carson* v. *Calhoun*, supra, the specification in the writ under the money count was not made to enable a valid attachment of real estate to be made and yet it is held that the claim of the plaintiff was restricted and his right of recovery limited by his specification.

At the October term, 1914, the defendant pleaded the general issue with brief statement invoking the statute of limitations and the case was sent to the auditor. It may be inferred that the report of the auditor was filed at the March term following. The cause was submitted to a jury at the March term, 1916, and resulted in a verdict for plaintiff in substantially the amount claimed in the account annexed. The case is before this court upon exceptions and the usual motion for new trial.

In the bill of exceptions are found thirteen exceptions to refusals to instruct the jury as requested, numerous exceptions to the admission and exclusion of evidence, six exceptions to the charge to the jury of the presiding Justice and exceptions to the admission of substantially the whole of the report of the auditor, as based upon incompetent evidence.

The first exception to refusals to instruct is "The plaintiff having attacked the auditor's report which was put in by her, that report no longer makes for her a prima facie case, and she must prove otherwise all the elements necessary to make out her case." The statute regarding auditors provides that their "report is prima facie evidence upon such matters only, as are expressly embraced in the order." "Their report may be used as evidence by either party, and may be disproved by other evidence." R. S., (1903) Chap. 84, Secs. 83, 85. Here is found nothing to indicate that impeachment or disproof of the report is confined to the party not offering it, but rather the contrary. So it is held in *Howard* v. *Kimball*, 65 Maine, 308, 326, 327, 328, 329, where the report was offered by plaintiff and wherein the court says: "The defendant was at liberty to put in the same evidence which was before the auditor or such other evidence pertinent to the case before the jury as he desired and this right does not seem to have been abridged. Either party has that right and will commonly find it necessary to avail himself of it, as to disputed items, whether the

object be to impeach or to support the auditor's report," without destroying the prima facie effect of its findings unless successfully impeached or disproved. To the same effect is *Kendall* v. *Weaver*, where again the report was offered by plaintiff, the court saying: "The party reading it may, as well as his adversary, produce evidence in addition to it, and may prove items not allowed by the auditor, or offer proof to contradict any part of it." 1 Allen, 277, 278, 279. See *Smith* v. *California Ins. Co.*, 87 Maine, 190, 195. The instructions given by the Justice presiding were without error.

In view of the conclusion to which the court must come upon the exceptions discussed below, which will render a new trial necessary, it is deemed profitless to consider the other exceptions to the charge of the presiding Justice or to his refusals to instruct, or other exceptions to the admission or exclusion of evidence.

The following question was addressed by plaintiff to one of her witnesses, a daughter of the plaintiff, subject to objection and exceptions.

"Q. From that time down (when witness was ten years old) what is your best judgment of the amount of time your grandmother was able to do her own housework?

A. She was not able to do her own work one half of the time, near."

The obvious intention was to show that the inability of the defendant to perform work, was proof of, or tended to prove, items of the account annexed. Each item of the account annexed is or may be a separate contract of itself; *Bennett* v. *Davis*, 62 Maine, 544; *Turgeon* v. *Cote*, 88 Maine, 108, 111.

Vagueness and indefiniteness of proof are as much an objection to sustaining a count for money had and received as they are in other actions; *Titcomb* v. *Powers*, 108 Maine, 347, 348, 349. And we conceive that clear and definite evidence is as essential in proof of the items of an account annexed. The question, moreover, calls not for a statement of fact but for the judgment of the witness. We think the question inadmissible and the exception is sustained.

Exceptions are taken to the refusal of the court to rule, as requested by defendant, that "the plaintiff is only entitled to recover in this action for the services specified in her account and you are not authorized to found your verdict on any other services." It follows, we think, from our conclusions already reached, that the instruction

requested should have been given. While it is probably true that the formal count in quantum meruit is no longer necessary in any case; Lawes Pl. in Assumpsit, 504, and that the value of work and labor done may be recovered under a general count in indebitatus assumpsit, it should be noted that such general count makes no attempt to set out or specify the particular labor performed. Such, as we have seen, is not the case in the present action. The exception is sustained.

Much of the confusion which has arisen in the case might have been avoided by different procedure. The defendant objects that the report of the auditor, or substantially the whole of it, is based upon illegal evidence. In *Briggs* v. *Gilman*, it is correctly stated that "The object of the statute by which the courts are authorized to refer cases to auditors and to require their reports to be read as prima facie evidence, although neither party may desire it, is to simplify and elucidate the issue to be tried. . . . If one of the findings of the auditor appears to the court, upon the facts reported by him, to be erroneous in matter of law, or in excess of the authority conferred by the rule of reference, the jury may be instructed accordingly, and so much of his report stricken out, leaving the rest to have its proper weight and effect. . . . But an objection to a portion of the evidence upon which the auditor has based his conclusion cannot be taken, as matter of right, except by motion to recommit the report to the auditor before the trial. To allow such an objection to be taken for the first time, at the trial, as a ground for rejecting the whole report and proceeding to trial without it, would defeat the purpose of the statute." 127 Mass., 530, 531, and cases cited. See also *Silver* v. *Worcester*, 72 Maine, 322, 325. *Collins* v. *Wickwire*, 162 Mass., 143, 145; *Harvard Brewing Co.* v. *Killian*, 222 Mass., 13, 15. And again it has been decided by the same court that the objection that certain evidence contained in an auditor's report was inadmissible is no ground for excluding the report or for striking out the portions of it based on such evidence on a motion made at the trial. *Leverone* v. *Arancio*, 179 Mass., 439, 448; and cases cited. No exception lies to the admission in evidence of an auditor's report, objected to for the first time upon the grounds that his conclusions were based on incompetent evidence. *Winthrop* v. *Soule*, 175 Mass., 400. See also *Kendall* v. *May*, 10 Allen, 59; *Allwright* v. *Skillings*, 188 Mass., 538, 539, 540.

The provisions of the statute under which the decisions of the Supreme Judicial Court of Massachusetts were reached are substantially identical with our own. "Their report may be recommitted. They may be discharged and others appointed." R. S., Chap. 87, Sec. 88. (R. S., 1903, Chap. 84, Sec. 84). We find nothing in the decisions of our own court holding otherwise. As a new trial is ordered, application for recommitment of the report may be made in vacation. (R. S., Chap. 87, Sec. 37) or at the next term. *Phillips* v. *Gerry,* 75 Maine, 277, 279. The motion for new trial is not considered.

The exceptions are sustained and new trial ordered.

EDITH H. MCALPINE, et al., *vs.* ALICE C. MCALPINE.

Cumberland. Opinion October 3, 1917.

Marriage settlements. Ante-nuptial contracts. Equity.

The following ante-nuptial agreement and contract entered into by Alice C. Moore of Portland, Maine, party of one part, and Silas H. McAlpine of Portland, Maine, part of the other part, witnesseth:

Whereas the said Silas H. McAlpine has promised to marry the said Alice C. Moore, the said Alice C. Moore in consideration of the promise of marriage as above and of the sum of Five Thousand Dollars to be paid to her from the estate of the said Silas H. McAlpine in case of the decease after marriage of said Silas H. McAlpine prior to the decease of the said Alice C. Moore agrees to release and relinquish and does hereby release and relinquish any and all claims of every name and nature upon the residue of the estate of the said Silas H. McAlpine, which, (except for this agreement and contract) as the widow of the said Silas H. McAlpine, she would have under the laws of the State of Maine or of any other State of the United States or of any foreign country. And she further agrees to sign all papers and perform all acts necessary to carry this contract and agreement into execution. The said sum of Five Thousand

Dollars as above shall be paid to her as soon after the decease of the said Silas H. McAlpine as can be done without unreasonable sacrifice of property in raising that amount of money.

In witness whereof the parties have hereunto set their hands and seals this sixth day of January, A. D. 1900.

(Signed) Alice C. Moore, (Seal)
(Signed) Silas H. McAlpine. (Seal)

State of Maine, Cumberland, } ss.

Personally appeared the parties to the above agreement and acknowledged that the same is their free act and deed before me this sixth day of January, A. D. 1900.

(Signed) GEORGE W. VERRILL,
Justice of the Peace.

Held:

1. This agreement was not a statutory marriage settlement, not being executed in the presence of two witnesses according to statute.
2. That the provision of R. S., 1903, Chap. 63, Sec. 6, (R. S., 1916, Chap. 66, (Sec. 8) is not an exclusive statute, and that before marriage a husband and wife may enter into an ante-nuptial agreement that will be binding in equity upon the parties.
3. That ante-nuptial contracts between persons contemplating marriage, settling prospective rights of the husband and wife in each other's property when the marriage is terminated by death are valid contracts, independent of the statutes, and are enforcible in the courts of equity.

Bill in equity asking for specific performance and also praying for an injunction. The cause was heard before single Justice upon bill, demurrer and answer, and sent to Law Court upon report. Bill sustained with costs. Decree in accordance with opinion.

Case stated in opinion.

Peabody & Peabody, for plaintiffs.

Coombs & Gould, for defendant.

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

HALEY, J. A bill in equity asking for the specific performance of an ante-nuptial agreement, and for an injunction restraining the defendant from prosecuting a petition for an allowance filed by her

in the Probate Court for Cumberland county. The defendant filed a general demurrer to the bill, and an answer admitting all the facts alleged in the bill; the case is before this court upon report.

The plaintiffs are the children of Silas H. McAlpine, late of Portland, County of Cumberland, who died intestate March 14, 1916, one of said children being the administratrix of the deceased. The defendant is the widow of the said Silas H. McAlpine. On January 6, 1900, Silas H. McAlpine, then a widower, and the defendant, then Alice C. Moore, both more than twenty-one years of age, being engaged to be married, executed an ante-nuptial contract, by the terms whereof in consideration of the mutual promises to marry and of the sum of five thousand dollars the defendant "agreed to release and relinquish, and does hereby release and relinquish, any and all claims of every name and nature upon the residue of the estate of said Silas H. McAlpine which, except for this agreement and contract as the widow of said Silas H. McAlpine she would have under the law of the State of Maine, or any other state of the United States or of any foreign country. . . . . And she further agrees to sign all papers, and perform all acts, necessary to carry this contract into execution." It was provided that the $5000 named in the agreement should be paid the widow after the decease of said Silas H. McAlpine.

The contract was acknowledged as the free act and deed of both parties the day of its date, January 6, 1900, but was not executed in the presence of two witnesses, as required by Sec. 6, Chap. 63, R. S., 1903. (R. S. 1916, Chap. 66, Sec. 8), which provides how a marriage settlement shall be executed. January 17, 1900, the parties were married and lived together as husband and wife until Mr. McAlpine's decease March 14, 1916.

The inventory filed in the Probate Court shows that the estate of Mr. McAlpine was appraised, real estate $3000, personal estate, $19,366.77. March 22, 1916, the administratrix of Silas H. McAlpine offered to pay to the defendant the sum of $5000, according to the terms of said agreement, which the defendant refused to receive and release the estate from all claims according to said agreement. April 25, 1916, the defendant filed in the Probate Court for Cumberland County a petition for an allowance as widow out of the personal estate of said deceased, upon which notice was ordered, and this suit is brought to enforce the ante-nuptial contract dated January 6, 1900,

and prays that the defendant be ordered to perform said contract and to execute and deliver to the administratrix a release of all her distributive share of the estate and all claims as widow, including her claim for a widow's allowance, and for other appropriate relief. The $5000 tendered to the defendant was paid into court when the bill was filed. The only issue in the case is the validity and construction of the ante-nuptial agreement above referred to.

The statute under which the defendant claims the agreement was executed was Sec. 6, of Chap. 63, revision of 1903, and so much thereof as is material reads as follows: "But a husband and wife, by a marriage settlement executed in presence of two witnesses before marriage, may determine what rights each shall have in the other's estate during the marriage, and after its dissolution by death, and may bar each other of all rights in their respective estates not so secured to them."

It is the claim of the defendant that, as the statute above quoted provides that the agrement to bar the widow's right in the real estate of her deceased husband must be executed in the presence of two witnesses, and as the paper executed by the defendant was not executed in the presence of any witness, that it is not a bar; that the widow can be barred only in the manner prescribed by the statute; that the statutes are exclusive and render all other forms of ante-nuptial agreements void and consequently unenforcible in equity. It is admitted that the agreement was not a statutory marriage settlement, as it does not appear to have been executed in the presence of two witnesses; nor is it claimed to be a jointure in its technical legal sense, and it is not pretended that it is of itself a legal bar since it distinctly provides for the further execution of such papers as may be necessary to make its terms effective in law. It is an ante-nuptial contract, an agreement made by two parties under no disability, both being *sui juris*. The agreement is not a bar to an action at law by the widow to recover her distributive share of her deceased husband's estate as it was not fully executed. It provided that the wife should execute the necessary papers to complete it.

In *Bright* v. *Chapman*, 105 Maine, 62, the court in discussing the statute above referred to said, "It does not follow that the section quoted covers the whole field of marriage settlements. On the contrary, it is clear that marriage settlements may be made to contain agreements as to matters growing out of the marriage relations other

than rights in the estate of one or the other. . . . . Equity will enforce such ante-nuptial settlements." Practically the same question involved in this case was discussed in 1751 in the case of *Buckinghamshire* v. *Diury,* 2 Ed., 39, 60; in which Lord Hardwick said: "The next thing is the consideration of equity, whether the jointure, or an equivalent to it, will not bind in a court of equity. . . . The general rule is, equity follows the law in the substance, though not in the mode and circumstances of the case. Therefore, if that has been done which is equivalent to what the law would call a jointure or conveyance of any other nature, it will bind in equity. . . . . This is built on maxims of equity, which regards the substance and not the form. What for good consideration is agreed to be done, is considered as done, and allowed all the consequences and effect as if actually done; especially if the condition of the parties is changed, for that cannot be rescinded; so what is fairly done before ought to be established . . . . Equity has therefore held, that where such provision has been made before marriage, out of any of these, she shall be bound by it. . . . . If anything can be clear in equity, it is this: If such agreements are fairly entered into, they will be decreed." It is true, as argued, that the statute upon which the respondent relies is the exclusive way provided by statute for barring the widow's right of inheritance in her husband's estate. That is, it is the only legal defense that can be offered in an action at law brought by her for her share of his estate, that is given her by the statute. It was so held in *Littlefield* v. *Paul,* 69 Maine, 527, which was an action of dower, and in *Wentworth* v. *Wentworth,* 69 Maine, 247, which was an action for dower and an appeal from an allowance made by the Judge of Probate. And the general rule was recognized in *Pinkham* v. *Pinkham,* 95 Maine, 71, which was a writ of entry, where the agreement relied upon was executed during coverture. The court in these cases where it was held that the statute was exclusive was discussing actions at law.

In nearly all the courts of this country where the validity of agreements similar to the agreement in this case has been passed upon, it has been held that the statute was not exclusive, but simply a statutory declaration that parties about to be married could, by executing a contract as prescribed by statute, bar the woman's interest in her husband's estate, and that statutes similar to ours do not deprive her of the power to bar her rights in her husband's estate by her ante-

nuptial agreements, that the statute is but a declaration of the effects of the settlement in that class of cases. As said in *Freeland* v. *Freeland*, 128 Mass., 509, in construing a somewhat similar contract: "This is a valid contract under the General Statutes, ... So far as it relates to the interest of either of the parties to the intended marriage in the estate of the other during coverture. So far as it relates to the rights of the survivor in the estate of the other after the termination of the marriage relation by death, *it is valid, independently of the statute.*" *Jenkins, Admr.*, v. *Holt*, 109 Mass., 116, was a bill in equity brought to enforce the specific performance of a marriage contract by which the defendant covenanted not to claim dower or any distributive share of her intended husband's estate, and the court said: "The validity of such a contract, and the power of a court of equity to enforce its specific performance, has been fully recognized by this court." The defendant in that case claimed the contract was void because it was not recorded as required by the General Statutes, and the court said: "The contract here sought to be enforced relates only to the rights which the survivor may claim in the estate of the other when the marriage is terminated by death. Its validity *does not* depend on the statute. It is as independent in its provisions, as a strict settlement by jointure or a pecuniary provision assented to by her in lieu of dower, and these have long been recognized as valid ante-nuptial agreements."

In *Riegar* v. *Schaidle*, 81 Neb., 33, and also reported in 17 L. R. A. (N. S.) 866, the court reviewed at length the decisions as to the ante-nuptial contracts and shows that the great weight of authority in this country is that ante-nuptial contracts between persons contemplating marriage, settling prospective rights of the wife in the property of the husband, when the marriage is terminated by death, are valid, independently of the statutes, and will be enforced by the equity courts. And in *Kennedy* v. *Kennedy*, 150 Ind., 633, the contract did not comply with the statute, and the court said: "No. principle seems to be more fully settled at the present time than that an adult woman, before her marriage, may bar her legal rights in her husband's estate by her agreement to accept any other provisions in lieu thereof; and such an agreement will be upheld and enforced by the courts, in the absence of fraud or imposition upon her, and where it may be said, under the particular circumstances, that it is not unconscionable." Also *Logan* v. *Phillips*, 18 Mo., 22, and cases cited in *Riegar* v. *Schaidle*, supra.

From an examination of the authorities there can be no question but that the contract signed by the plaintiff in this case was a valid contract, and barred her right by descent to share in the real or personal estate of her husband. But it is urged that she is not barred from petitioning for an allowance from the estate. It was held in *Riegar* v. *Schaidle*, supra, that if the ante-nuptial contract was valid and enforcible, it should be given full effect, and the widow denied any interest in, or any part of, the husband's estate. By the terms of that contract her dower interest was barred by contract prior to marriage, on the same principle the allowance awarded the widow by statute would also be barred, and the same in this case, that the agreement being valid and enforcible, it bars her right to an allowance as it bars her right to share in the estate by descent. In *Bright* v. *Chapman*, supra, it was held that a marriage settlement, no broader than the contract in this case, included a claim of the widow for an allowance, and that equity would enjoin the prosecution of the petition for an allowance.

There being no pretense of any fraud or imposition in procuring the contract; the consideration therefor being adequate; its terms not being unreasonable; the parties, at the date of its execution, being competent to contract, and they having partially performed the terms thereof, the death of Silas H. McAlpine fixed the rights of the defendant in his estate according to the terms of the contract, and equity will decree that the defendant execute the necessary instruments to carry out the provisions of the contract. The five thousand dollars deposited with the clerk by the administrator should be paid the defendant as the amount due her by the terms of the contract.

Bill sustained with costs. Decree in accordance with the opinion.

CHARLES G. VIELE and PRESSLY J. BARR, Pet'rs,

vs.

CHARLES W. CURTIS.

Penobscot. Opinion October 3, 1917.

Rule as to findings of fact by the court in jury-waived cases. Resulting and constructive trusts. Burden of proof to establish same. Rule as to letters written by trustee as bearing upon question of establishing trust.

A petition for partition in which the petitioners allege themselves to be owners in fee of one-third each of the land sought to be divided and the respondent the owner of the remaining one-third. The respondent, answering the petition, denied the ownership of the petitioners and claimed by brief statement and by way of equitable defence title to the whole premises alleging that his wife, from whom petitioners claimed title by descent, held the premises in trust for him and his children.

The case was heard by the presiding Justice, without a jury, who held the petitioners to be owners in fee of the two-thirds of the premises and the respondent to be owner of the other one-third and the petitioners entitled to judgment for partition as prayed for.

On exceptions to his finding:

Held: That exceptions in jury waived cases are limited to rulings upon questions of law and the only question of law is whether there be any evidence to support the finding. If there be, the decision of the court must stand even if there was a large preponderance of the evidence the other way.

That the burden of proof of establishing resulting and constructive trusts is upon the party asserting their existence and this burden is sustained only by full, clear and convincing proof.

A letter subscribed by the alleged trustee, whether addressed to, or deposited with, the cestui que trust or not, or whether intended, when made, to be evidence of the trust or not, or whether made at the time the legal title was conveyed or later, will be sufficient to establish a trust where the subject, object and nature of the trust and the parties and their relations to it and each other appear with reasonable certainty.

That the letter relied upon by respondent to establish an express trust does not meet the requirements of law.

Petition for partition in which plaintiffs claimed each to be the owner in fee of one-third in common and undivided of the premises described in the petition and as claimed therein, the defendant being owner of the other one-third of said premises, The cause was heard without jury before single Justice, and his findings were that the petitioners were entitled to judgment for partition of the premises described in their petition and as therein prayed for. To the ruling of the single Justice, defendant filed exceptions. Exceptions overruled.

Case stated in opinion.

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

Carl C. Jones, for defendant.

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

BIRD, J. This is a petition for partition in which the petitioners allege themselves to be the owners in fee of one-third each of the land sought to be divided and the respondent to be the owner of the remaining third.

The respondent, in answer to the petition, denied that the petitioners were each seized in fee of one-third of the premises and claimed under a double brief statement, by way of equitable defense, "an undefeasible title to the whole premises," alleging that his wife, from whom the petitioners claimed to have title by descent, held the premises in trust for him should she predecease him and in trust for his children by a former marriage, should he predecease her. The first brief statement sets up a constructive trust, the second an express trust.

The cause was heard by the Justice presiding without a jury and, after hearing the evidence, he found and ruled:—

1. That each of the petitioners is the owner in fee of one-third in common and undivided of the premises described in the petition, and, as claimed therein, that the respondent, Charles W. Curtis is the owner of the other one-third undivided, of said premises; and

2. That the petitioners are entitled to judgment for partition of the premises described in their petition and as therein prayed for.

To these findings and rulings the defendant excepted. The petition, pleadings and evidence are part of the bill of exceptions.

In jury waived cases, so far as the conclusion reached rests upon facts, the finding of the court is conclusive, unless the only inference

to be drawn from the evidence is a contrary one. *Maine Water Co.* v. *Steam Towage Co.*, 99 Maine, 473, 475. It has been held that the exception here noted presents a question of law. *Morey* v. *Milliken*, 86 Maine, 464, 481. If so, we must hold as such in the present case that the only inference to be drawn from the evidence is not contrary to that found by the court.

Exceptions in such cases, it is said in *Prescott* v. *Winthrop*, are limited to rulings upon questions of law and the only question of law is whether there was any evidence to support the findings. If there was, the decision of the court must stand even if there was a large preponderance of the evidence the other way. 101 Maine, 236, 239. We think there was evidence to support the finding. The credibility of the witnesses and the weight of the evidence was wholly for the Justice presiding. The burden of proof of establishing resulting and constructive trusts is upon the party asserting their existence and this burden is sustained only by full, clear and convincing proof. *Provost* v. *Gratz*, 6 Wheat. 481, 494; *Culver* v. *Guyer*, 129 Ala. 602; *Whitmore* v. *Learned*, 70 Maine, 276, 285; *Fall* v. *Fall*, 107 Maine, 539; *Coombs, et als., Appellants*, 112 Maine, 445, 446. We hesitate to conclude that the court erred in finding no satisfactory proof of a constructive trust or trust ex maleficio.

The express trust alleged is claimed to be proved by a letter written by the wife of defendant to her daughter. It is urged that the letter "taken in connection with all the evidence is a written declaration of an expressed trust." The letter is as follows:

"My dear Ada

You know that some years ago Mr. Curtis gave me a deed of our Dexter to me in accordance with a promise made before we were married, should he outlive me, he will naturally desire to have you and Charlie sign off your claims to the property as my heirs. This I should wish you do on proper considerations. Mr. Curtis owes me two thousand dollars of which he has had the use nearly ever since we were married. This I wish him to pay to you and Charlie each one thousand, keep this paper in case you should ever need it as a proof of the desire of your affectionate mother,

ANNIE VIELE CURTIS.

Dexter Maine Jan 22nd 1900."

It is undoubted law, that a letter subscribed by the trustee, whether addressed to, or deposited with, the cestui que trust or not, or whether intended when made to be evidence of the trust or not, or whether made at the time the legal title was conveyed or later, will be sufficient to establish the trust when the subject, object and nature of the trust, and the parties and their relations to it and each other, appear with reasonable certainty. *Bates* v. *Hurd*, 65 Maine, 180, 181; *McLellan* v. *McLellan*, Id., 500, 506. But the letter relied upon by plaintiff measures up to requirements no better than that considered in *Lane* v. *Lane*, 80 Maine, 570, 576, 577; which was held, as between husband and wife, to be insufficient.

Assume, however, what we by no means hold, that the letter was admissible as indirect evidence of a trust and that the statements of the letter may be supplemented by oral testimony, the question is one for a jury, and in this case for the presiding Justice, and, as already seen, to his findings of fact, no question of law arising, no exceptions lie. *State* v. *Peterson*, 68 Maine, 473, 475, 476; *Pettengill* v. *Shoenbar*, 84 Maine, 104, 106; *Fuller* v. *Smith*, 107 Maine, 161, 168. The exceptions must be overruled.

So ordered.

HERBERT J. CARVILLE *vs.* P. E. LANE.

Androscoggin. Opinion October 3, 1917.

Obtaining property by means of false representations as to financial ability to pay. Meaning of word "property." Scope of discharge under general Bankruptcy Act. What proof necessary to avoid discharge in bankruptcy.

On report. This action on the case is brought by plaintiff to recover damages for the deceit or misrepresentation of defendant whereby it is alleged that defendant fraudulently obtained property of plaintiff. The defendant pleaded the general issue and specially his discharge in Bankruptcy.

The plaintiff claimed that the alleged property obtained by defendant was notes, one of which was taken by plaintiff in renewal of an earlier note given for merchandise purchased of the defendant and the other for merchandise purchased many months earlier.

Where alleged false representations were not communicated to the payee until after taking and acceptance of a note, such acceptance cannot be held to have been indeed by such representations.

The taking of a note by plaintiff in renewal of another note induced by false pretense of the maker of the note, does not constitute an obtaining of property by false pretenses, as excepted from the operation of a discharge in bankruptcy under the Bankruptcy Act of 1898 as amended.

Action on the case to recover damages on account of deceit and misrepresentations of defendant, whereby it is claimed and alleged that defendant had fraudulently obtained property of plaintiff. Defendant filed plea of general issue, and by way of brief statement set forth his discharge in bankruptcy. At close of testimony, by agreement of parties case was reported to Law Court for its determination. Judgment for defendant.

Case stated in opinion.

McGillicuddy & Morey, for plaintiff.

Ralph W. Crockett, for defendant.

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

BIRD, J. This action on the case is brought by plaintiff to recover damages for the deceit or misrepresentations of the defendant whereby it is claimed that defendant fraudulently obtained property of plaintiff. The case is before us upon report.

It appears from the evidence that the latter had for many years supplied the defendant with fertilizer for which, several months after delivery to him, in each year, defendant gave his note to the plaintiff. In the spring of 1913 the defendant purchased fertilizer of plaintiff to the amount of between $70 and $80 and on the twenty-first day of December, 1913, gave to the plaintiff his note to order of the First National Bank of Lewiston for $80 on six months with interest after due till paid. This note was endorsed by plaintiff who discounted it at the payee bank, receiving the proceeds. On the twenty-first day of June, 1914, it was renewed, endorsed and discounted as before. Again on December 21, 1914, it was renewed, endorsed and discounted as before. In the spring of 1914 plaintiff sold defendant fertilizer to the amount of nearly $190. The balance of the purchase price of this sale in the fall of 1914 amounted with interest, less credits, to $185.65 for which sum defendant gave his note dated December 5, 1914, in other respects of like tenor as the notes already described. This note was discounted by plaintiff at the same bank on the seventh day of December, 1914, and he received the avails. On the twenty-eighth day of May, 1915, before either of the notes given in December, 1914, became due, the defendant filed his petition in bankruptcy and was granted a discharge on the third day of September, 1915, which is pleaded by way of brief statement in bar of the action.

The plaintiff alleges that on the fourteenth day of December, 1914, the defendant made to him certain representations as to the property owned by him, which were false and untrue, relying upon which he took and accepted the notes of December 5 and December 21, 1914, and that both notes are liabilities within the debts excepted from the operation of the discharge in bankruptcy, invoking the exception of the Bankruptcy Act, relating to discharges, of debts such as "(2) are liabilities for obtaining property by false pretense or false representations. . . . ." 30 U. S. Stats. at Large, Chap. 541, Sec. 17, as amended by 32 U. S. Stats. at Large, Chap. 487, Sec. 5.

We are unable to perceive how the acceptance by plaintiff of the note of December 5, 1914, which was discounted two days later, could have been induced by or made in reliance upon the statement as to assets made December 14, 1914. As to this note or indebtedness, the plaintiff cannot recover. *State* v. *Church*, 43 Conn., 471, 478. See *In re McLellan*, 204 Fed., 482; *In re Main*, 205 Fed. 421, 424.

The note of December 21, 1914 for $80 was received by plaintiff and by him discounted after the statement of December 14, 1914, was communicated to him. As observed, this note was given and discounted in renewal of a former note of a like amount. The property for which the original note was given was obtained in the spring of 1913. The new note and discount afforded him an extension of credit.

Did the making of the new note of December 21, 1914, by the defendant and its acceptance by the plaintiff constitute a liability for obtaining property by false pretenses or false representations? The word property is not defined by the bankruptcy act of 1898. In *Gleason* v. *Thaw*, 185 Fed., 345, 347, 348, a petition for review of an order staying an action by which the plaintiff sought to recover for professional services alleged to have been rendered in reliance upon false representations made by defendant, the court in its opinion says:

"While enlarging somewhat the scope of such exceptions, this amendment [substituting for "judgments in actions for fraud or" the words "liabilities for"] imposed upon the court of bankruptcy the duty of determining whether the debt sought to be excepted was or was not such a liability. . . . .

"That the word 'property' is nomen generalissimum, as asserted by the petitioner, is not to be denied, but no more is it to be denied that its meaning may be restricted, not only by the application of the maxim, noscitur a sociis, but by the purpose for which it is used, or by its evident use as a word of art, or by its use in a technical sense. The very generality of the word requires restriction, according to the circumstances in which it is used. In some judgments as well as in some obiter dicta the word 'property' has been made to cover, by a sort of rhetorical flourish, everything tangible or intangible of which value may be predicated. . . . .

"The language used in the seventeenth section of the bankruptcy act, to which we have already referred, by which liabilities for obtaining property by false pretenses are exempted from the provable debts

discharged in bankruptcy, are the usual and most general words for describing a specific crime. Their use in this connection dates back as far as the Statute of 30 George II, Chap. 34 (1757) and they have since then, so far as they define the crime, remained unchanged. 19 Cyc., 387. The same language, in substance, has been used in the statutes in this country, and where departed from, it is only by way of enumeration of certain kinds of property that may be included under the general designation. These enumerations all refer to substantive things—to a res—and in no case to which our attention has been called is anything included in the enumeration which approaches, in its description or definition, services rendered. Certainly under no proper and strict administration of the criminal law could any one be indicted under the general language of obtaining property under false pretenses, on the ground that services, whose performance has been induced by a false pretense, are property, within the meaning of the act." See also *Gleason* v. *Thaw*, 196 Fed., 359.

It is the conclusion of the court that the acceptance and discount of the note of December 21, 1914, even if induced by false representations was not an obtaining of property within the meaning of the bankruptcy act Sec. 17, nor of our own statute defining the crime of obtaining money, goods or other property by false pretenses. R. S., Chap. 128, Sec. 1. The defendant obtained by the renewal of the note, neither money, goods nor other property. The plaintiff obtained the note and used it to replace the former note, while the defendant obtained an extension of the time of payment of his original indebtedness.

Where the plaintiffs were induced by the false statements of defendant to bring no suit upon their claim by reason of the latter representing it to be paid, it was held no exception to the discharge in bankruptcy of defendant, the court remarking that "This deceit was after the contract had been created, and formed, of course, no inducement or element of it." *Brown* v. *Broach*, 52 Miss. 536, 538. Obtaining the satisfaction of one's debt due to another, by false pretenses, no money passing has been held not indictable; *Jamison* v. *State*, 37 Ark. 445; 40 Am. Rep. 103. See also *Queen* v. *Crosby*, 1 Cox C. C. 10; *Wavell's Case*, 1 Moody C. C. 224. In *State* v. *Moore*, 15 Iowa, 412, 413, under a statute practically identical with our own (R. S. 128, Sec. 1) it is held that to obtain an indorsement or credit

upon a promissory note is not obtaining property, money or goods within the meaning of the statute. Under the bankruptcy act of 1867, it is said that "The fraud must have been committed in contracting the debt. It is no answer to the discharge that the defendant by fraud induced the plaintiff to forbear an action upon it." Low. Bankruptcy, Sec. 433. And see under the act of 1898, Id., Sec. 480. See also R. S., Chap. 128, Sec. 3.

Judgment for defendant.

GERTRUDE TIBBETTS *vs.* CHARLES F. CURTIS.

Androscoggin. Opinion October 16, 1917.

Wills. Intention of testator. General rule to be applied in construction of will.

A bill in equity brought in the Probate Court of Androscoggin County by complainant for the construction of the will and codicil of George W. Curtis, deceased. The case is here upon exceptions to the decree of the Supreme Court of Probate sustaining the decree of the Probate Court.

It is elementary law that the intention of the testator collected from the whole will and all the papers which constitute the testamentary act is to govern.

It may well be doubted if any other source of enlightenment in the construction of a will is of much assistance than the application of natural reason to the language of the instrument, under the light which may be thrown upon the intent of the testator by the extrinsic circumstances surrounding its execution and connecting the parties and the property devised with the testator and with the instrument itself.

Citations of adjudicated cases cannot afford much aid. No two wills are ever precisely alike. No two testators are situated precisely the same, and it is both unsafe and unjust to interpret the will of one man by the dubious light afforded by the will of another.

The codicil of the testator, formal parts omitted, is "I now revoke item sixth in said will, wherein I bequeathed thirty-five hundred dollars, to my brother Silas Curtis, of Wayne, and I now give and bequeath to Charles F. Curtis of Auburn, Maine, two thousand dollars ($2,000.00) in trust, to be used by him for the benefit of my said brother Silas Curtis, hereby giving said Charles F. Curtis,

absolute control of said sum in his discretion, not confining him to the income thereof, for the benefit of my brother Silas, if the said Silas shall survive me, but authorizing him to use from the principal of the same, when in his judgment it shall become necessary.

"Should any of said trust fund be unexpended on the death of my said brother Silas, I direct said Trustee to use from said fund to give my said brother a Christian burial and erect a gravestone to his memory, and, if after these expenses shall have been incurred there shall be any balance remaining I direct my said trustee to pay it to my niece, Gertrude Tibbetts, providing she shall continue to care for her father. If some one other than the said Gertrude cares for my brother Silas I direct said Trustee to pay what may be left, if any, to that person."

Silas Curtis, who at the date of the codicil was living with complainant who was caring for him then and continued to care for him until his death, predeceased the testator.

Held: That the testator had in mind a definite plan for the benefit of his brother and whoever cared for him till his death;

That the death of Silas was not to effect the remainder of the plan, that the bequest in trust has not lapsed, that the burial expenses of Silas and the erection of a gravestone to his memory are charges against that fund, and, these being paid therefrom, that the Complainant is entitled to the balance.

Bill in equity filed in the Probate Court, Androscoggin County, asking the court to construe and interpret the will of George W. Curtis and the codicil thereto. From the finding of the Judge of Probate, appeal was entered to Supreme Court of Probate, at which term the appeal was dismissed by the presiding Justice; to which ruling, exceptions were filed. Judgment in accordance with opinion.

Case stated in opinion.

White & Carter, for plaintiff.

Tascus Atwood, for Defendant.

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

BIRD, J. The will of George W. Curtis, bearing date the twenty-sixth day of October, 1910, among other legacies, gave to his brother Silas Curtis, the sum of three thousand five hundred dollars. On the eighteenth day of November, 1915, he executed a codicil to his will, which omitting formal parts, is as follows:

"I now revoke item sixth in said Will, wherein I bequeathed thirty-five hundred dollars, to my brother Silas Curtis, of Wayne, and I now give and bequeath to Charles F. Curtis of Auburn, Maine, two thou-

sand dollars, ($2,000.00) in trust, to be used by him for the benefit of my said brother Silas Curtis, hereby giving said Charles F. Curtis, absolute control of said sum in his discretion, not confining him to the income thereof, for the benefit of my brother Silas, if the said Silas shall survive me, but authorizing him to use from the principal of the same, when in his judgment it shall become necessary.

"Should any of said trust fund be unexpended on the death of my said brother Silas, I direct said Trustee to use from said fund to give my said brother a Christian burial and erect a gravestone to his memory and, if after these expenses shall have been incurred there shall be any balance remaining I direct my said trustee to pay it to my niece, Gertrude Tibbetts, providing she shall continue to care for her father. If some one other than the said Gertrude cares for my brother Silas I direct said Trustee to pay what may be left, if any, to that person."

Both the will and codicil were duly proved and allowed in the Probate Court of Androscoggin County and defendant Charles F. Curtis appointed executor. Silas Curtis, having predeceased the testator, Gertrude Tibbetts, his daughter, brought her bill in equity for the construction of the codicil in the Probate Court of Androscoggin County. Other facts essential to an understanding of the case will be found in the opinion of the Judge of Probate which we quote in full;

"A decision of this case calls for the construction of the codicil to the will of George W. Curtis, late of Auburn, deceased. The codicil in question is dated November 18, 1915. Silas Curtis, therein named, died December 23, 1915. George W. Curtis, the testator, died February 15, 1916. It is admitted that at the date of the codicil the said Silas Curtis was living with the plaintiff, who was then caring for him and continued to care for him until his death. It is further admitted that at the time of the filing of the bill the remains of said Silas Curtis were in a tomb or receiving vault and had not been buried, nor had a gravestone been erected to his memory,—but while the case has been pending in this court the expenses of the burial and of the gravestone have been paid by the respondent, Charles F. Curtis, in accordance, as he says, with a request of George W. Curtis.

"The plaintiff contends that by the codicil a trust fund of two thousand dollars was created to be applied, first for the benefit of Silas Curtis if Silas survived the testator; second, to provide for a

Christian burial of Silas Curtis and for the erection of a gravestone in his memory; and third, the balance was to be paid to the niece, Gertrude Tibbetts, provided she continued to care for her father.

"The contention is that the clause 'if said Silas shall survive me' applies only to the use of the fund for the benefit of Silas during his life, and that the further provisions indicate an intent on the part of the testator to provide for the burial of his brother and for the erection of a gravestone to his memory, and to recognize the care which the plaintiff, Gertrude Tibbetts had rendered and should render to her father.

"The defendant, Charles F. Curtis, on the other hand contends that the whole bequest was conditional upon the survivorship of Silas, and that Silas having died before the testator, the trust never became operative,—that there is no obligation on his part to pay from the fund the expenses of his burial or to erect a gravestone to his memory,—and that the niece, Gertrude Tibbetts is not entitled to any portion of the fund.

"The difference in the views of the parties arises from the location of the phrase 'if the said Silas shall survive me', which it will be noticed is inserted between two clauses of the will relating to the use of the fund. The defendant, Charles F. Curtis, would construe the will as if the clause 'if the said Silas shall survive me' had been inserted after the words 'two thousand dollars', so that the codicil would read:

'I now give and bequeath to Charles F. Curtis, of Auburn, Maine, two thousand dollars if my brother Silas Curtis shall survive me, in trust to be used by the said Charles F. Curtis for the benefit of my said brother Silas Curtis, and hereby give said Charles F. Curtis absolute control of said sum in his discretion, not confining him to the income thereof for the benefit of my brother Silas, but authorizing him to use from the principal of the same when in his judgment it shall be necessary.'

"The counsel for the several parties have stated their contentions with much positiveness. I have therefore examined the case with much care and given it careful consideration.

"It is familiar law and not disputed, that the intention of the testator collected from the whole will and all the papers which constitute the testamentary act, is to govern; that the intent is to be

sought in the will as expressed, and that the declarations of the testator before or after the will was made cannot aid the interpretation.

" 'It may well be doubted if any other source of enlightenment in the construction of a will is of much assistance than the application of natural reason to the language of the instrument, under the light which may be thrown upon the intent of the testator by the extrinsic circumstances surrounding its execution and connecting the parties and the property devised with the testator and with the instrument itself.' *Clark* v. *Johnston,* (Miller, J.) 18 Wall., 493, cited and quoted in *Bradbury* v. *Jackson,* 97 Maine, 455, 456.

"Citations of adjudicated cases cannot afford much aid.

" 'No two wills are ever precisely alike. No two testators are situated precisely the same, and it is both unsafe and unjust to interpret the will of one man by the dubious light afforded by the will of another.' *Bradbury* v. *Jackson,* 97 Maine, 455, 456.

"After considering the will and codicil in all their details, and weighing all portions thereof, I think George W. Curtis had in mind several objects, all parts of one plan, which I would state as follows.

1. To reduce an absolute legacy of $3500 to the smaller sum of $2000, placing the latter sum in trust.

2. To provide from this fund for the care of his brother Silas while he lived.

3. To provide for his burial and the erection of gravestones, having in mind the contingency which has happened, that his own death might follow the death of his brother so closely that he could not attend to the burial himself.

4. To make provision for the niece, Gertrude Tibbetts, if she continued to care for her father as she was doing when the codicil was made; and

5. If through sickness, death or other cause, Mrs. Tibbetts could not care for Silas Curtis, to provide for whoever might furnish such care.

"I think that the phrase 'providing she shall continue to care for her father,' means to continue to care for him as Mrs. Tibbetts was caring for him when the codicil was made, and as she continued to care for him until the day of his death. If the codicil is construed as the defendant, Charles F. Curtis, contends, by reading the conditional clause into the instrument immediately following the amount of the legacy and before the declaration of trust, the whole plan has

failed; he is under no obligation to pay for the burial of Silas and the erection of gravestones, and there is no recognition of the care rendered by the plaintiff to Silas Curtis. By his action in assuming to pay these expenses he cannot affect the plaintiff's rights. But reading the codicil as it is written, with the conditional clause placed parenthetically between the clause relating to the application of the income and the clause authorizing the use of the principal, the intention of the testator that the death of Silas is not to affect the remainder of the plan, is emphasized and made clear.

"I cannot think that it was the intention of the testator that the whole plan should fail if he survived his brother, and the language of the codicil considered in all its parts, does not require such a construction.

"So construing the codicil, the case falls rather under the doctrine of *Thompson* v. *Thornton*, 197 Mass., 273, and similar cases cited in behalf of the plaintiff, than under the doctrine of *Huston* v. *Dodge*, 111 Maine, 246, 251, and *Harlow* v. *Bailey*, 189 Mass., 208, cited in behalf of the defendant Curtis.

"I therefore rule that the bequest to Charles F. Curtis of two thousand dollars in trust, as made in said codicil, has not lapsed; that the expenses of the burial of Silas Curtis and the erection of a gravestone to his memory are a charge against that fund, and that the plaintiff, Gertrude Tibbetts, is entitled to the balance of the fund after these expenses have been paid."

From the decree entered in accordance with the opinion and ordering that the costs of complainant taxed at a sum certain, be paid from the general assets of the estate, the respondents appealed, giving as reasons of appeal, 1. that it being admitted that Silas died before the testator, the legacy of $2000 in trust lapsed; 2. that the only interest of complainant in the estate was contingent upon her father's surviving the testator and her continuing to care for her father in case he survived the testator; 3. that the complainant is entitled to no part of the trust fund, so called, as it never came into being; 4. that the complainant is not entitled to costs.

Upon hearing in the Supreme Court of Probate, it was decreed that the appeal be dismissed with costs, the decree of the Judge of Probate affirmed and the case remanded to the Probate Court.

To this decree of the Supreme Court of Probate the respondent had exceptions upon which the case is now before us.

It is the opinion of the court that the exceptions must be overruled for the reasons set forth in the opinion of the Judge of Probate which the Justice sitting in the Supreme Court of Probate made part of his rescript. To it we can add nothing save to call attention to the cases of *Adams* v. *Legroo*, 111 Maine, 302, 307, and *Prescott* v. *Prescott*, 7 Met., 141, 145, which are in harmony with the opinion.

Exceptions overruled.
Costs of complainant in this court to be paid from the general assets of the estate.
Case remanded to the Supreme Court of Probate of Androscoggin County for further proceedings in accordance with this opinion.

HUGH D. GRANT *vs.* ROBERT H. JACK.

Sagadahoc. Opinion October 20, 1917.

Evidence. Admissibility of copies of letters written on same typewriter.

1. It is a readily observable fact that a typewriting machine develops by use some defects or irregularities in the alignment or position of its type, or in other features, and that such defects or irregularities are inevitably disclosed by the work produced upon such machine.
2. Since it is not probable that any one of such defects or irregularities would occur in precisely the same way in two machines, and that it is well-nigh impossible that two or more of them should do so, it is now well recognized that a typewriting machine may possess an individuality which differentiates it from other typewriting machines, and which is recognizable through the character of the work which it produces.
3. Inasmuch as the work produced upon a typewriting machine affords the readiest means of identifying the machine, no valid reason is perceived why a proven specimen of its work should not be received in evidence for purposes of comparison with other typewritten matter alleged to have been produced upon the same machine.

4. If a proven specimen of work produced upon a certain typewriter corresponds identically with a disputed specimen in all of several defects, irregularities and imperfections of the work, that fact would be pertinent and material to the question whether the disputed specimen was produced upon the same typewriter.

5. In support of his action the plaintiff undertook to prove that the defendant was one of a number of men who unlawfully entered upon his premises in the evening of February 22, 1915 and presented to him a threatening letter written upon a typewriter. As bearing on the credibility of the defendant's testimony denying all knowledge of the letter until after it was delivered, the plaintiff undertook to show that the letter was written on an Oliver Typewriter which the defendant borrowed and took to his home on the same evening and prior to the delivery of the letter; and he offered in evidence a copy of the letter, shown to have been made upon the same typewriter after the defendant returned it.

Held:

That the copy of the letter, as a proven specimen of work produced upon the typewriter which the defendant borrowed, was admissible in evidence, for the purpose of comparison with the original letter, on the question of the identity of the typewriter upon which the original letter was written.

6. It cannot be reasonably held under all the facts disclosed in the case that the plaintiff was not prejudiced by the exclusion of the offered copy.

Action of trespass quare clausum. Defendant filed plea of general issue. Verdict was rendered for defendant. Plaintiff filed exceptions to certain rulings of the Justice presiding relative to the admissibility of certain evidence. Exceptions sustained.

Case stated in opinion.

Oakes, Pulsifer & Ludden, for plaintiff.

George W. Heselton, for defendant.

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

KING, J. In support of this action of trespass quare clausum the plaintiff undertook to prove that the defendant was one of a number of men who unlawfully entered upon his premises in Bowdoinham in the evening of February 22, 1915, and presented to him a threatening letter. The verdict was for the defendant, and the case comes up on exceptions.

The plaintiff introduced evidence tending to show that on the evening of February 22 the defendant brought the letter, written on a typewriter, to a number of men assembled in the rooms of the Pythian

building in Bowdoinham where it was partly read by him and partly by his father-in-law, one Frank J. Nichols, and that the letter was taken by the men there assembled, or some of them, to the plaintiff's house and delivered to him by one Frank P. Brown. The plaintiff's evidence also tended to show that the defendant was recognized by him as one of the men who came upon his premises that evening. The defendant, testifying in his own behalf, denied absolutely that he had any knowledge of the letter before it was delivered to the plaintiff, and further denied that he was on the plaintiff's premises or in the vicinity during that evening. As bearing on the credibility of the defendant's testimony, and as tending to show that he was a participant in the affair, the plaintiff undertook to show that the letter was written on an Oliver Typewriter which the defendant borrowed and took to his own home just before six o'clock of that evening. And at the trial the plaintiff offered a copy of the letter, shown to have been made by a witness upon the same typewriter that the defendant borrowed and took to his home—the copy having been made after the defendant returned the typewriter. The offered copy was excluded, and that ruling is the subject of the plaintiff's exception.

The copy of the letter, as a proven specimen of work produced upon the typewriter which the defendant borrowed, was offered in evidence for the purpose of comparison with the original letter on the question of the identity of the typewriter upon which that letter was written. We think the copy was admissible for the purpose for which it was offered. The basis for its admissibility is the fact, now well recognized, that the work of any particular typewriter, after it has been in use for some time, has a distinctive character determinable with much certainty from an inspection of its work. It is readily noticeable that typewriting machines, after some use, get out of exact alignment, that here and there a letter gets somewhat "off its feet," that slight changes in the spaces between some letters develop, and that certain letters become more or less imperfect. Such defects or irregularities are plainly disclosed by the work the machine does. In Ames on Forgery, page 117, speaking of such defects or irregularities, the author well says: "It is highly improbable that any one even of these accidents should occur in precisely the same way upon two machines, and that any two or more should do so is well-nigh impossible." And in Osborn, Questioned Documents, quoted in the note

on page 861 of Vol. 45, L. R. A. (N. S.) it is said: "The work of any number of machines inevitably begins to diverge as soon as they are used and . . . . it very soon begins to be possible to identify positively the work of a particular typewriter if the writing in question includes clear prints of a sufficient number of the characters and a sufficient amount of genuine writing is furnished for comparison. The principles underlying the identification of typewriting are the same as those by which the identity of a person is determined or a handwriting is identified. The identification in either case is based upon a definite combination of common or class features in connection with a second group of characteristics made up of divergences from normal features which thus become individual peculiarities."

The question presented in the case at bar is perhaps one of first impression in this State. But it has been considered in some other jurisdictions. In *People* v. *Storrs*, 207 N. Y., 147, 45 L. R. A. (N. S.) 860, it appears, that at the trial of the defendant under an indictment charging him with the forgery of an instrument, it was important to the case for the prosecution to establish that the body of the instrument was produced by the use of the defendant's typewriter, and for that purpose the district attorney was permitted, over the defendant's objection and exception, to introduce in evidence, for comparison with the instrument in question, another paper prepared by a witness upon the defendant's typewriter. The defendant's exception to that ruling was overruled, and the court, after reference to certain other cases, said: "These several cases base the rulings which have been mentioned upon the assumption or proof that a typewriting machine may possess an individuality which differentiates it from other typewriters and which is recognizable through the character of the work which it produces. Inasmuch as its work affords the readiest means of identification, no valid reason is perceived why admitted or established samples of that work should not be received in evidence for purposes of comparison with other typewritten matter alleged to have been produced upon the same machine."

We think the fact is patent and well recognized, requiring no expert testimony to establish it, that typewriting machines do develop by use some defects or irregularities in the alignment or position of its type, or in other features, and that such defects or irregularities are inevitably disclosed by the work produced upon such machines. If a proven specimen of work produced upon a

certain typewriter corresponds identically with a disputed specimen in all of several defects, irregularities, and imperfections of the work, that fact would be pertinent and material to the question whether the disputed specimen was produced upon the same typewriter. And we think a proven specimen of the work of a certain typewriter, as the copy offered in evidence in this case was shown to be, is admissible for comparison with a disputed specimen, when the question of the identity of the typewriter upon which the disputed specimen was written becomes material. The following cases support more or less directly this view. *Levy* v. *Rust*, N. J., Eq., 49 Atl., 1017, 1025, *State* v. *Freshwater*, 30 Utah, 442, 85 Pac., 447, and *Huber Mfg. Co.* v. *Claudel*, 71 Kan., 441, 80 Pac. 960.

It was proven in the case at bar that just before six o'clock of the afternoon in question the defendant borrowed the typewriter and carried it to his home, and that his father-in-law, Mr. Nichols, who was visiting him at his home that afternoon, was in the room at the Pythian building and read a part at least of the original typewritten letter. In view of those facts, and that the defendant denied all knowledge of that letter, it was competent for the plaintiff, as bearing on the credibility of the defendant's denial, to show that the original letter was written on that same typewriter. And for the purpose of showing that fact we think the copy of the letter, shown to have been made on the same typewriter, was admissible in evidence for comparison with the original letter. The comparison was to be made by the jury, and it was for them, and not for the presiding Justice, to determine by the comparison if there were defects or irregularities in the typewriting of the original letter which were plainly reproduced in the typewriting of the copy.

It is urged by the defendant that the plaintiff was not prejudiced by the ruling complained of. But we think it cannot be so held under all the facts and circumstances disclosed.

Accordingly the entry must be,

Exceptions sustained.

E. DAVIS LEAVITT

vs.

HENRY D. WILLIAMS and LOUIS C. HATCH.

Penobscot. Opinion October 20, 1917.

Landlord and Tenant. Negligence.

The defendants were owners in common of a three story building on Main Street in Bangor. A. Langdon Freese leased the first or street floor, and the plaintiff holding under Mr. Freese as a tenant at will, occupied one of the stores on that floor as a millinery store. Several tenants had offices or rooms in the second and third stories of the building. In an alcove of the hallway on the second floor, under the stairs leading up to the third floor, an iron sink was set with an ordinary three quarter inch faucet on the water pipe opening into the sink. The outlet of the sink was adequate to vent all the water which that faucet would discharge when it was fully open. The sink was for the use of any of the tenants of that floor having occasion to use it. On the night of August 25, 1915, some unknown person negligently caused the outlet of the sink to be clogged and left the faucet open in part, with the result that the sink overflowed and the water found its way down into the plaintiff's store and damaged her goods. In her action against the owners of the building to recover her damages thus sustained.

Held:

1. It is familiar law that the owner of a building, not in a defective or dangerous condition, is not liable to a tenant or occupant of the building, or to any one else, for injuries or damages caused by the unauthorized, and not reasonably to be anticipated, act of any other tenant or occupant, or of any third person, unless his relation to the doer of the act is such that the doctrine respondeat superior applies.
2. It cannot be regarded as imprudent, or unreasonable, or negligent for the defendants to maintain the sink as it was maintained for the use of their tenants. It had been there for seventeen years or more and no overflow from it had ever occurred before this accident, and there is no suggestion of proof that the defendants had any reason to anticipate that any harm would ever result from it.
3. There is no evidence that the overflow was caused by the defendants personally, or by any one who stood in the relation of agent to them, or for whose unauthorized act they could be held responsible on the ground that they had reason to anticipate it. Whose negligent act caused the overflow is left wholly to conjecture.
4. In the opinion of the court the plaintiff has failed to establish a cause of action against the defendants for her damages.

Action on the case for alleged negligence on the part of the defendants as owners in common of a building, part of which was occupied by the plaintiff. Defendants filed plea of general issue. At close of testimony, by agreement of parties case was reported to Law Court upon so much of evidence as legally admissible, the Law Court to assess damages if the defendants were liable. Judgment for defendants.

Case stated in opinion.

George E. Thompson, and James D. Maxwell, for plaintiff.

Donald F. Snow, and Ryder & Simpson, for defendants.

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

KING, J. This case comes up on a report of the evidence which shows the following facts: August 25, 1915, the defendants were owners in common of a three story building on Main Street in Bangor. A. Langdon Freese leased the first or street floor, and the plaintiff, holding under Mr. Freese as a tenant at will, occupied one of the stores on that floor as a millinery store. Several tenants had offices or rooms in the second and third stories of the building. In an alcove of the hallway on the second floor, under the stairs leading up to the third floor, an iron sink was set with an ordinary three quarter inch faucet on the water pipe opening into the sink. The outlet of the sink was adequate to vent all the water which that faucet would discharge when it was fully open. The sink was for the use of any of the tenants of that floor having occasion to use it.

On the night of August 25, 1915, a Mr. Young, who was a tenant of of an office on the second floor of the building, left the premises between 8.30 and 9 o'clock, and everything was then all right; but on his return at about 10 o'clock he found a small stream of water running from the faucet into the sink, and the strainer at the outlet of the sink was clogged so that the water was overflowing onto the floor. He at once closed the faucet and removed the obstruction from the strainer and swept the water from the floor. The overflowing water had, however, found its way down into the plaintiff's store and had damaged her goods to the extent of about $300. This action is brought to recover that damage.

It is not shown by whom the faucet over the sink was thus left partly open, or who caused the sink to become clogged. But Mr.

Young's testimony of the character of the obstruction to the outlet of the sink justifies an inference that some nauseated person had used the sink, and had left the faucet partly open. That person may have been a tenant of the building, or a visitor to one of the tenants, or a mere trespasser. There was evidence in behalf of the plaintiff that Mr. Williams, one of the defendants, on the morning after the accident, said in substance to the plaintiff's husband, that he was very sorry for the overflow, that it would not occur again, and that "they would pay for" the damage done to the plaintiff's goods.

To entitle the plaintiff to recover it was necessary for her to show that the overflow that damaged her goods was caused by some negligence of the defendants.

Certainly no negligence ought to be imputed to the defendants from the fact that the sink was maintained in the alcove of the hallway on the second floor of the building. It was a common iron sink properly constructed with an outlet fully adequate to vent all the water that could be discharged into it through the faucet. We think it was not an imprudent, or unreasonable, or careless thing to do, to maintain that sink as it was maintained. It cannot be regarded as a nuisance, but rather as a reasonably necessary fixture for such a building. It had been there for seventeen years or more and no overflow from it had ever occurred before this accident, and there is no suggestion of proof that the defendants had any reason to anticipate that any harm would ever result from it.

It is familiar law that the owner of a building, not in a defective or dangerous condition, is not liable to a tenant or occupant of the building, or to any one else, for injuries or damages caused by the unauthorized, and not reasonably to be anticipated, act of any other tenant or occupant, or of any third person, unless his relation to the doer of the act is such that the doctrine respondeat superior applies. *Manning* v. *Sherman*, 110 Maine, 332, 335, *McCarthy* v. *Savings Bank*, 74 Maine, 315, *Allen* v. *Smith*, 76 Maine, 335, Cyc., Vol. 29, pages 477-8.

That the overflow and consequent damage to the plaintiff's goods was caused by the negligent act of some one cannot be doubted, but who did that negligent act is not shown. There is no evidence that it was done by the defendants personally, or by any one who stood in the relation of agent to them or for whose unauthorized act they could be held responsible on the ground that they had reason to anticipate it.

The overflow which caused the plaintiff's damage was the result of the careless act or acts of some unknown person or persons. It may have been, as suggested, the act of a tenant of the building, or of some visitor to a tenant, or of a mere trespasser in the building, but that is all conjecture. If, however, such were the fact, then, according to well settled principles, the defendants would not be liable, for they had no knowledge of the careless act or acts, and we think they should not be held, under the circumstances disclosed, to have anticipated that any such careless act would be committed. As a case practically on all fours with the case at bar, see *Rosenfield* v. *Newman*, 59 Minn., 156, 60 N. W., 1085.

In the opinion of the court the plaintiff has failed to establish a cause of action against the defendants for her damages, and the entry must be,

Judgment for defendants.

GEORGE R. SELLERS, Admr., *vs.* MARGARET V. WARREN, et als.

Knox. Opinion October 22, 1917.

Contracts. Options. Necessary language to constitute an acceptance of offer. Meaning of phrase "would not consider less than half."

The plaintiff, as administrator of Elsie A. Sellers, deceased, brings this action of assumpsit against the defendants Margaret V. Warren and Mary Gould for the recovery of one-half of eleven thousand dollars, or fifty-five hundred dollars, which he alleges the defendants agreed with Elsie A. Sellers, in her lifetime, should be paid to her upon sale of certain real estate. The case is reported.

Where in the negotiation of a contract one party rejects an offer of the other adding the words "would not consider less than half," the words added are not to be taken as an outright offer upon the part of the latter to sell for one-half.

The words "would not consider less than half" are equivalent to saying that the party using them will consider, think or reflect upon an offer of one-half, if made. The words are appropriate to the invitation rather than to the proposal of an offer.

Action on the case. Plea of general issue filed. At close of testimony case was reported to Law Court upon the evidence as presented, the Law Court to settle the rights of the parties. Judgment for defendant.

Case stated in opinion.

A. S. Littlefield, for plaintiff.

R. I. Thompson, for defendant.

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

BIRD, J. The plaintiff, as administrator of Elsie A. Sellers, deceased, brings this action of assumpsit against the defendants Margaret V. Warren and Mary Gould for the recovery of one-half of eleven thousand dollars, or fifty-five hundred dollars, which he alleges the defendants agreed with Elsie A. Sellers, in her life-time, should be paid to her upon sale of certain real estate. The case is in this court upon report.

The plaintiff, individually, and his intestate and the two principal defendants, Mrs. Warren and Mrs. Gould, were all interested in a certain parcel of real estate in Rockland, known as the Estabrook property.

The parties claim interest therein under an item of the will of Caroline H. Estabrook which is as follows:—

"I give, devise and bequeath to my sister, Elsie A. Sellers, my homestead on Pleasant Street, in said Rockland, and all that is therein contained with the right to make such disposition of the articles of personal property as she may desire, to have and to hold the said homestead during her natural life. After her death the said homestead is to revert to Margaret V. Warren and her daughter, Mary E. Gould before mentioned, or the survivor of the two. If the said Margaret V. Warren and Mary E. Gould should both die before the said Elsie A. Sellers, then at the death of the said Elsie A. Sellers, the homestead shall vest in my nephew, George R. Sellers, of South Weymouth, Massachusetts."

Early in the year 1916 a railroad corporation sought, through S. T. Kimball, Esq., an attorney-at-law authorized to act for it as trustee, to purchase this property for station purposes, offering the consideration of eleven thousand dollars. Miss Sellers accordingly gave to Mr. Kimball as trustee, a written option to purchase the property for

the sum mentioned. The option by its terms was to expire on the first day of July, 1916. The agreement was evidently prepared for all the parties in interest to join in its execution. Miss Sellers did, under date of May 16, 1916, execute the original and copies or duplicates of the agreement or option were sent to Mrs. Warren and Mrs. Gould, but apparently were never executed. The plaintiff, before the option was prepared, had declared himself to be willing to take whatever action Miss Sellers might desire.

Correspondence by letter was at once opened by E. K. Gould, Esq., acting as attorney for Miss Sellers, with the principal defendants for settlement of the terms on which they would become parties to the conveyance contemplated by the option. Various offers, counter-offers and refusals had been made, when on June 21, 1916, and thereafter the correspondence was conducted by telegraph as appears from the following telegrams:

"June 21, 1916.

To MARGARET V. WARREN,
518 Clay St., Portland, Oregon.

Miss Sellers finally persuaded offer you both four thousand. This her best offer. If declined option withdrawn sale abandoned station to be relocated on Park Street. Company will not buy unless four devisees sign deed. . . . .

E. K. GOULD."

"Seattle, Washn. 7 P. M. June 24 1916.

E. K. GOULD,
Rockland, Maine.

Cannot accept Sellers offer would not consider less than half

MARGARET V. WARREN.

"June 29, 1916.

To MARGARET V. WARREN
518 Clay Street
Portland, Oregon.

Sellers accepts your offer of equal division deed following by mail.

E. K. GOULD."

"July 5, 1916.

Miss Sellers died July fourth option expired July first. May be able to sell for you Eleven Thousand if we act quickly Wire

E. K. GOULD."

to which Mrs. Warren evidently replies:—

"Portland, Oregon July 5, 1916.

E. K. GOULD,
Rockland, Maine.

Will sell at once, will both sign.

MARGARET V. WARREN."

Subsequently Mrs. Warren and Mrs. Gould conveyed the property to the railroad corporation, receiving the consideration of eleven thousand dollars.

The court is forced to conclude that the telegram of June 24, 1916, does not, as claimed by plaintiff, contain an offer on the part of defendant Warren. "Would not consider less than half" is not to be taken as an outright offer to sell for one-half. In *Lake* v. *Ocean City*, 62 N. J. L., 160, 162, it is said that consider "means to think with care upon a matter." To the same effect is *Halleck* v. *Lebanon*, 215 Pa. St., 1, 5; See *Crocker* v. *Trevett*, 28 Maine, 271, 274; *Mason* v. *Rowe*, 16 Vt., 525, 528. It cannot be held that a refusal to consider less than half is an offer to accept one-half. It is tantamount to

saying that a party will consider, think or reflect upon such an offer of one-half, if made. The words are appropriate to the invitation rather than to the proposal of an offer. We conclude this is the construction to be placed upon the telegram of Mrs. Warren. The following cases *Ashcroft* v. *Butterworth*, 136 Mass., 511, 513, 514; *Martin* v. *Northwestern Fuel Co.*, 22 Fed., 596, 599; *Stagg* v. *Compton*, 81 Ind., 171, 175; *Knight* v. *Cooley*, 34 Ia., 218, 221; *Patton* v. *Arney*, 95 Ia., 664; *Moulton* v. *Kushaw*, 59 Wis., 316, 48 Am. Rep., 516, 519, are illustrative.

We will say, although unnecessary, that this construction receives strong support from the situation of the parties. In the telegram last preceding that of June 24, 1916, from the attorney of Miss Sellers, it is said "Miss Sellers finally persuaded offer you both four thousand. This her best offer. If declined option withdrawn sale abandoned station to be relocated on Park Street." Such being the attitude of plaintiff's intestate, she could not reasonably expect the words of the telegram of Mrs. Warren to be a definite offer for that which was no longer open for negotiation. See Wald's Pol. Cont. (1906) 307, 308. (244, 245).

Judgment may be entered for the defendant.

So ordered.

ALEXANDER BILODEAU

vs.

NARRAGANSETT MUTUAL FIRE INSURANCE COMPANY.

CLOTTIE BILODEAU

vs.

DIRIGO MUTUAL FIRE INSURANCE COMPANY.

Kennebec. Opinion October 22, 1917.

Contracts of insurance. Right to assign policy under R. S., 1916, Chap. 57, Sec. 63. Rule as to agents binding company. General rule as to waiver.

Exceptions and motions for new trial by defendants.

EXCEPTIONS: By virtue of the provision of R. S., 1916, Chap. 53, Sec. 119, the acts of agents of domestic insurance companies, regarding any insurance effected by them, may constitute a waiver of the terms of the policy, and the company is bound by such waiver.

MOTION: The testimony does not disclose such error on the part of the jury in reaching their verdicts as will authorize setting those verdicts aside under the well established rules of this court.

Action on the case to recover on certain insurance policies. The two actions were tried together, husband and wife plaintiff in each case. Defendant filed plea of general issue and also brief statement. Verdict was rendered for plaintiff in each case. Defendant filed exceptions to certain rulings of presiding Justice, and also motion for new trial. Exceptions overruled. Motion overruled.

Case stated in opinion.

Johnson & Perkins, for plaintiff.

Newell & Woodside, for defendant.

SITTING: KING, BIRD, HALEY, PHILBROOK, JJ.

PHILBROOK, J. These two suits, brought to recover on fire losses, were tried together. The plaintiffs are husband and wife. In

former suits each of these plaintiffs recovered a verdict against the Maine Central Railroad Company for the loss sustained, on the ground that a locomotive of that company, while passing the property destroyed, emitted sparks which caused the fire. Judgments in both suits were fully satisfied by the railroad company. By virtue of the provisions of R. S., 1916, Chap. 57, Sec. 63, both plaintiffs assigned their policies of insurance, and all their right, title and interest in those policies, to the railroad company. The latter brought these suits under the provisions of the statute just referred to, in the names of the insured, and is herein the plaintiff in interest.

The plaintiff in interest also obtained verdicts in both cases at bar. The defendant companies present bills of exceptions and motions for new trial on the customary grounds. Those exceptions and motions relate to the same principles in both cases and this discussion will proceed as if but one case were presented for consideration.

In addition to denial of liability under the general issue, the defendants alleged, for brief statement of matter of defense,

First; that the policy in suit was never paid for by the insured, or by anybody in his behalf, although the same was demanded and became due and payable at the delivery of said policy;

Second; that the assessments on said policy due and payable prior to the fire, as described in plaintiff's writ, were due and unpaid at the date of said fire;

Third; that the buildings were destroyed through the negligence and carelessness of the Maine Central Railroad Company, in its management of an engine in its use and under its control, which caused said fire to be set by sparks from said engine, and that the plaintiff has received full payment for said fire loss to his property so destroyed.

By an amendment to its pleadings and brief statement, each defendant declared that it is a mutual fire insurance company, organized under the statutes of this state; that by virtue of the statute it became the legal duty of the plaintiff, before receiving the policy in suit, and as a condition precedent to said policy taking effect, to deposit his note for a certain sum with the company, and to immediately pay a certain part of that note. The amended brief statement further declared that this last named payment was never made, and defendants therefore claimed that by reason of such non-payment the policy in suit never went into effect and was null and

void. The statement reiterated payment of the loss by the railroad, and finally alleged fraudulent over-valuation by the plaintiff of the property destroyed.

The defendant insurance companies in the printed argument presented to this court quite clearly and concisely stated their defenses to be as follows:

"The defenses raised in the case of Alexander Bilodeau, were, first, that the policy had not been paid for; second, that in the proof of loss furnished to the company, the items of loss were knowingly over-valued for the purpose of defrauding the defendant; and third, that the policy is void.

"The defenses raised in the case of Clottie Bilodeau, were, first, that the cash payment on the policy amounting to $6.54, had not been paid; second, that there were unpaid assessments; third, that with the intent to defraud the defendant, the plaintiff knowingly and intentionally overvalued items of property in her proof of loss under said policy; and fourth, that the policy is void.

"It is claimed, as a legal proposition, that, being mutual fire insurance companies, organized under the statutes of this state, the cash payment constitutes a condition precedent without which a policy does not become effective; that the cash payment not having been made on either, the contracts for insurance were never consummated for either; that, if otherwise, the policy of Clottie Bilodeau became void by reason of the non-payment of assessments; and that the statute provision for the cash payment could be waived only by proper action of the insurer and not by any act of its agent, Mr. Millett, unless he were expressly authorized so to do by corporate authority."

Thus it will be seen that the defenses relating to payment by the Maine Central Railroad Company, and the negligence of that company in causing the fire, were practically abandoned. The plaintiffs concede that the policy, in the case of Alexander Bilodeau, had not been paid for; also, that in the case of Clottie Bilodeau, the cash payment and certain assessments had not been paid; but urge that the contract requirements in these particulars were waived by the defendants. They deny that in either case there was a fraudulent over-valuation of the property destroyed, and deny that the policies were void.

In their turn the defendants deny waiver as claimed by the plaintiffs. Neither the bill of exceptions nor the argument of counsel contains complaint regarding instructions of the presiding Justice as to what constitutes waiver in law, but they urge that the waiver was not made, as matter of fact, and if made at all, was not made by competent authority and except to the instructions given upon this point. In support of these contentions the defendants cite numerous cases from other jurisdictions, as well as text writers, to the effect that the waiver suggested could only be done by corporate authority.

Our legislature has declared that "the agents of all domestic companies shall be regarded as in the place of the company in all respects regarding any insurance effected by them. The company is bound by their knowledge of the risk and of all matters connected therewith. Omissions and misdescriptions known to the agent shall be regarded as known by the company, and waived by it as if noted in the policy." R. S., Chap. 53, Sec. 119. That the acts of an agent may constitute a waiver of the terms of the policy, and that the company is bound by such waiver has been recently held by this court in *Frye* v. *Equitable Life Insurance Company*, 111 Maine, 287. Upon this question of waiver by an agent the defendants cite, and with some confidence rely upon *Lewis* v. *Monmouth Mutual Fire Ins. Co.*, 52 Maine, 497, and *Swett* v. *Citizens Relief Association*, 78 Maine, 541. The former case was decided four years before the enactment of the statute just quoted. The latter case involved the power of an agent to ratify a contract which was invalid in its inception. Neither case is applicable to the question now under consideration. The instructions made the subject of exceptions in the present case are in harmony with our statute law and the decisions of this court.

As to whether there was a waiver in fact, as claimed by the plaintiff, was a question to be determined by the jury under instructions which, we have just said, were correct. The defense of fraudulent over valuation was also in that same realm of fact. After a careful and patient study of the cases we are unable to say that in any of its findings there was such manifest error as to require the verdicts to be set aside.

Exceptions overruled.
Motion overruled.

STATE OF MAINE, (By Complaint), *vs.* DAVID MCCURDY, Appellant.

Kennebec. Opinion October 23, 1917.

General scope and purpose of complaint in bastardy proceedings. Meaning of word "child" where respondent is charged in a complaint for desertion.

This is a prosecution, on complaint and warrant, brought under the provisions of Chap. 42, Public Laws, 1907, and the amendments thereto, Chaps. 54 and 178, Public Laws, 1909, and Chap. 144, Public Laws, 1911, and comes before the court upon an agreed statement of facts.

Held:

1. The respondent's liability arises under the provisions of Chap. 99, R. S., 1903, under which he was tried, convicted and imprisoned. He was released from imprisonment by taking the poor debtor's oath as provided by statute, and he is exempt from further prosecution or arrest, except upon an execution procured in the same suit for non-compliance with the order of court therein.
2. He is under no other act liable to prosecution or arrest for or on account of the non-support of the illegitimate child in question. The duty to support such child is imposed by statute, and the same act provides for its enforcement.
3. The child in question is not respondent's minor child within the meaning of Public Laws of 1907, Chap. 42. The "child or children" contemplated by the provisions of Chap. 42, Public Laws, 1907, and amendments thereto, mean legitimate children, and do not include illegitimate children.
4. The support of illegitimate children is provided for under the bastardy act which makes adequate and exclusive provision for the enforcement of that duty.

Complaint and warrant under provision of Chap. 42, Public Laws of 1907 and amendments thereto. Respondent was adjudged guilty by the Judge of the Municipal Court and an appeal was taken to the Superior Court, Kennebec County, from which court the case was reported to Law Court upon an agreed statement of facts, the Law Court to determine the legal rights of the parties and to render judgment. Complaint dismissed.

The case is stated in the opinion.

William H. Fisher, County Attorney, for the State.

Maxcy & Goodspeed, and B. F. Maher, for respondent.

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

HANSON, J. This is a prosecution, on complaint and warrant, brought under the provisions of Chap. 42, Public Laws, 1907, and the amendments thereto, Chaps. 54 and 178, Public Laws, 1909, and Chap. 144, Public Laws, 1911, and comes before the court upon the following agreed statement of facts:

"On December 8, 1915, Marion Blondette of Augusta, Maine, complained upon oath before the Judge of the Municipal Court of said Augusta, that she was about to become the mother of a child, which if born alive would be a bastard, and accused David McCurdy of Gardiner, Maine, of being the father thereof. The Judge thereupon issued a warrant for the arrest of said McCurdy. On the 9th of December, 1915, the defendant was brought before said Judge and after a hearing was ordered to give bonds conditioned for his appearance at the January term of the Superior Court of the County of Kennebec next following. No hearing was held at the said January term, because the child had not been born at that time. The case came on to be tried at the April term of said court next following, and the jury returned a verdict of guilty, thereupon the defendant was adjudged the father of the said child, and was ordered by the court to pay the costs, to pay the expenses incurred through medical attendance and nursing, and to pay the sum of $12.00 each and every month for the support of said child until further order of the court; and was further ordered to furnish bonds to the complainant and to the City of Augusta conditioned upon the payments of the amounts as stated in the decree. McCurdy was unable to furnish bonds as was ordered and in accordance with the provision of R. S., Chap. 99, was committed to jail where he remained for 90 days. On July 5, 1916, after proper notice and hearing as provided by the statute he made a full disclosure of all his property. Thereupon the poor debtor's oath was administered, and the defendant was released from jail. He was at once arrested under the provisions of Chap. 42 of the Public Laws of 1907, and the amendments thereto, Chap. 178 of the Public Laws of 1909, and was charged with desertion of a child under the age of sixteen years, of the age of four months. A hearing was held that day in the Augusta Municipal Court and the defendant was found guilty and was sentenced to pay a fine of $150.00 and costs, or in

default of payment to serve six months in jail. The defendant appealed and was ordered to furnish bonds in the sum of $1,000.00 conditioned upon his appearance at the September term of the Superior Court of the County of Kennebec. At said term the said case was continued until the January term, 1917, and the defendant was permitted to give a personal recognizance in the sum of $200.00 for his appearance at that term. At the January term, 1917, by agreement of counsel for the defendant and the County Attorney, the case was to be submitted to the Law Court upon an agreed statement of facts. The child referred to in the criminal case is the same illegitimate child referred to in the bastardy proceedings, and the question is, whether the action in the criminal case may be maintained. If the action may be maintained, then the defendant is to appear before the Superior Court for sentence; if not, then the case is to be dismissed."

The respondent's liability arises under the provisions of Chap. 99, R. S., 1903, under which he was tried, convicted and imprisoned. He was released from imprisonment by taking the poor debtor's oath as provided by statute, and he is exempt from further prosecution or arrest, except upon an execution procured in the same suit for non-compliance with the order of court therein. *McLaughlin* v. *Whitten*, 32 Maine, 31. He is under no other act liable to prosecution or arrest for or on account of the non-support of the illegitimate child in question. The duty to support such child is imposed by statute, and the same act provides for its enforcement. Liability follows the breach of a duty. The duty in this case was imposed by Chap. 99, R. S., 1903, supra, and became a fixed liability only after full compliance with the requirements of that chapter. The former action, though criminal in form, was a civil action. *Smith v. Lint*, 37 Maine, 546.

The respondent is now charged in a criminal complaint with desertion of his minor child under the age of sixteen years. We think the action may not be maintained. The child in question is not respondent's minor child within the meaning of Public Laws of 1907, Chap. 42. The "child or children" contemplated by the provisions of Chap. 42, supra, mean legitimate children, and do not include illegitimate children. *Hall* v. *Cressey*, 92 Maine, 514, 7 C. J., 957, Sec. 38; *Hiram* v. *Pierce*, 45 Maine, 367, citing *Curtis* v. *Heronis*, 11 Met., 294.

The support of illegitimate children is provided for under the bastardy act which makes adequate and exclusive provision for the enforcement of that duty. Chap. 99, R. S., 1903; *McKenzie* v. *Lombard*, 85 Maine, 224; *Hammond* v. *L. A. & W. St. Railway*, 106 Maine, 213.

In accordance with the stipulation the entry must be,

Complaint dismissed.

JOSEPH B. FENDERSON *vs.* HARRIET N. FENDERSON.

Franklin. Opinion October 23, 1917.

Scope of court of equity. Redemption of mortgages. Waiver of foreclosure. Rule as to the right to redeem being kept open by agreement or otherwise.

Bill in equity in which the plaintiff prays that an account may be taken of the sum equitably due the defendant upon a mortgage for $500, and of the rents and profits, and the sums expended by her in repairs and improvements; that the plaintiff may be allowed to redeem said mortgaged premises by paying to the defendant such sum as may be found due the defendant by said account; and that the defendant may be ordered upon payment of said sum to surrender possession of said premises and execute a discharge of said mortgage to the plaintiff.

Held:

1. It is the rule that, in general, a mistake of law, pure and simple, is not adequate ground for relief.
2. If the mistake of law is not pure and simple, but is induced or accompanied by other special facts giving rise to an independent equity on behalf of the mistaken person, such as inequitable conduct of the other party, there can be no doubt that a court of equity will interpose its aid. Even when the mistake of law is pure and simple, equity *may* interfere.
3. A court of equity will not permit one party to take advantage and enjoy the benefit of an ignorance or mistake of law by the other, which he knew of and did not correct. While equity interposes under such circumstances, it follows, *a fortiori*, that when the mistake of law by one party is induced, aided, or accompanied by conduct of the other more positively inequitable, and containing ele-

ments of wrongful intent, such as misrepresentation, imposition, concealment, undue influence, breach of confidence reposed, mental weakness, or surprise, a court of equity will lend its aid and relieve from the consequences of the error.

4. The right to redeem mortgaged real estate may be kept open by express agreement of the parties, or by circumstances from which an agreement may be inferred.

Bill in equity asking for an accounting of the sum that may be equitably due under two mortgages given by plaintiff, and that plaintiff may be allowed to redeem said mortgages. Cause heard upon bill, answer and replication. By agreement of parties, at the close of the testimony the case was taken to the Law Court upon report. Judgment in accordance with opinion.

The case is stated in the opinion.

Robert Doe, of the New Hampshire Bar, *George F. Gould, and Frank W. Butler*, for plaintiff.

Richards & Rollins, and George C. Wheeler, for defendant.

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

HANSON, J. Bill in equity in which the plaintiff prays that an account may be taken of the sum equitably due the defendant upon a mortgage for $500. on the real estate hereinafter referred to, and of the rents and profits, and the sums expended by her in repairs and improvements; that the plaintiff may be allowed to redeem said mortgaged premises by paying to the defendant such sum as may be found due the defendant by said account; and that the defendant may be ordered upon payment of said sum to surrender possession of said premises and execute a discharge of said mortgage to the plaintiff.

The case is reported for the "determination of this court upon so much of the evidence as is legally admissible, the court to render such judgment as the law and equity require."

In February, 1911, the plaintiff was the owner of certain real estate in Scarboro, in the County of Cumberland, which was a portion of farm formerly owned in common and undivided, by the plaintiff and his father, Nathaniel B. Fenderson. In 1909 that part of the farm involved in this suit was set off to the plaintiff as his half. The barn

and outbuildings on the plaintiff's half were to be owned and occupied in common with Nathaniel B. Fenderson, the father, and the house and connected shed on the father's portion of the farm were to be owned and occupied in common with Joseph B. Fenderson, the plaintiff, and expense of repairs to be equally divided. The father's interest later became the property of Albion L. Fenderson, now deceased, brother of the plaintiff, and husband of the defendant.

On February 20, 1911, the plaintiff executed a mortgage on his portion of the farm in the sum of $500., payable in one year, to one Addison L. Winship. On February 27, 1911, said Winship assigned the mortgage to Frank W. Woodman. Interest on the mortgage was paid to February 20, 1914. On July 8, 1914, said Woodman commenced foreclosure of said mortgage by publication. On October 12, 1914, said Woodman assigned the mortgage to the defendant. The plaintiff, on April 15, 1912, mortgaged the same premises to his brother, the defendant's husband, Albion L. Fenderson, for $1,000 / on one year, and subject to the $500. mortgage first mentioned. On the death of Albion L. Fenderson, the defendant qualified as executor of his estate, and the last named mortgage came into her possession as executrix of said estate.

On November 6, 1914, the defendant, as executrix, commenced two suits against the plaintiff, one a real action in the Supreme Judicial Court for Cumberland County to foreclose the $1,000 mortgage, the other on the note secured by that mortgage, returnable in the County of Franklin.

The history of the case thus far is undisputed. The solution of the question raised by the bill and answer depends upon the equities, if any, arising and resulting from what was said and done at a meeting between the parties hereto, on the farm in question, in June before the foreclosure of the $500. mortgage would expire on July 8, 1915.

For a better understanding of the plaintiff's position, it may be well to state that the attorney who foreclosed the $500. mortgage, and who later acted as attorney for the plaintiff in the suits at law before mentioned, had informed the plaintiff that on account of an error in the later proceedings in connection with the suits referred to, the time for redemption would be extended so that he would have a year from the following September in which to redeem. It is not urged, however, that the advice of counsel operates in favor of the plaintiff's position.

It is admitted that the parties met on the premises in June, 1915, and the record shows the plaintiff's account of the meeting: "Q—State just what was said about the foreclosure? A—In general conversation the mortgage was brought up, and I told her I was going to pay her all the money that was due before the September Term of court, and I says, 'I am advised by counsel that I have until the September Term of Court and another year for redemption,' 'but', I says, 'I shan't take a year. I will have it paid by the September Term of Court.' Q—What did she say? A—She says, 'Yes', and looked at me and didn't say anything else. Only general conversation."

The defendant admits the meeting, but denies that such conversation took place, or that the $500. mortgage was referred to, but we are persuaded that the conversation was substantially as claimed by the plaintiff, and the testimony of Mr. Doe in relation to a second meeting of the parties in October at Farmington leaves no doubt as to the subject of the conversation in June. Mr. Doe testified,—"in the course of the conversation Joe called her attention to the fact that he had a talk with her on the farm in June preceding and said 'you know Hattie at that time I told you that I had until the September Term to pay up these mortgages and a year of redemption even after that,' and she says, 'I know that, but I came home to Farmington and asked Mr. Richards if you had a year in which to redeem the $500. mortgage and he told me you did not.'" This testimony of Mr. Doe is denied also by the defendant, who says that she knew the foreclosure would expire in July, knew it when she talked with the plaintiff in June, and had no occasion to ask Mr. Richards when the foreclosure would expire.

The case shows that the plaintiff acted upon the belief set out in the bill, and began negotiations through a bank in New Hampshire to procure money to pay all his indebtedness to the defendant; that he succeeded in doing so, and the preliminary work was done and notes and mortgage prepared and in readiness for execution in September, when further action on his part was rendered unnecessary by the defendant's refusal to consent to the redemption. The testimony discloses further that on July 28 the defendant sent the plaintiff an account of repairs and demanded payment. The plaintiff claims he was misled, to his injury, by the silence of the defendant when she should have spoken. The defendant asserts that while a conversa-

tion was had in June, it related to the $1,000. mortgage and not to the $500. mortgage, and the only question presented is this: Is the defendant now equitably estopped from insisting upon a strict foreclosure of the $500. mortgage? The defendant contends that the conversation in June, 1915, (1) does not show an agreement to extend the time for redemption, (2) nor does it show any conduct on the defendant's part which would estop her to claim that foreclosure was completed on July 8, 1915, and further, (3) that the action was not brought within the statutory period, and (4) that even if the plaintiff's contention is correct that the conduct of the defendant did amount to misrepresentation, the misrepresentation was one of law, on which the plaintiff had no right to rely.

Counsel for the defendant has cited *Carll* v. *Kerr*, 111 Maine, 365, as being directly in point, and urges the observance of the rule emphasized therein that "the time in which a mortgage may be redeemed is clearly fixed by statute and the court cannot enlarge it." That is now the well nigh universal rule and this court has not varied in following it. But while the court may not enlarge the time, the parties may do so, and the inquiry here is whether or not the parties have enlarged the time, and whether this court in the exercise of its equity powers has authority to consider all the facts and circumstances which help to show what is right and just between the parties and having found what is equitably right, to enforce it.

A careful study of the testimony can lead the mind to but one conclusion. The plaintiff owned the equity in his part of the family homestead. He had delayed payment of the amount due on the outstanding mortgages from causes over which he apparently had no control; he was involved in financial troubles, but desired to redeem the property, and made his intention clear to the defendant. The conversation in June shows this plainly, and it as plainly appears that he believed his right to redeem had been extended beyond the statute limitation on account of the pending litigation in which all his property had been attached, and in reference to which his counsel had advised him as above. While so understanding his rights, if nothing further were presented as a reason for equitable interference, he would be entitled to no relief. But the parties met and had the conversation detailed herein, and we are persuaded that the testimony justifies the plaintiff's claim that then and there words were spoken on the part of both the parties which, together with the conduct of

each in respect to the $500. mortgage foreclosure then nearly completed, and in view of the defendant's admissions as to her knowledge that foreclosure would be perfected, and her silence in respect thereto, justified him in believing as he did believe, that the time had been extended and that she was assenting thereto. And we must hold that she did assent, and that she is now equitably estopped to claim a strict foreclosure of the $500. mortgage. The case presents a series of facts unlike any other cited from our own decisions, and in our view one where equitable relief should be granted if ever extended by the court. The defendant, with full knowledge of her own rights, in conversation with the plaintiff, who had so far been misled as to his rights, and when the same is made known to her, adds to his ignorance and misfortune by at least assenting to his misunderstanding, has brought herself within the class which cannot be allowed to profit by their own wrong. She knew he had been misled, she knew he was further misled when she left him, and remained silent when she should have spoken. That he believed the defendant had assented to the extension is borne out by all that has since occurred. Her conduct was of such a character as would naturally have the effect of influencing the action of the plaintiff. It is not urged, nor is it necessary to hold, that the defendant had an actual intention to mislead or deceive the plaintiff in the conversation in June. We are not concerned with that. We are concerned, however, in preventing that which, if allowed, would work a manifest fraud upon the plaintiff. *Lewenburg* v. *Hayes*, 91 Maine, 105; *Brown* v. *Lawton*, 87 Maine, 83; *Martin* v. *Maine Central R. Co.*, 83 Maine, 100; Pomeroy's Equity, 3rd edition, Sections 802-3; *Rogers, Assignee*, v. *Portland & Brunswick St. Ry.*, 100 Maine, 93; *Holt* v. *N. E. Tel. & Tel. Co.*, 110 Maine, 12.

As to the contention that the complaint was not brought within the statutory period, in which the time limit is one year after the first publication, in this case July 8, 1914, when the complaint is filed nearly two years later, the rule is stated in *Schroeder* v. *Young*, 161 U. S., 334-344, as follows: "Defendant relies mainly upon the fact that the statutory period was allowed to expire before this bill was filed, but the court below found in this connection that before the time had expired to redeem the property, the plaintiff was told by the defendant Stephens that he would not be pushed, that the statutory time would not be insisted upon, and that the plaintiff believed and relied upon such assurance. Under such circumstances the courts

have held with great unanimity that the purchaser is estopped to insist upon the statutory period, notwithstanding the assurances were not in writing, and were made without consideration, upon the ground that the debtor was lulled into a false security." It will be noticed that in *Carll* v. *Kerr*, supra, on which defendant's counsel relies, the circumstances were not the same, and stop short of the vital stage reached in the case at bar. In that case the mortgagee's attorney inquired by telephone of the Register of Deeds as to the date of the first publication of the notice of foreclosure, and by mistake the Register of Deeds gave him the date of the last publication. There the plaintiff intended to redeem, but on account of misinformation from the Register of Deeds let the foreclosure expire. There is no pretense that the defendant in that case did anything, or said anything, or withheld anything to the injury of the plaintiff. The cases are clearly to be distinguished in facts and in principle.

As to the first contention of the defendant that the misrepresentation, if one was made, was a mistake of law. Assuming, but not conceding, that the initial mistake into which the plaintiff was led, was a mistake of law, and his rights were considered upon that phase alone, he would have no standing in equity, for it is the rule that, in general, a mistake of law, pure and simple, is not adequate ground for relief. Pomeroy's Equity, Jur. 3rd ed., Section 842. That authority, however, in treating the same subject, lays down the rule, "that if the mistake of law is not pure and simple, but is induced or accompanied by other special facts giving rise to an independent equity on behalf of the mistaken person, such as inequitable conduct of the other party, there can be no doubt that a court of equity will interpose its aid. Even when the mistake of law is pure and simple, equity *may* interfere." In further discussion of the subject the text writer says: "A court of equity will not permit one party to take advantage and enjoy the benefit of an ignorance or mistake of law by the other, which he knew of and did not correct. While equity interposes under such circumstances, it follows, *a fortiori*, that when the mistake of law by one party is induced, aided, or accompanied by conduct of the other more positively inequitable, and containing elements of wrongful intent, such as misrepresentation, imposition, concealment, undue influence, breach of confidence reposed, mental weakness, or surprise, a court of equity will lend its aid and relieve from the consequences of the error. The decisions illustrating this general rule

are numerous, and it will be found that many of the cases in which relief has been granted contain, either openly, or implicitly, some elements of such inequitable conduct." Idem, Sec. 847, citing *Jordan* v. *Stevens*, 51 Maine, 78; *Freeman* v. *Curtis*, 51 Maine, 140; *Spurr* v. *Benedict*, 99 Mass., 463; *Chestnut Hill, etc., Co.* v. *Chase*, 14 Conn., 123; *Woodbury, etc., Bank* v. *Charter Oak Ins. Co.*, 31 Conn., 517. See *Tarbox* v. *Tarbox*, 111 Maine, 381.

Our conclusion is in harmony with an unbroken line of decisions of this court, the latest expression being found in *Thomas* v. *Hall*, 116 Maine, 140, 100 Atl. Rep., 502, where it is held that the right to redeem mortgaged real estate may be kept open by express agreement of the parties, or by circumstances from which an agreement may be inferred.

The entry will be,

Bill sustained with costs.
Decree in accordance with this opinion.

ALMIRA C. NORTON, et als.,

Appellants from Decree of Judge of Probate in re Last Will and Testament of Susan York.

Cumberland. Opinion October 23, 1917.

Wills. Burden of proof showing testamentary capacity. Burden of proving undue influence. Acts of kindness or attention, diminishing another legacy as bearing on the question of undue influence.

This is an appeal from a decree of the Judge of Probate for the County of Cumberland admitting to probate the last will and testament of Susan York, late of Brunswick, in the County of Cumberland, and is before the court on report.

Held:

1. Here, as in the Probate Court, the burden is on the proponent to show mental capacity, and we are of the opinion that the proponent has sustained the burden.
2. The contestants rely largely upon the ground taken by them that the execution of the will was procured by undue influence, and the law casts upon them the burden of proving that allegation in their reasons of appeal.
3. Acts of kindness and courteous attention are not undue influence. Diminishing another legacy, or changing the amount for care of the lot in the cemetery, has no tendency to prove undue influence in the absence of evidence of other acts sufficient, in connection with that named, to overcome the volition and free agency of the testatrix.
4. From all the evidence we are of the opinion that the will and the provision in favor of Dr. Foss were not procured by undue influence exercised by him, or by others for him, upon the testatrix.

Appeal from a decree of the Judge of Probate, of Cumberland County, State of Maine, allowing the last will and testament of Susan York, late of Brunswick. The appeal and reasons for appeal were duly filed in the Supreme Court of Probate, and by agreement of parties the case was reported to the Law Court for decision on the questions raised in said appeal upon so much of the evidence as is legally admissible. Judgment in accordance with opinion.

The case is stated in the opinion.

Joseph H. Rousseau, and Frederic J. Laughlin, for proponents.

A. M. Spear, and Clarence E. Sawyer, for appellants.

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

HANSON, J. This is an appeal from a decree of the Judge of Probate for the County of Cumberland admitting to probate the last will and testament of Susan York, late of Brunswick, in the County of Cumberland, and is before the court on report. The contestants filed the following reasons of appeal:

1. That the alleged will was not duly executed.
2. That said deceased was not of testamentary capacity at the time of executing said will.
3. That the execution of said will was procured by undue influence.
4. That said execution of said will was induced and procured by misleading statements and a misunderstanding of the facts.
5. That said instrument does not express the last will of the deceased.

The testatrix, after making provision for a lot in Pine Grove Cemetery, made several bequests in money and jewelry to friends and lodges, and one dollar each to the contestants, bequeathed $500. to her executor, and the residue of her estate, about $8,000., to Dr. Clarence W. P. Foss, an acquaintance of many years, who was her attending physician.

The record discloses that the testatrix since 1911 had made three wills, the will under consideration having been made in September, 1915, two months prior to her death. In the first will the testatrix made similar provision for the care of the cemetery lot, and after making various small bequests, bequeathed to one of the attorneys for the contestants, who was not related to her, the residue of her estate in amount substantially the same as in the last will. In her second will, after making substantially the same smaller bequests, the testarix gave the residue of her estate in trust to her executor, who was also named a trustee, the income of said residue to be paid semi-annually to her heirs at law. This will was made January 29, 1915. Mr. Hall, the executor named in the second will, was named executor in the last will, and it appears that Mr. Hall met Dr. Foss for the first time on or about the date of the last will.

1. The contestants do not now contend that the will was not duly executed.

2. Here, as in the Probate Court, the burden is on the proponent to show mental capacity, and we are of the opinion that the proponent has sustained the burden.

3. The contestants rely largely upon the ground taken by them that the execution of the will was procured by undue influence, and the law casts upon them the burden of proving that allegation in their reasons of appeal.

The record contains nearly six hundred pages, the larger portion of which, on the part of the contestants, is devoted to testimony tending to sustain their theory that Dr. Foss, during his visits at the house of the testatrix from June to September, 1915, unduly influenced Mrs. York to execute a will in his favor. We have examined the record carefully and find that the contestants have failed to sustain the proposition asserted by them by a preponderance of all the evidence. The testimony discloses that during the progress of the disease for which he was treating the testatrix he brought to her sick room on one or more occasions delicacies demanded by her condition, that his bearing in the sick room was friendly and courteous, that his visits were always of short duration, and that the final disposition of her property was as much a surprise to him as to others. But acts of kindness and courteous attention are not undue influence. Diminishing another legacy, or changing the amount for care of the lot in the cemetery, has no tendency to prove undue influence in the absence of evidence, of other acts sufficient, in connection with that named, to overcome the volition and free agency of the testatrix. The case does not show any opportunity on the part of Dr. Foss to carry out the purpose unduly to influence Mrs. York. He was seldom if ever alone with her. Her illness required the presence of a nurse, and during his attendance three different nurses were employed, all of whom testify in the case to a course of conduct on the part of Dr. Foss characterized by uniform kindness and entirely in keeping with the highest professional ethics. From their testimony it not only appears that he had no opportunity unduly to influence the testatrix, but that he made no attempt to do so. That the testatrix selected the proponent as her residuary legatee is not evidence of undue influence. She had made a similar will three years before, naming a friend and not a relative as principal legatee; she had made another will, and again a

codicil thereto, in each instance withholding from her relatives the property which she did not intend they should have, and no suggestion enters the case that in all those acts she was of unsound mind or unduly influenced. She had a reason, which the case shows to be good and sufficient, for diverting her property into other channels. That she had a legal right to do as she did in each case in the absence of undue influence is not denied.

Reasons 4 and 5, so far as they are supported, are comprehended in the foregoing.

From all the evidence we are of the opinion that the will and the provision in favor of Dr. Foss were not procured by undue influence exercised by him, or by others for him, upon the testatrix.

The entry will be,

Appeal dismissed with costs for proponent.
Decree of the Judge of Probate affirmed.

FRANK A. CHASE *vs.* SAMUEL SCOLNIK.

Androscoggin. Opinion October 24, 1917.

Meaning of clause "exclusive original jurisdiction." Rule as to general Acts of legislation overruling and repealing provisions of Charters granted to Municipal corporations.

The jurisdiction of the Lewiston Municipal Court under Private and Special Laws, 1871, Chap. 636, as amended by Private and Special Laws, 1874, Chap. 626, and Private and Special Laws, 1887, Chap. 88, was as follows: "Said Municipal Court shall have exclusive jurisdiction in all civil actions in which the debt or damages demanded do not exceed twenty dollars . . . . and shall have original concurrent jurisdiction with the Supreme Judicial Court in all civil actions where the debt or damages demanded, exclusive of costs, do not exceed three hundred dollars," etc.

The act creating a Superior Court for Androscoggin County, Public Laws of 1917, Chap. 260, provided that "Within said County, said Superior Court shall have exclusive jurisdiction of civil appeals from municipal and police courts and trial justices, ... and all other civil actions at law not exclusively cognizable by municipal and police courts and trial justices where the damages demanded do not exceed five hundred dollars" etc.

In an action of assumpsit returnable in the Lewiston Municipal Court after the Superior Court act had taken effect in which the ad damnum was fifty dollars, it is

Held:

1. That the action not being exclusively cognizable by the Lewiston Municipal Court because the ad damnum exceeded twenty dollars became solely cognizable by the Superior Court.
2. That the two acts in so far as they apply to the jurisdiction over cases where the ad damnum exceeds twenty dollars and the specific demand in the writ does not exceed three hundred dollars are repugnant to each other and cannot stand together.
3. That the earlier statute must be regarded as amended by the later so as to become conformable thereto, and all those actions over which the Lewiston Municipal Court had previously taken concurrent jurisdiction with the Supreme Judicial Court, that is between twenty dollars and three hundred dollars, fell into the exclusive jurisdiction of the newly established Superior Court and the concurrent jurisdiction of the Municipal Court ceased.
4. That the defendants motion to dismiss for want or jurisdiction was well taken.

Action of assumpsit on account annexed, returnable at regular civil term of the Lewiston Municipal Court, said term of court being subsequent to the enactment of a law creating a Superior Court for said County of Androscoggin. The ad damnum in the writ was fifty dollars, and defendant duly filed motion to dismiss the action on the ground of jurisdiction, setting forth that the Superior Court had exclusive jurisdiction where the amount demanded was more than twenty dollars. Defendant's motion to dismiss was overruled and exceptions were duly filed and certified to the Chief Justice, as provided by the act creating said Municipal Court. Exceptions sustained.

Case stated in opinion.

Louis J. Brann, for plaintiff.

Benjamin L. Berman, for defendant.

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

CORNISH, C. J. This action of assumpsit was begun on August 2, 1917, and made returnable on the first Tuesday of September, 1917, in the Municipal Court for the City of Lewiston. The amount claimed in the account annexed is $22.75 and the ad damnum is fifty dollars. The defendant seasonably filed a motion to dismiss on the ground that the Municipal Court had no jurisdiction of the cause, the defendant claiming that the Superior Court for Androscoggin County created by the Legislature of 1917 is exclusively cognizable thereof. This motion was overruled by the court and the defendant's exceptions to this ruling were certified at once to the Chief Justice as provided by the act creating the court.

The jurisdiction of the Lewiston Municipal Court in civil matters as provided in the act creating the court, Private and Special Laws of 1871, Chap. 636, and as amended by Private and Special Laws of 1874, Chap. 626, and of 1887, Chap. 88, was as follows; "Said municipal court shall have exclusive jurisdiction in all civil actions in which the debt or damages demanded do not exceed twenty dollars, and both parties, or one of the parties and a person summoned as trustee, reside in the city of Lewiston, ... and shall also have original concurrent jurisdiction with the Supreme Judicial Court in all civil actions where the debt or damages demanded, exclusive of costs, do not exceed three hundred dollars, and the defendant resides in the County of Androscoggin."

Under these provisions the exclusive original jurisdiction of the Municipal Court in civil actions was limited to an ad damnum of twenty dollars. It also had concurrent jurisdiction with the Supreme Judicial Court where the specific demand set forth in the writ, exclusive of costs, did not exceed three hundred dollars. This difference in language limiting the amount is explained in *National Pub. Soc.* v. *Raye*, 115 Maine, 147.

This was the situation when the Superior Court was created by Chap. 260 of the Public Laws of 1917. Sec. 3 of that act, so far as material to the point under consideration, is as follows: "Within said County, said Superior Court shall have exclusive jurisdiction of civil appeals from municipal and police courts and trial justices, exclusive original jurisdiction of actions of scire facias on judgments and recognizances not exceeding five hundred dollars; of bastardy trials, and all other civil actions at law not exclusively cognizable by municipal and police courts and trial justices where the damages demanded do not exceed five hundred dollars, ... and concurrent original jurisdiction . . . . of all other civil actions at law where the damages exceed five hundred dollars" etc.

The particular clause under consideration here is "Exclusive original jurisdiction of . . . . all other actions at law not exclusively cognizable by municipal and police courts and trial justices where the damages demanded do not exceed five hundred dollars."

The interpretation of this section admits of no doubt. The language is unambiguous. The Superior Court is given exclusive jurisdiction up to an ad damnum of $500 of all actions which are not within the exclusive jurisdiction of municipal and Police Courts and Trial Justices. The Lewiston Municipal Court had exclusive jurisdiction in civil actions only up to twenty dollars. Therefore when the act creating the Superior Court took effect, on July 7, 1917, all those actions over which the Lewiston Municipal Court had previously taken concurrent jurisdiction with the Supreme Judicial Court, that is between twenty dollars and three hundred dollars, fell at once into the exclusive jurisdiction of the newly established Superior Court and the concurrent jurisdiction of the Municipal Court ceased. There is no escape from this conclusion. It is expressly stated in unmistakable terms.

When the Superior Court act was passed it worked an amendment of the Municipal Court act ipso facto. The two acts in so far as they

apply to the jurisdiction over cases where the ad damnum exceeds twenty dollars and the specific demand set forth in the writ does not exceed three hundred dollars, are antagonistic. They are so repugnant that they cannot stand together. Therefore the old statute must be regarded as amended by the new so as to become conformable thereto. *Starbird* v. *Brown*, 84 Maine, 238; *Jumper* v. *Moore*, 110 Maine, 159.

The plaintiff invokes the rule that general acts are held not to repeal the provisions of charters granted to municipal corporations, though conflicting with the general provisions, unless the words of the general statute are so strong and imperative as to render it manifest that the intention of the legislature cannot otherwise be satisfied, citing *State* v. *Cleland*, 68 Maine, 258, and *Bass* v. *Bangor*, 111 Maine, 390. The words of the Superior Court act, even if considered to be a general law, are so strong and imperative that they meet the requirements of this rigid rule. But, the Superior Court act, although printed in the general laws is, in essence, a local act and applies to Androscoggin County alone, the same County in which the Lewiston Municipal Court has jurisdiction. Both courts are virtually local, the Superior Court having the broader jurisdiction. Hence the rule as to general laws amending or repealing by implication the charters of a single municipal corporation is hardly applicable. But as was said by this court in *Starbird* v. *Brown*, 84 Maine, 238, where the application of that rule was contended for by counsel and *State* v. *Cleland* was relied upon as supporting that position: "There is this marked difference between that case and this. In that, the question was whether a general act should have general or only partial application. In this, the question is whether a general act shall have any application or not." The same comment is pertinent in the pending case.

The plaintiff further contends that the legislature could never have actually intended to take away from the Municipal Courts in Androscoggin County so much of their then existing jurisdiction. But we must be governed by their intention as expressed in the legislative act. We cannot distort the language of the act from its plain and unambiguous meaning.

In order to make assurance doubly sure section 7 of the Superior Court act further provides: "All acts and parts of acts relating to Courts and judicial proceedings shall be modified so far as to give

full effect to this act, and all acts and parts of acts inconsistent with this act are hereby repealed." This was the last word of the legislature on the subject and must govern. It is almost a repeal, not by implication merely but in express terms.

Our conclusion is that the Municipal Court has no jurisdiction of the pending suit and that the defendant's motion to dismiss was well taken.

Exceptions sustained.

ISRAEL GLOVSKY, Pet'r, *vs.* MAINE REALTY BUREAU, et al.

Cumberland. Opinion October 27, 1917.

R. S., 1916, Chap. 94, Sec. 1, paragraph 3, interpreted. Meaning of phrase "party in interest." Judgment. Parties bound by judgment. "Party in interest" as distinguished from "person in interest." Parties to a petition for review.

An indemnitor who has neither appeared and defended nor has been requested to defend an action against his indemnitee is not such a party in interest as to entitle him to petition for a review of the action under R. S., Chap. 94, Sec. 1, paragraph 3.

Petition for review, brought under R. S., 1916, Chap. 94, Sec. 1. paragraph 3. The presiding Justice, before whom petition was heard, ruled that the petitioner as a matter of law was not a "party in interest" within the meaning of the Statute and dismissed the petition; to which ruling, plaintiff filed exceptions. Exceptions overruled.

Case stated in opinion.

Carroll L. Beedy, for petitioner.

Robert M. Pennell, for Maine Realty Bureau.

Arthur Chapman, for Abraham Goodside.

SITTING: CORNISH, C. J., SPEAR, KING, HANSON, MADIGAN, JJ.

CORNISH, C. J. This is a petition for review. The facts upon which it is based are these. The Maine Realty Bureau on May 20, 1915, brought suit against one Abraham Goodside to recover commissions on the sale of certain real estate. After the case was heard by a referee and an award made, judgment was entered on February 16, 1916, in favor of the Maine Realty Bureau for the sum of one hundred and twenty dollars debt or damage and twenty-five dollars and thirty-nine cents costs.

Prior to May 20, 1915, the date of instituting the suit, the petitioner, Israel Glovsky, had entered into a certain written agreement with Goodside whereby Glovsky had agreed to take care of any claim which might arise against Goodside for commissions growing out of the real estate sale.

Subsequent to the rendition of judgment in the suit brought by the Realty Bureau, Goodside brought suit against Glovsky on this written agreement, which suit is still pending. Glovsky had no notice of the pendency of the suit against Goodside, was not present at the hearing, had no opportunity to defend, and now brings this petition for review of the judgment in that case, making both the Maine Realty Bureau and Goodside, who were the parties to the original suit, parties defendant in this petition as is the proper practice. *Farnsworth, Pet'r,* v. *Kimball,* 112 Maine, 238-240.

The petitioner rests his right to a review upon R. S., (1916), Chap. 94, Sec. 1, paragraph III, viz: "On the petition of a party in interest, who was not a party to the record, setting forth the fact of such interest" etc.

The sole inquiry therefore is this, can the petitioner be deemed "a party in interest," within the purview of this statute, under the admitted facts in this case? These words at first reading would seem to have a wide scope and to include any person who might be interested in the suit. But a "party in interest" is quite different from a "person in interest." The former phrase is far more limited in its application.

Prior to 1859 a petition for review could be brought only by a party of record or one representing the interest of such party. *Elwell* v. *Sylvester,* 27 Maine, 536; *Nowell* v. *Sanborn,* 44 Maine, 80, (1857). Perhaps in consequence of a suggestion of the court in the latter case

the Legislature of 1859 extended the rights of review somewhat and passed the act in question which was Sec. 3 of Chap. 94 of Public Laws, 1859. The language of this original act giving the right to a "party in interest" who was not a party to the record fixes beyond doubt the precise meaning of the term. The provision was as follows: "An action prosecuted or defended by a party in interest who is not a party of record may be reviewed on petition of the party in interest" &c. In the revision of 1871, Chap. 89, Sec. 1, paragraph third, this section was condensed and the words "an action prosecuted or defended" were omitted. This condensation has been followed in subsequent revisions. But this abbreviation of itself should not be deemed a change of legislative intent. *St. George* v. *Rockland*, 89 Maine, 43; *Mitchell* v. *Page*, 107 Maine, 388. As the court said in *Martin* v. *Bryant*, 108 Maine, 256: "There has been no specific legislation authorizing the changing of the phraseology of the statute by striking out the words omitted. A change in phraseology in the reenactment of a statute in a general revision does not change its effect unless there is an evident legislative intention to work such change." Citing *Hughes* v. *Farrar*, 45 Maine, 72; *Cummings* v. *Everett*, 82 Maine, 260; *Taylor* v. *Caribou*, 102 Maine, 401-6.

It is obvious therefore from the language of the original act that by the party in interest who is permitted to bring a petition for review is meant one who has taken part in the prosecution or defense of the original suit. He was not a party of record, but having taken part in the case he was as firmly bound by the judgment therein as if he had been a party of record. The reason of the enactment is apparent. If one is bound by a judgment in the original suit, it is just that he should be given the right to bring a petition for its review. Hence it has been held that a warrantor who has been vouched in to defend a real action brought against his warrantee can bring a petition for review as a party in interest, because after such voucher the warrantor was bound by the judgment rendered therein even though she did not appear and defend the suit. *Farnsworth, Pet'r*, v. *Kimball*, 112 Maine, 238-240.

Had Glovsky, the indemnitor in this case, appeared and defended the action brought against Goodside, his indemnitee, or had Goodside notified him of the pendency of the suit and asked him to take upon himself its defense, he would then have been a party in interest. The rights and obligations of an indemnitor in a suit brought against his

indemnitee have been stated as follows: "When a person is responsible over to another, either by operation of law or by express contract, and notice has been given him of the pendency of the suit and he has been requested to take upon himself the defense of it, he is no longer regarded as a stranger to the judgment that may be recovered, because he has the right to appear and defend the action, equally as if he were a party to the record. When notice is thus given, the judgment, if obtained without fraud or collusion, will be conclusive against him, whether he has appeared or not." *Davis* v. *Smith*, 79 Maine, 351-6; *Penobscot Lumbering Ass'n* v. *Bussell*, 92 Maine, 256.

The converse is also true. If the indemnitor takes no part in the trial and has no notice of the action nor request to assume its defense, he is not bound by the judgment. He is a stranger to it and a judgment that is res inter alios is not admissible in evidence against him. *Snow* v. *Russell*, 94 Maine, 322.

In the case at bar, the indemnitor, who is the petitioner in review, took no part in the defense of the original suit against his indemnitee, was not requested to assume the defense, and knew nothing of it. It follows therefore that he has no standing under the statute to ask the review of a judgment to which he was and is a stranger.

In *Johnson* v. *Johnson*, 81 Maine, 202, a residuary legatee of a solvent testator sought to review an action brought by the administrator cum testamento annexo against an alleged debtor of the estate, on the ground that she was a "party in interest who was not a party to the record." The court denied the right and in the course of the opinion said: "It is evident therefore that not every one interested in an action or affected by its result should have leave to bring an action of review. He may be a party by record or a party in interest, but he should be a party, having the care or responsibility of the suit. This petitioner though interested, is clearly not a party in interest, such as the statute contemplates."

Our conclusion therefore is that the presiding Justice did not err in dismissing the petition as a matter of law, and the entry must be,

Exceptions overruled.

JENNIE GILMAN, Trustee, In Equity,

vs.

HELEN BURNETT, et als.

Kennebec. Opinion October 27, 1917.

Wills. Cy pres doctrine. Rule when this doctrine can be applied. Rule where clause in will creates a public charity and it is impossible of execution and no general charitable intent shown.

In a bill in equity brought to construe a will,

Held:

1. When it appears from a will that the intention of the testatrix was that her property should be applied to a charitable purpose, whose general nature is described so that a general charitable intent can be inferred, then if by a change of circumstances it becomes impracticable to administer the trust in the precise manner provided by the testatrix the doctrine of cy pres may attach and the gift applied to some kindred charity as nearly like the original purpose as possible.
2. But if it appears that the gift was limited to a particular purpose and no general charitable intention is discovered, then if it becomes impossible to carry out the object, the doctrine of cy pres does not apply, and in the absence of any limitation over or other provision, the legacy lapses.
3. The testatrix in the case at bar devised her farm and wood lot in Augusta in perpetual trust to be used as a home for one or more unmarried women who have been employed in the straw industry in Massachusetts. The words of the will reveal a particular charitable gift but no general charitable intent, and therefore the cy pres doctrine does not apply.
4. The trust is impossible of fulfillment as the trustee admits because there are no funds with which to maintain the property, and it is constantly depreciating in value.
5. As it is impracticable and impossible to execute the particular charity for which provision is made, the gift fails and the property in question must pass to the next of kin as intestate property. The estate devised to the plaintiff depends upon the validity of the trust and falls when that falls.

Bill in equity asking for the construction of a certain clause in the will of Mina Perry. The cause was heard upon bill, answer and replication, and the sitting Justice before whom the cause was heard, being of the opinion that questions of law were involved of sufficient importance to justify the same and the parties agreeing thereto, the cause was reported to the Law Court to determine the construction of the will in question, as provided in R. S., 1903, Chap. 79, Sec. 6, paragraph 8 (R. S., 1916, Chap. 82, Sec. 6, paragraph 10); whether the trust therein created has failed, and if it had not failed in what manner the trust should be executed in order to carry out the intention of the testatrix. Decree in accordance with opinion.

Case stated in opinion.

Melvin S. Holway, for plaintiff.

LeRoy L. Hight, for defendants.

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

CORNISH, C. J. The plaintiff asks the construction of the following clause in the will of Mina Perry, who died January 13, 1916:

"Tenth: I give, bequeath and devise to my beloved aunt, Lydia B. Pickett, of Hyde Park, Massachusetts, the farm owned by me in Augusta, Maine, which is situate on the Eight Rod Road, so-called, on the west side of the Kennebec River, and about two and one-half miles north of the Kennebec Bridge in said Augusta; said farm containing fifty acres, more or less, with the buildings thereon; also my wood lot situate in Sidney in said County of Kennebec and State of Maine, and all the remainder of my estate, real, personal or mixed, wherever found or however situated, to said Lydia B. Pickett, in trust for the following purposes, to wit:

That said farm shall be occupied by my dear aunt, Lydia B. Pickett and that she shall afford a home for one or two, or more, if it may be arranged, of the unmarried women who have been employed in the straw industry of Massachusetts; that having been my occupation, and knowing the many worthy and deserving cases in the employ of that industry I desire that my accumulations, however limited they may be, shall be so intrusted as to afford to my sisters in this line of work a place of refuge and comfort; trusting that others may feel like enlarging and endowing this beautiful spot where my said farm

is situated in order to afford them the necessary comforts and enjoyments. Said trust to be carried on perpetually, and at the decease of my dear aunt, Lydia B. Pickett, or should I survive her, then I nominate and appoint my dear friend, Miss Jennie Gilman, of Readfield, Maine, her successor; and at the decease of my dear friend, Miss Jennie Gilman, then I nominate and appoint my dear friend, Mrs. Cora I. Morse of said Medway, Mass., her successor; and her successor or successors in carrying on this trust shall be appointed by the Judge of Probate for said County of Kennebec, upon the recommendation of my executor hereinafter named, if alive, otherwise upon the recommendation of the Mayor of said City of Augusta. This trust shall not take effect until October 1, 1908, and this provision is made so that the present occupant of the farm, William B. Smith, shall not be disturbed until that period, but shall enjoy the privileges and emoluments of said premises until that time. Said William B. Smith not to be allowed to cut any wood on said premises. Whatever funds may remain at the time of my decease I hereby give and bequeath to said trust above mentioned, the income to be used in the maintenance and carrying on of the object of the aforesaid trust." The entire property disposed of under this will consisted of the real estate specified in item ten appraised at $2,360. and personal property appraised at $629.20. The debts, legacies and expenses of administration will exhaust all the personal property, leaving for the trust estate the farm of fifty acres, the wood lot and a small amount of furniture and furnishings in the farm house. Lydia B. Pickett, the aunt of the testatrix, the trustee named in the will died prior to the death of the testatrix. The plaintiff, Jennie Gilman, named as her successor, has been duly appointed and qualified. She alleges in the bill that it is impossible to carry out the terms of the trust, that the farm has neither stock nor implements, and there is no money with which to purchase any or to pay the ordinary running expenses, that the income of the untilled land is very small and the property is steadily depreciating in value; that she is unable to live upon the premises and afford a home to one or more of the designated beneficiaries, that no other trustee would be able to do this without assistance apart from the property and that no outside party has shown a disposition to endow the farm so as to fulfill the purposes of the trust. All these allegations are admittedly true.

What is the power and the duty of the court when confronted with this situation? The plaintiff trustee asks us to find that she is a devisee for life, charged with a trust, that Cora I. Morse may be decreed to have a succeeding life estate, charged with the same trust, that the doctrine of cy pres shall be applied by the court in directing the execution of the trust and some plan be devised which will carry out the alleged general charitable intent of the testatrix. No suggestions are made as to what that plan might be. The established rules of law, however, as applied to the construction and execution of charitable trusts will not permit this course to be pursued.

That the clause in the will under consideration created what is known in law as a public charity is assumed by counsel on both sides and we will follow the assumption without determining the question. Such determination is unnecessary. Granting that a public charity was created, must it lapse under the facts presented here? This question we are constrained to answer in the affirmative.

It is conceded that the trust is so impracticable that it is impossible of execution for the uncontradicted reasons recited by the trustee in the bill. The real estate is grossly insufficient for the contemplated purpose. It is not even self-supporting. There is no additional endowment. There is no provision by which the property can be sold and the proceeds converted into a fund which could be allowed to accumulate, and if accumulations were permitted, the principal is so meagre that the time of enjoyment would be postponed so far into the future that the purpose of the testatrix, which was intended to be executed in a short time after her decease, would be thwarted.

In this respect this case differs from *Allen* v. *Nasson Institute*, 107 Maine, 120, where, after the termination of certain life estates real estate of great value was left in trust for the establishment of a young ladies institute. It was there expressly provided that a portion of the income during the continuance of the life estates should be funded, and at their termination a large portion of the real estate should be sold and the proceeds added to this fund. Under those conditions the court held that the trust was not impossible of fulfillment.

The case at bar, in this aspect, more nearly resembles *Teele* v. *Bishop*, 168 Mass., 341, where a bequest of not exceeding twelve thousand dollars was made to trustees for the purpose of purchasing a lot and building a chapel in Carndrine, Ireland, the title to be vested in the Bishop of that diocese and his successors, to be used

forever for purposes of public worship under the auspices of the Roman Catholic Church. The scheme of the testatrix was found to be impracticable and a wasteful expenditure of the trust fund, because the population of the place was small, and diminishing, the people too poor to maintain the chapel or support a priest and the bishop refused assistance without which the people could do neither. The trust was accordingly held to fail. The same was held in *Bowden* v. *Brown*, 200 Mass., 269, the trust provision being: "the remainder shall be given to the town of Marblehead, toward the erection of a building that shall be for the sick and poor, those without homes. I leave this in the hands of B. B. and R. of Marblehead." The town declined to accept the legacy which amounted to about $8,000 but which of itself was insufficient for the purpose. Kindred cases on this point are *Ely* v. *Atty. Gen.*, 202 Mass., 545; *Atty. Gen.* v. *Hurst*, 2 Cox, Ch. Cas. 369, and *In re White's Trusts*, 33 Ch. Div., 449.

To allow the trust property to remain as it is means its uselessness in the present and its greatly diminished value in the future. It should either be applied in such a way as to effectuate the general charitable intent of the testatrix, if such intent can be found, by invoking the doctrine of cy pres, or it should be held to belong to the heirs at law on the ground of a lapsed devise.

Whether the cy pres rule attaches depends upon whether or not the will itself discloses a general charitable intention or a gift for a particular charitable purpose without that intention. The rule under each state of facts has been clearly stated as follows: "If it appears from the will that the intention of the testatrix was that her property should be applied to a charitable purpose whose general nature is described so that a general charitable intent can be inferred, then if by a change of circumstances or in the law it becomes impracticable to administer the trust in the precise manner provided by the testatrix, the doctrine of cy pres will be applied in order that the general charitable intent which the court regards as the dominant one may not be altogether defeated. . . . . But if the charitable purpose is limited to a particular object or to a particular institution and there is no general charitable intent, then if it becomes impossible to carry out the object or the institution ceases to exist before the gift has taken effect, and possibly in some cases after it has taken effect, the doctrine of cy pres does not apply, and in the absence of any limitation over, or other provision, the legacy lapses." *Teele* v. *Bishop of*

Derby, 168 Mass., 341. In that case the court found no general charitable intent but a bequest for the particular purpose designated. Other illustrations are *Bowden* v. *Brown,* 200 Mass., 269, before cited; *Atty. Gen.* v. *Hurst,* 2 Cox, Ch. Cas., 369, where the gift was for the building of a church in a specified place; *Gladding* v. *Saint Matthew's Church,* 25 R. I., 628.

The same distinction between a general charitable intent and a particular charitable gift has always been recognized and applied by this court in accordance with the purpose disclosed in the particular will under consideration, such general intent being discovered and therefore the cy pres doctrine applied as in *Lynch* v. *Cong. Parish,* 109 Maine, 32, and only a special gift being found and therefore the cy pres doctrine rejected as in *Merrill* v. *Hayden,* 86 Maine, 133, and *Brooks* v. *Belfast,* 90 Maine, 318.

We search in vain in the will in the pending case for evidence of any general charitable intent on the part of the testatrix. The words in every portion preclude such an inference. The other items of the will embrace small gifts to several personal friends, together with a trust fund of one hundred dollars to the Forest Grove Cemetery Association. The character of the testatrix's intention must be gleaned from item ten alone. Here the emphasis is laid not on the general relief of the beneficiaries named but on one specific object to be carried out at one specific place. The farm is to be occupied by the trustees named where "a home is to be afforded" one or more of the beneficiaries. It is to be "a place of refuge and comfort." She trusts "that others may feel like enlarging and endowing this beautiful spot where my said farm is situated in order to afford them the necessary comforts and enjoyments." The trust is not to take effect until a later day in order to prevent the then occupant from being disturbed in his occupancy. The final sentence is "whatever funds may remain at the time of my decease I hereby give and bequeath to said trust above mentioned, the income to be used in the maintenance and carrying on of the object of the aforesaid trust", that is the maintenance and carrying on of the farm for the benefit of the persons specified. There is nothing to indicate that the testatrix intended to make any provision for the recipients of her bounty unless they could be provided for in her old home, the spot that she loved and thought so beautiful. Her charitable purpose was linked with the particular farm which constituted the subject of her bounty. The exact loca-

tion provided for in the will was the paramount consideration in her thought, and a general provision for the beneficiaries would seem to be quite beyond her contemplation. This case is therefore to be sharply distinguished from the line of decisions cited by the learned counsel for the plaintiff, in all of which the court found a general charitable purpose, such as *Osgood* v. *Rogers*, 186 Mass., 238; *Richardson* v. *Mullery*, 200 Mass., 247; *Grimke* v. *Atty. Gen.*, 206 Mass., 49; *Norris* v. *Loomis*, 215 Mass., 344, and *Lynch* v. *Cong. Parish*, 109 Maine, 32.

We are therefore of opinion that it is impracticable and impossible to execute the particular charity for which provision is made, that the doctrine of cy pres cannot be invoked, that the gift fails and the property in question must pass to the next of kin as intestate property. *Haskell* v. *Staples*, 116 Maine, 103. The estate devised to the plaintiff depends upon the validity of the trust and falls when that falls.

Costs and reasonable counsel fees may be allowed by the sitting Justice and paid from the estate.

So ordered.

FRANK B. WILDER, Trustee,

vs.

ESTELLE L. WILDER BUTLER, et al.

Waldo. Opinion October 27, 1917.

General rule as to the rights of "adopted children." Rule where one makes provision for his own "child or children" as to including an "adopted child or children." Rule where provision is made for a "child or children" of some other person. Rule as to "adopted child" taking as a "lineal descendant." Distinction between an "adopted child" inheriting a legacy from the testator and taking the same legacy as a "lineal descendant" by force of the statute.

A deed of trust provided that at the termination of certain life estates the trustee should transfer and convey said premises and trust estate in fee simple to the child or children of A., free and discharged of all trusts. A. left no children of his body but left a legally adopted son, the adoption having occurred sixteen years after the trust deed was executed.

Upon the question whether this adopted son is to be deemed a "child" within the purview of this trust deed it is

Held:

1. That under R. S., Chap. 72, Sec. 38, an adopted child, so far as custody of the person and rights of inheritance and obedience are concerned, becomes the child of the adopters the same as if born to them in lawful wedlock, with two exceptions not material here.
2. That when one makes provision for his own "child or children" by will or by deed of trust he should be presumed to have included an adopted child within that designation.
3. But when in a will or deed of trust provision is made for a "child or children" of some other person than the testator or grantor an adopted child is not included unless other language in the will or deed makes it clear that he was intended to be included.
4. That as the gift over in this case was to the "child or children" of another party than the grantor the presumption is against the estate passing to the adopted son, and as the record is barren of any facts tending to prove that the grantor intended the estate to pass to an adopted child, the burden resting on the defendants has not been sustained.

Action of forcible entry and detainer. In the Municipal Court defendant filed plea of general issue, together with brief statement alleging title in Walter Morse Wilder, under whom defendant claimed to occupy and hold the property in question. In the Supreme Court, to which the action was appealed, defendants, by consent of plaintiff and by leave of court, filed an amended brief statement and also filed an equitable plea under and by virtue of Chap. 84, Secs. 14, 17, R. S., 1903 (Chap. 87, Secs. 15, 17, R. S., 1916), and the case was reported to Law Court upon agreed statements, the Law Court to determine all questions of law and fact and to render judgment accordingly. Judgment for plaintiff.

Case stated in opinion.

Dunton & Morse, for plaintiff.

Arthur S. Littlefield, for defendants.

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

CORNISH, C. J. This is an action of forcible entry and detainer. The legal rights of the parties depend upon the construction to be given to the words "child or children" as used in a certain clause in a trust deed from Andreas Blume to Frank B. Wilder, Trustee, dated January 23, 1892. This trust deed granted a life estate in certain property in Waldo County to William L. Wilder, and, at his decease, an estate to Minnie E. Wilder, the wife of William L., during her life or her widowhood. Then follows the clause in controversy: "And on her marriage, or if she shall not marry again, on her death, (the trustee) to transfer and convey said premises and trust estate in fee simple to the child or children of said William L. Wilder, free and discharged of all trusts."

Minnie E. Wilder was divorced by her husband, William L., in 1903. She married again and now disclaims all interest in the subject matter of this suit. William L. subsequently married Estella L. Morse, one of the defendants, who had been previously married and had a son by the former husband. On August 14, 1908, sixteen years after the trust deed was given, this son was duly adopted by his step-father, William L. Wilder, and took the name of Walter Morse Wilder. He is the co-defendant. William L. Wilder died on May 4, 1915, leaving no children of his body, but leaving this adopted son. Without going further into the chain of title it is sufficient to state, that

it is agreed that if this adopted son takes the property under the terms of the trust deed, judgment is to be rendered for the defendants; otherwise for the plaintiff. The single question therefore is, whether this adopted son is to be deemed a "child" of William L. Wilder within the purview of this trust deed. Under the settled law of this State we must answer this question in the negative.

The defendants base their contention upon the statute governing adoption which is in these words: "By such decree the natural parents are divested of all legal rights in respect to such child, and he is freed from all legal obligations of obedience and maintenance in respect to them; and for the custody of the person and all rights of inheritance, obedience and maintenance he becomes to all intents and purposes, the child of his adopters, the same as if born to them in lawful wedlock, except that he shall not inherit property expressly limited to the heirs of the body of the adopters, nor property from their lineal or collateral kindred by right of representation" etc., R. S., Chap. 72, Sec. 38. Neither of these exceptions is involved here. The adopted child is not to all intents and purposes whatever declared to be the child of his adopters the same as if born to them in lawful wedlock, but "for the custody of the person and all rights of inheritance, obedience and maintenance." The limitation is plain. The original statute in this State had even a narrower scope. It provided that a child so adopted should be deemed to have the same rights as the child of the body, merely "for the custody of the person and the right of obedience." Public Laws 1855, Chap. 189, Sec. 6. The qualified right of inheritance was added by Public Laws 1880, Chap. 183.

What is the legal effect of the present statute regulating adoption so far as property rights are concerned? In strictness it simply fixes the status of the adopted child in case of the intestacy of his adopters, where the rights of inheritance are involved. It is also held to have a bearing upon the intention of the grantor or testator who is himself the adopter. But it is of no particular aid in determining whether an adopted child is within or without the designation of "child" or "children" as used in a deed or will where the grantor or testator is other than the adopter. The right of inheritance by the adopted child is a matter of statutory creation; the taking under a deed or a will depends upon the intention of the grantor or testator, as revealed by the instrument itself construed in the light of the surrounding

facts and conditions. Where the grantor or testator is the adopting parent it is reasonable to presume that the adopted child was within the intended bounty of such grantor or testator. But where he is a stranger to the adoption such presumption does not prevail. The distinction between the limitation of the statute to the inheritance rights of the adopted child, and the rule governing the construction of a deed or will of a stranger to the adoption is clear, and it has been observed in previous decisions of this court. A leading case in each line will serve as illustrations.

In *Warren* v. *Prescott*, 84 Maine, 483, the testatrix devised the residue of her estate, share and share alike, to various relatives, each legatee being entitled to one-eleventh. One legatee predeceased the testatrix, leaving no issue of his body but leaving an adopted child. Under the statute, then and now in existence, when a relative of the testator, having a devise of real or personal estate, dies before the testator, leaving lineal descendants, the devise does not lapse as at common law, but those descendants take such estate as would have been taken by such deceased relative if he had survived. R. S., (1916) Chap. 79, Sec. 10. The precise question before the court in that case was whether an adopted child is made a lineal descendant by the statute of adoption, and as such could prevent the lapsing of the legacy. Lineal descendants are those to whom the property would descend in a line, were there no will. Who they may be is prescribed in this State by the statutes regulating descent. The statute of adoption makes an adopted child inherit from its adopters the same as a child born to them in lawful wedlock, with certain exceptions not here involved, and to that extent constitutes a part of the statute of descent. Therefore the child by adoption answers the requirement of lineal descendant, and the court so held in that case. The only question was that of inheritance from the adopter, as was made clear by the court in stating the rights of the adopted child: "He does not 'inherit' the legacy from the testator. He takes as a lineal descendant of the legatee by force of the statute. . . . Not as a lineal descendant by birth, but as a statutory lineal descendant, and as lawfully in the line of descent as if he were placed there by birth. It is as competent for the legislature to place a child by adoption in the direct line of descent as for the common law to place a child by birth there." The construction of the word "child" in a will, as including an adopted child, was not involved in that case;

simply the construction of the words "lineal descendants" in another statute, as including an adopted child under the provisions of this statute. The gift was to the legatee alone. There was no limitation as to child or children. There was no suggestion as to where the testatrix desired that share to go in case of the legatee's death prior to her own. She left that matter to the law, and the statute as interpreted by the court settled it. An adopted child was held to be a statutory lineal descendant and the existence of a lineal descendant prevented the lapsing of the legacy.

As clearly illustrative of the other line of decisions, those involving the construction of the word "child" in a deed or will as embracing an adopted child, is the recent case of *Woodcock's Appeal*, 103 Maine, 214. In that case the testatrix gave the remainder of her estate to her daughter Mary for life. Then followed this clause: "Upon the decease of my said daughter Mary, without a child or children, I give and devise the balance of my estate then remaining unto my following named three children, ... equally, and in case either of my said three children shall die before said Mary, leaving a child or children, then it is my will and desire and I do hereby devise and bequeath that the child or children of said deceased child shall receive the same share as its or their parent would have received if living." One of the sons died, leaving no child of his blood but a child by adoption. The question directly involved was whether the words "child or children", as used in the clause in the will above quoted, included this adopted child, and the court held that it did not. It was not a question of the construction of the adoption statute as in *Warren* v. *Prescott*, supra, but of the words in a will; not a question of the intention of the legislature but of the testatrix. The rule to be followed in the construction of a will, and the reasons therefor, are laid down in these words:

"Where one makes provision for his own 'child or children' by that designation he should be held to have included an adopted child, since he is under obligation in morals, if not in law, to make provision for such child", (citing *Virgin, Ex'r.*, v. *Marwick*, 97 Maine, 578, and *Martin* v. *Aetna Life Ins. Co.*, 73 Maine, 25) "When, in a will, provision is made for 'a child or children' of some other person than the testator, an adopted child is not included, unless other language in the will makes it clear that he was intended to be included, which is not the case here. In making a devise over from his own children

to their 'child or children' there is a presumption that the testator intended 'child or children' of his own blood, and did not intend his estate to go to a stranger to his blood. Blood relationship has always been recognized by the common law as a potent factor in testacy."

The application of this rule in the case at bar is conclusive upon the rights of the parties, because the terms of the gifts in the two instruments, and the circumstances, are substantially the same. The gift over by the grantor in this trust deed, as by the testatrix in the will, was not to his own child or children but to the child or children of another party, William L. Wilder. Therefore the presumption is against the estate passing to the adopted son of William L. unless in other ways such clearly appears to have been the intention of the grantor. The case is barren of any facts suggesting such intention. The same considerations that led the court in *Woodcock's Appeal* to deny the right of the adopted child, prevail with equal force here. The adopted son of William L. Wilder, however fully his child at law, was in no way related to the grantor Blume, nor even to his grantors, the executors of the will of Charles W. Wilder whose conveyance to Blume was a part of the same transaction. The trust settlement was made when William L., the first beneficiary, was living with his first wife, from whom he was subsequently divorced, and sixteen years prior to the adoption by William L. of this son of his second wife by a former husband. The grantor or settler was under no kind of obligation to make provision for him and no intention to do so can be inferred from the situation.

The defendants confidently rely upon two Massachusetts cases, one in the State and the other in the Federal Court, in support of their contention, but the statute under which they were decided was much broader than the statute in Maine. The first is *Sewall* v. *Roberts*, 115 Mass., 262, (1874) where it was held that the adopted child of a beneficiary took as a "child" under the terms of the trust settlement. The Massachusetts statute, governing that case, as quoted in the opinion, provided that "a child, so adopted, shall be deemed for the purposes of inheritance by such child and all other legal consequences and incidents of the natural relation of parents and children, the child of the parents by adoption, the same as if he had been born to them in lawful wedlock" etc. This act established the status of an adopted child not only as regards inheritance, but for

"all other legal consequences and incidents of the natural relation of parents and children." This language is very broad and comprehensive, as the court remarked, and it was upon this clause that the opinion was based. Here are the decisive words: "It is true that if she takes under the settlement the property does not come to her by inheritance, but it comes to her as one of 'the legal consequences and incidents of the natural relation of parents and children.'" This comprehensive clause upon which that decision rested is not to be found in the Maine statute, and for this reason *Sewall* v. *Roberts* fails as an authority here.

It is significant that within two years after this interpretation was rendered by the court, the Legislature of Massachusetts repealed the statute under which *Sewall* v. *Roberts* was decided and enacted Chap. 213 of the Public Laws of 1876 "with a view to limit the operation of the earlier statutes as construed by the Court", as the Federal Court observed in *Tirrell* v. *Bacon*, 3 Fed. Rep., 62. This case is the other upon which the defendants strongly rely, but although it was decided in 1880, four years after the statute in *Sewall* v. *Roberts* had been repealed, it involved the construction of the same statute, because the adoption of the child and the death of the testator having both occurred prior to the passage of the statute of 1876, Chap. 213, the interest of the adopted child had become vested and therefore was expressly excepted from the provisions of that statute as the court held. *Tirrell* v. *Bacon* rests on *Sewall* v. *Roberts* and together with that case is not to be regarded as an authority in the case at bar. It is unnecessary to discuss other authorities cited by the learned counsel for the defendants.

Under the present statute in Massachusetts, which is the embodiment of Chap. 213 of the Public Laws of 1876, the term "child" or its equivalent in a grant, devise or trust deed, is held to include a child adopted by the grantor, testator or settler, unless the contrary plainly appears by the terms of the instrument; but where the grantor, testator or settler is not himself the adopting parent, the adopted child does not have the rights of a child of the body unless it plainly appears to have been the intention of the testator to include such adopted child. Revised Laws of Mass., Chap. 154, Sec. 8; *Wyeth* v. *Stone*, 144 Mass., 441; *Blodget* v. *Stowell*, 189 Mass., 142; *Walcott* v. *Robinson*, 214 Mass., 172.

This court, in the case of *Woodcock's Appeal*, supra, established the same rule of construction in this State as the Legislature of Massachusetts has formulated in statute. The burden is upon the defendants here to show that it was the intention of the settler to include an adopted child of William L. Wilder, when he used the words "child or children" in his trust deed. We can find nothing to indicate that the settler had in mind any other than the child or children by blood, children in fact, in the ordinary signification of the term. The burden resting upon the defendants has not been sustained.

Judgment for plaintiff.

MARCIA B. GODING *vs.* MILTON BECKWITH, et als.

Androscoggin. Opinion October 27, 1917.

Release of surety on a bond in a bastardy complaint. What constitutes a final judgment in a bastardy complaint. Meaning of "surrender into court." Time of surrendering principal on bond in court in order for sureties to be released. Amount of judgment to be rendered on bond. Amount of execution to be issued on such judgment.

In an action of debt against the principal and sureties on a bastardy bond executed in accordance with R. S., (1903) Chap. 99, Sec. 3, the presiding Justice directed a verdict for the plaintiff. Upon exceptions by defendant,

Held:

1. That after the signing of the bond the sureties had the election either to surrender the accused into court at any time before final judgment and be discharged, or to satisfy the judgment after it was rendered.
2. The decree of filiation signed by the presiding Justice and entered on the docket in open court constituted the final judgment of the court.
3. When the final judgment was rendered the right to surrender the accused into court ceased.
4. That after the decree was agreed upon, what took place between counsel did not constitute a waiver on the part of the complainant nor release the sureties from their legal obligations under the bond.

Action of debt on a bond given in a complaint in bastardy. Defendants filed plea of general issue and also brief statement. At the conclusion of the evidence, the court directed a verdict for the plaintiff, to which ruling defendants filed exceptions. Exceptions overruled. Judgment in accordance with opinion.

Case stated in opinion.

McGillicuddy & Morey, for plaintiff.

Harrie L. Webber, for defendants.

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

CORNISH, C. J. Action of debt against the principal and sureties in a bastardy bond dated November 14, 1915, and executed in accordance with R. S. (1903), Chap, 99, Sec. 3. The conditions were for the appearance of the principal defendant Beckwith at the January term, 1916, of the Supreme Judicial Court for Androscoggin County and his abiding the order of the court in the bastardy proceedings.

It appears that the complaint was entered at the January term and continued to the April term, 1916, under Sec. 4 of the same chapter. At the latter term Beckwith, the accused, was present in court with his counsel as if for trial. The sureties were also present in the court room. Before the case was called for trial Beckwith and his attorney together with the attorney for the complainant retired for a conference in the Judge's room and a form of decree was agreed upon which obviated the necessity of a trial. Thereupon the presiding Justice returned to the court room and his decree of filiation, as agreed upon by the parties and signed by him, was read and entered in open court. This decree adjudicated the paternity of the child and provided for the payment of expenses already incurred and for its future support. This constituted the final judgment of the Court. *Doyen* v. *Leavitt*, 76 Maine, 247; *Corson* v. *Dunlap*, 80 Maine, 354; *Brett* v. *Murphy*, 80 Maine, 358.

The rights and obligations of the sureties at that juncture are well settled. After the signing of the bond the sureties had the election either to surrender the accused in court at any time before final judgment, and be discharged, as provided in R. S., Chap. 99, Sec. 4, or to satisfy the judgment after it was rendered. The sureties admit that they did not surrender the accused in court. True they were present

in the court room with the accused as were doubtless many other spectators. The court was probably ignorant of their presence. They were not parties to the pending suit. To satisfy the statute there must be a formal surrender on the part of the sureties and an exoneration entered on the docket in discharging the bail. *Blood* v. *Morrill*, 17 Vt., 598; *Humphrey* v. *Karson*, 26 Vt., 760. Some such formal step is necessary so that the complainant may have knowledge of the fact and protect her rights, and the accused may be committed until a new bond is given, as the statute provides.

When the final judgment was entered in this case the right of surrender into court ceased, and there remained the other obligation which was "the performance of the order of Court consequent on the adjudication of the accused as the reputed father of the child." *Taylor* v. *Hughes*, 3 Maine, 433; *Corson* v. *Tuttle*, 19 Maine, 409. The sureties "are not authorized to delay action until they learn what the judgment is and then elect whether to satisfy it or surrender the principal. The statute says they must elect before judgment." *Brett* v. *Murphy*, 80 Maine, 358, 361.

The sureties in this action plead neither surrender nor performance, but they contend that after the decree of filiation was drawn up and agreed upon, counsel for the complainant agreed with counsel for the accused to give the accused until the end of the term to pay the amount due and furnish new bond, that thereby the complainant waived the terms of the order without the consent of the sureties and the sureties were relieved from the condition of the bond which compelled them to abide the order of court.

The fact that such an agreement was made, or understanding arrived at was emphatically denied in evidence by the counsel for the complainant, but that issue it is unnecessary to determine. Granting that the agreement was made it did not release these defendants from their legal obligations under the bond. There was no consideration for such an agreement, and therefore it was not a binding contract. At the best it was a mere consent to forbear for a time the strict performance of the terms of the order, but it was non-enforcible and therefore the legal rights of the sureties on the bond were in no way affected by it. *Leavitt* v. *Savage*, 16 Maine, 72; *Berry* v. *Pullen*, 69 Maine, 101; *Thorn* v. *Pinkham*, 84 Maine, 101; *Bank* v. *Blake*, 113 Maine, 313. If their rights were unaffected, so were their obligations.

The sureties having failed to surrender their principal before final judgment and to comply with the order of court after final judgment, the presiding Justice did not err in directing a verdict for the plaintiff in the penal sum of the bond. *Hodge* v. *Hodgdon*, 8 Cush., 294. Execution however should issue only for such damages as accrued under the order of court. *Corson* v. *Dunlap*, 80 Maine, 354-358; *Same* v. *Same*, 83 Maine, 32.

Exceptions overruled.

JOSEPH A. BRACKENBURY, et al.

vs.

SARAH D. P. HODGKIN, et al.

Androscoggin. Opinion October 27, 1917.

Courts of equity. Jurisdiction over trusts. Unilateral contracts; how same may be accepted and completed. Appeal in equity from finding of sitting Justice. Creation of equitable trust. Power of court in equity to grant relief in cases of trust.

In a bill in equity brought to enforce the plaintiffs' equitable interest in certain real estate the sitting Justice sustained the bill. Upon defendants' appeal it is *Held*:

1. That a valid contract was made between the parties, whereby the plaintiffs were to care for the defendant Sarah, during her life and to have the homestead at her decease.
2. That an equitable interest was thereby created in favor of the plaintiffs.
3. That there has been no breach of contract on the part of the plaintiffs.
4. That the court in equity is given special statutory jurisdiction to grant relief in cases of trusts, and the plaintiffs are entitled to the remedy here sought.

Bill in equity. Defendants each filed a demurrer and answer. Cause was heard before presiding Justice, from whose findings and decree an appeal to Law Court was taken by defendant. Judgment in accordance with opinion.

Case stated in opinion.
McGillicuddy & Morey, for plaintiffs.
Benjamin L. Berman, and Jacob H. Berman, for defendants.

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

CORNISH, C. J. The defendant, Mrs. Sarah D. P. Hodgkin, on the eighth day of February, 1915, was the owner of certain real estate, her home farm, situated in the outskirts of Lewiston. She was a widow and was living alone. She was the mother of six adult children, five sons, one of whom, Walter, is the co-defendant, and one daughter, who is the co-plaintiff. The plaintiffs were then residing in Independence, Missouri. Many letters had passed between mother and daughter concerning the daughter and her husband returning to the old home and taking care of the mother, and finally, on February 8, 1915, the mother sent a letter to the daughter and her husband which is the foundation of this bill in equity. In this letter she made a definite proposal, the substance of which was that if the Brackenburys would move to Lewiston, and maintain and care for Mrs. Hodgkin on the home place during her life, and pay the moving expenses, they were to have the use and income of the premises, together with the use of the household goods, with certain exceptions, Mrs. Hodgkin to have what rooms she might need. The letter closed, by way of postscript, with the words: "you to have the place when I have passed away."

Relying upon this offer, which was neither withdrawn nor modified, and in acceptance thereof, the plaintiffs moved from Missouri to Maine late in April, 1915, went upon the premises described and entered upon the performance of the contract. Trouble developed after a few weeks and the relations between the parties grew most disagreeable. The mother brought two suits against her son-in-law on trifling matters and finally ordered the plaintiffs from the place but they refused to leave. Then on November 7, 1916, she executed and delivered to her son, Walter C. Hodgkin, a deed of the premises, reserving a life estate in herself. Walter, however, was not a bona fide purchaser for value without notice but took the deed with full knowledge of the agreement between the parties and for the sole purpose of evicting the plaintiffs. On the very day the deed was executed he served a notice to quit upon Mr. Brackenbury, as pre-

liminary to an action of forcible entry and detainer which was brought on November 13, 1916. This bill in equity was brought by the plaintiffs to secure a reconveyance of the farm from Walter to his mother, to restrain and enjoin Walter from further prosecuting his action of forcible entry and detainer and to obtain an adjudication that the mother holds the legal title impressed with a trust in favor of the plaintiffs in accordance with their contract.

The sitting Justice made an elaborate and carefully considered finding of facts and signed a decree, sustaining the bill with costs against Walter C. Hodgkin and granting the relief prayed for. The case is before the Law Court on the defendants' appeal from this decree.

Four main issues are raised.

1. As to the completion and existence of a valid contract.

A legal and binding contract is clearly proven. The offer on the part of the mother was in writing and its terms cannot successfully be disputed. There was no need that it be accepted in words nor that a counter promise on the part of the plaintiffs be made. The offer was the basis, not of a bilateral contract, requiring a reciprocal promise, a promise for a promise, but of a unilateral contract requiring an act for a promise. "In the latter case the only acceptance of the offer that is necessary is the performance of the act. In other words the promise becomes binding when the act is performed." 6 R. C. L., 607. This is elementary law.

The plaintiffs here accepted the offer by moving from Missouri to the mother's farm in Lewiston and entering upon the performance of the specified acts, and they have continued performance since that time so far as they have been permitted by the mother to do so. The existence of a completed and valid contract is clear.

2. The creation of an equitable interest.

This contract between the parties, the performance of which was entered upon by the plaintiffs, created an equitable interest in the land described in the bill in favor of the plaintiffs. The letter of February 8, 1915, signed by the mother, answered the statutory requirement that "there can be no trust concerning lands, except trusts arising or resulting by implication of law, unless created or declared by some writing signed by the party or his attorney." R. S. (1903), Chap. 75, Sec. 14. No particular formality need be observed; a letter or other memorandum is sufficient to establish a trust provided its terms and the relations of the parties to it appear

with reasonable certainty. *Bates* v. *Hurd*, 65 Maine, 181; *McClellan* v. *McClellan*, 65 Maine, 500. The equitable interest of the plaintiffs in these premises is obvious and they are entitled to have that interest protected.

3. Alleged breach of duty on the part of the plaintiffs.

The defendants contend that, granting an equitable estate has been established, the plaintiffs have failed of performance because of their improper and unkind treatment of Mrs. Hodgkin, and therefore have forfeited the right to equitable relief which they might otherwise be entitled to. The sitting Justice decided this question of fact in favor of the plaintiffs and his finding is fully warranted by the evidence. Mrs. Hodgkin's temperament and disposition, not only as described in the testimony of others but as revealed in her own attitude, conduct and testimony as a witness, as they stand out on the printed record, mark her as the provoking cause in the various family difficulties. She was "the one primarily at fault."

4. Adequate relief at law.

The defendants finally invoke the familiar rule that the plaintiffs have a plain and adequate remedy at law and therefore cannot ask relief in equity.

The answer to this proposition is that this rule does not apply when the court has been given full equity jurisdiction or has been given special statutory jurisdiction covering the case. *Brown* v. *Kimball Co.*, 84 Maine, 492; *Farnsworth* v. *Whiting*, 104 Maine, 488; *Trask* v. *Chase*, 107 Maine, 137. The court in equity in this State is given special statutory jurisdiction to grant relief in cases of trusts, R. S., (1903), Chap. 79, Sec. 6, paragraph IV, and therefore the exception and not the rule must govern here.

The plaintiffs are entitled to the remedy here sought and the entry must be,

Appeal dismissed.
Decree of sitting Justice affirmed with costs against Walter C. Hodgkin.

THEODORE KERR *vs.* LORENZO F. DYER.

Cumberland. Opinion November 13, 1917.

Negotiable instruments. Liability of indorsers on promissory notes. Necessity of proving demand on maker to fix liability of indorser. When demand on maker must be made. Effect of notary's certificate.

An action of assumpsit by indorser against indorsee. At the close of the evidence for plaintiff, the court directed a verdict for defendant and the plaintiff excepted.

When a note is made payable at any bank or either of the banks in a city or town it may be presented at either of them. The law requiring a demand upon the maker of a promissory note, in order to fix the liability of an indorser, is satisfied if the note was in the bank at which it was made payable on the day when it fell due.

A statement in the certificate of a notary public of presentment and demand on the day after the maturity of a note is not even prima facie evidence of a legal presentment and demand.

The burden of proof is upon plaintiff to show that all the steps, necessary to hold an indorser, have been taken. No step is presumed to have been taken in the absence of evidence.

Action on the case by holder of note against indorser. The case was heard at the April term, A. D. 1917, of the Superior Court, Cumberland County. At close of plaintiff's testimony, court ordered verdict for defendant; to which ruling, plaintiff filed exceptions. Exceptions overruled.

Case stated in opinion.

Harold R. Foss, for plaintiff.

Woodman & Whitehouse, and Clement F. Robinson, for defendant.

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

BIRD, J. This is an action of assumpsit upon a promissory note of the tenor following:—

$300. Portland, Maine, June 8, 1909.

Four months after date I promise to pay to the order of A. W. Dyer, Three Hundred Dollars, at any Bank in Portland, Maine.

Value received with interest.

C. B. DALTON.

The note bore the following indorsements "A. W. Dyer, Lorenzo F. Dyer, Theodore Kerr. Previous indorsements guaranteed. Pay to the order of Portland National Bank, Portland, Maine. Westbrook Trust Company, Westbrook, Maine. W. M. Lamb, Treas."

The declaration alleged an indorsement of the note by the payee to Lorenzo F. Dyer and by the latter to the plaintiff and that he on the eighth day of October, 1909, at Portland, presented the note when due and payable to the maker for payment which he refused. The case was tried in accordance with the declaration as an action of indorsee against indorser. (*Calhoun* v. *Averill*, 30 Maine, 310, 318).

At the close of the evidence of the plaintiff, the court directed a verdict for defendant upon the express ground that there was no evidence in the case that demand was made on the day the note became due to fix the liability of the indorser. It is upon exception to this ruling that the case is before this court.

It is the undoubted law of this State that when a note is made payable at any bank or either of the banks in a city or town it may be presented at either of them. *Langley* v. *Palmer*, 30 Maine, 467, 50 Am. Dec. 454. *Allen* v. *Avery*, 47 Maine, 287. The law requiring a demand upon the maker of a promissory note, in order to fix the liability of an endorser, is satisfied, if the note was in the bank at which it was made payable, or was demanded there, on the day when it fell due. *Magoun* v. *Walker*, 49 Maine, 419, 420.

The evidence in the case is the note, the certificate of a notary public, protesting the note for alleged non-payment, and the testimony of the plaintiff.

The certificate of the notary alleges that on the ninth day of October, 1909, he presented and demanded payment of the note at the Portland National Bank of Portland [one of the banks of Portland, Maine]; that payment was refused; that the note remaining unpaid, he duly and officially notified the indorsers of its dishonor by written notice, each notice requiring payment.

The note maturing on the eighth day of October, 1909, the certificate of the notary is not even prima facie evidence of a legal presentment and demand. *Page* v. *Gilbert*, 60 Maine, 485, 488, 489; *Brooks* v. *Blaney*, 62 Maine, 456, 458.

It is urged for the plaintiff that his evidence shows that the note was in the Portland National Bank for collection on the day of its maturity. We do not find that it does. The burden of proof is upon the plaintiff to show that all the steps were taken necessary to hold the indorser. No step is presumed to have been taken without some evidence. *Magoun* v. *Walker*, 49 Maine, 419, 420. The testimony of plaintiff does not indicate the date on which the note was sent to the bank, through the trust company, for collection—whether before, on or after the day of its maturity. Considering the fact that the notary made demand on the day after maturity, and his statement must be taken as true, it seems, considering all possible inferences, little better than a possibility that the note was at the bank on the day of maturity and a conclusion based upon a possibility is unwarranted. *Titcomb* v. *Powers*, 108 Maine, 347, 349; *Allen* v. *R. R. Co.*, 112 Maine, 480, 483; *Seavey* v. *Laughlin*, 98 Maine, 517.

The plaintiff having failed to prove legal presentment and demand to fix the liability of the indorser, the exceptions must be overruled and it is so ordered.

FRED L. EMMONS *vs.* EUGENE A. SIMPSON.

York. Opinion November 14, 1917.

Service of writs on non-residents. Necessary form of plea in abatement to jurisdiction of court. Form of plea in abatement to the writ or service.

The writ in this action was served on the defendant, a non-resident while attending court as a party and witness. Claiming exemption from service the defendant by his attorney pleaded in abatement, On the ground that the plea was to the jurisdiction of the court and that by pleading by attorney the defendant admitted jurisdiction, the plaintiff demurred to the plea. The presiding Justice overruled the demurrer and the plaintiff filed exceptions.

Held:

The plea was a plea in abatement to the writ and not a plea to the jurisdiction and therefore properly pleaded by attorney.

Action on the case for abuse of process. At return term, defendant seasonably filed plea in abatement, setting forth the fact that he was a non-resident at the time service was made upon him. To the plea in abatement so filed, plaintiff filed demurrer. The presiding Justice overruled the demurrer, sustained the plea in abatement with costs; to which ruling the plaintiff filed exceptions. Exceptions overruled.

Case stated in opinion.

Robert B. Seidel, for plaintiff.

Stone & Stone, for defendant.

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

MADIGAN, J. The writ in this action was served on the defendant, a non-resident, while he was attending court in this State, as a party and witness. Claiming to be exempt from service, while so attending court the defendant by his attorney seasonably filed a plea in abatement. The presiding Justice overruled a demurrer to the plea, and the case is before the court on exception to this ruling.

The plaintiff contends that this is a plea to the jurisdiction, and therefore should have been pleaded in person, and not by attorney. It is, however a plea to the writ and not to the jurisdiction, and properly pleaded. While the defendant has admitted the court's jurisdiction, he has not admitted valid service of the writ, or waived his privilege of exemption from service. Under the laws of England, attorneys were privileged from service in their own court, and a claim of such privilege was properly made by plea in abatement filed by defendant's attorney. Chitty vol. 2, page 273. Massachusetts statutes provided that local or transitory actions should be brought in the county where one of the parties lived, otherwise they would abate. *Cleveland* v. *Welch*, 4 Mass., 591, holds that parties desiring to avail themselves of the provisions of this statute must do so by plea in abatement to the writ, "for the exception is not to the jurisdiction, but to the writ as sued out and returned in the wrong county."

In *Guild, Admr.*, vs. *Richardsin, Admr.*, 6th of Pickering, 364, the defendant in a writ was named as resident of a town not within the Commonwealth, and the officer returned that he had attached all of the defendant's interest in a parcel of land, and had left a summons at the place of his last and usual abode when in the Commonwealth. The defendant pleaded by attorney that he had no interest in the land, and prayed that the writ might abate and for his costs. The court held that the plea was a plea to the writ and not the jurisdiction of the court. The court says as follows: "This plea was well pleaded by the attorney. If it had been a plea to the jurisdiction, the reasoning of the plaintiff's counsel would have been conclusive. So, according to the English practice, misnomer cannot be pleaded by attorney; but other pleas in abatement may be so pleaded, and such is the uniform practice. By appearing by an attorney of the court, the defendant admits its jurisdiction, but not that the writ is good, or the service sufficient."

Exceptions overruled.

S. ELLISON SAWYER, Petitioner,

vs.

THE COUNTY COMMISSIONERS OF ANDROSCOGGIN COUNTY.

Androscoggin. Opinion November 14, 1917.

Writ of mandamus. General rule as to when same may be granted. Rights and duties of Sheriffs. Powers and duties of County Commissioners.

Mandamus to compel the county commissioners of Androscoggin to "fix the pay" of the petitioner for services as jail physician.

The case is reported and presents the following question: First, can mandamus be properly invoked upon the allegations in the petition and admitted by the return. Second, Who, if either, has the legal right to employ a physician to render medical attendance to sick prisoners confined in jail, the county commissioners, or the sheriff. Third, To determine the case upon legal principles.

Held:

(1) That the various statutes relating to the subject all point the same way and are consistent with the expressed intention of the legislature, that the sheriff or his deputy, as jailer, shall have absolute and exclusive custody and charge of all prisoners confined in the jail.

(2) That these provisions impose so great a responsibility upon the sheriff or jailer for the safe keeping of all prisoners that their interpretation is inconsistent with any other theory than that which vests in the sheriff complete control of the key that unlocks the door that stands between the confinement of prisoners and access to escape.

(3) That nowhere is found any authority, express or implied, conferred upon the county commissioners, in conflict with the authority vested by the statutes, in the sheriff or his deputy, as jailer.

(4) That the interpretation of the statutes herein reviewed by express language, not only give, but impose upon, the sheriff or his deputy, as jailer, the sole responsibility for the care, custody and safe keeping of the prisoners; and by necessary implication, authorize him, alone, when necessary, to employ a physician to administer to the prisoners.

Petition for mandamus. Defendants filed answer and, by agreement of parties, cause was reported to Law Court upon certain agreements and stipulations. Judgment in accordance with opinion.

Case stated in opinion.

Garcelon & Adams, and George C. Webber, for petitioner.

William H. Hines, County Attorney, for respondents.

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

SPEAR, J. Mandamus to compel the County Commissioners of Androscoggin to "fix the pay" of the petitioner for services as jail physician.

The case is reported and presents the following questions: First, Can mandamus be properly invoked upon the allegations in the petition and admitted by the return? Second, Who, if either, has the legal right to employ a physician to render medical attendance to sick prisoners confined in jail, the County Commissioners, or the Sheriff? Third, To determine the case upon legal principles.

The solution of these questions depends upon the construction of the statutes relating to the respective duties and powers of the sheriff and county commissioners.

At the outset it may be said that there is no statute conferring express authority either upon the sheriff or county commissioners to employ a "physician authorized to attend the sick" as expressed in R. S., 1916, Chap. 85, Sec. 47, or "the physician appointed to attend said prisoner" as said in R. S., Chap. 127, Sec. 26. Yet these expressions and the necessity of such action, necessarily imply the duty and power of some authority, having the control and custody of prisoners, who are helpless in their own right, to employ a physician to administer to the welfare of the prisoners in a county jail at the expense of the county. This authority once implied from the statutes, is as positive as if expressed in the statutes.

Before discussing the question of implied authority it may be well to first determine whether, if the implied power is found in the sheriff to employ a physician to treat the prisoners, he is entitled under the facts of this case to the remedy of mandamus. By the process of elimination this question may be determined. R. S., Chap. 85, Sec. 27, provides that for all subordinate assistants and employees of the jailer the county commissioners shall fix their pay. They therefore cannot bring suit against the county until the pay is fixed. *Huse* v. *Cumberland County,* 29 Maine, 467. (1) The commissioners,

while they have refused to pay the bill presented by the physician in the case at bar, have not fixed his pay. Hence he cannot bring an action of assumpsit on an implied contract or quantum meruit. (2) He is not a public officer. He is an employee. His employment is conceded. The legality of his employment only is in question. Hence quo warranto does not lie. (3) The county commissioners have not acted, according to the statute, upon his bill. They have rejected it, not "fixed his pay" as something or nothing. Hence certiorari will not lie.

It quite clearly appears that no remedy lies except upon petition for mandamus. In *Dennett* v. *Manufacturing Company*, 106 Maine, 478 the use of mandamus is defined as follows: "From the authorities the general rule is deducible, we think, that mandamus will not be used except to compel the performance of some duty clearly imposed by law and in respect to the performance of which no discretion may be exercised, and in behalf of one whose right to its performance is legally established and unquestioned, and where there is no other sufficient and adequate remedy." Under this definition the petitioner must show that he was legally employed and had a legal claim against the county upon which it was the duty of the county commissioners to fix the amount to be paid. The legality of his bill depends upon the legality of his employment. When the latter question is determined the former will be taken care of. We have already concluded that power must be implied from the statutes to authorize somebody, either the sheriff, or the county commissioners, to employ a physician for sick prisoners for which he will be entitled to a reasonable compensation. Who shall it be? It depends upon the construction of the statutes, considered in pari materia. Ordinarily the interpretation of a statute depends upon the intent of the legislature as gleaned from certain words in a section. But here it depends upon the intent as gleaned from certain sections in different chapters, as the intent is to be determined by implication. Accordingly, in their bearing upon a proper interpretation, the situation and the circumstances connected with the service to be performed become of unusual importance. The situation presents a county containing a jail erected and supported for the confinement and detention of the prisoners who may be committed to it. These prisoners are in the custody of the law and helpless. They can neither confer nor communicate with the outside public except through the medium of some official agency.

Their health, as an infliction upon themselves, or as a menace to the other prisoners, as in the case of an infectious or loathsome disease, depends upon official attention. These are not theoretical, but actual, conditions. These circumstances demonstrate the necessity of lodging authority in some agency that can act quickly and efficiently in the employment of medical aid.

In view of the official functions of the sheriff, as jailer, and of the county commissioners as financial officers of the county, which agency is the better adapted to meet the requirements of this situation?

The office of sheriff is one of the oldest known to the common law. It is inseparably associated with the county. He is the chief executive officer of the state in his county. The office of sheriff is recognized in the earliest annals of English law. It is much older than Magna Charta. Under all systems of government which have recognized the law as the supreme rule of action it has been found absolutely necessary to vest in some one person the ultimate power to preserve the peace and quell disorder and suppress riots, and this person is the sheriff. His power is largely a discretionary one. See Words and Phrases, title, "Sheriff." In this state the sheriff is a constitutional officer. By the common law and the statute law he is made responsible as a conservator of the peace and a protection to society against the commission of vice and crime. He is obliged to give a bond in the sum of $25,000 conditioned for the faithful performance of the duties of his office and to answer for all neglects and misdoings of his deputies.

The board of county commissioners are political officials whose primary duties are to act as financial agents of the county. R. S., 1916, Chap. 83, Sec. 10 under the caption "Duties of County Commissioners" provides as follows: "The county commissioners shall make the county estimates and cause the taxes to be assessed; examine, allow and settle accounts of the receipts and expenditures of moneys of the county; represent it; have the care of its property and management of its business; by an order recorded, appoint an agent to convey its real estate; lay out, alter or discontinue ways, and perform all other duties required by law." Under this general provision and other provisions of the statute it is the duty of the commissioners to provide and keep in repair jails as provided in the statute, to provide workshops for prisoners, to provide servitude

employment for prisoners, and may authorize the keepers of jails to keep able bodied male prisoners to work on the building or repairing of highways. This last provision is significant. The commissioners are not permitted to set the prisoners at work, themselves. They can only authorize the keeper of the jail to do this.

Nowhere in the statute are the commissioners vested with the powers of jailer or given control or custody of prisoners while confined in jail. No responsibility by bond or penalty is placed upon them for the care, custody or condition of the prisoners. Nor are they required to be present at all at the jail to look after the prisoners or to delegate any agent to represent them in this regard.

Accordingly, from the standpoint of adaptability the sheriff as jailer is the only officer who, by himself or keeper, is always present at the jail ready to act in any emergency.

Thus the situation and circumstances, in view of the general duties, respectively, of the sheriff and county commissioners, would strongly suggest that the sheriff is the official, intended to be made responsible for and vested with the authority to employ every person whose employment requires him to have access to the cells of the prisoners.

But in addition to this general rule of construction the various sections found in different chapters of the statute all point directly to the sheriff as the official, whose authority and control are intended to extend exclusively to the care and custody of the prisoners while they are within the confines of the jail. These statutes are all consistent with the exercise of such power and control and inconsistent with any other hypothesis.

Sec. 27 of Chap. 85 in express terms confers such dominion over the jail and the prisoners: "The sheriff has the custody and charge of the jail in his county, and of all prisoners therein, and shall keep it himself, or by his deputy, as jailer, master or keeper, for whom he is responsible." This language is definite, unambiguous and clear. The sheriff has (1) the custody and charge of the jail; (2) of all prisoners therein; (3) shall keep it himself; (4) or by his deputy as jailer, master or keeper; (5) for whom he is responsible.

Nowhere are these five direct and positive functions of the sheriff modified by express statute or necessary implication or conflict of authority.

The next sentence reads: "The jailer, master or keeper shall appoint all subordinate assistants and employees for whom he is

responsible." Construed in the light of the previous sentence, defining the powers of the sheriff, this language is equally unambiguous and clear, and, when viewed in the light of the situation, its interpretation would seem to be unquestionable. The duties imposed by the sheriff by the first sentence in this section, if he perform those duties, make it absolutely necessary that he should have the appointment of every person, no matter what his employment, lawyer, doctor or minister,—who shall be permitted to enter the jail and come in personal contact with the prisoners. If the county commissioners can employ a jail physician, such right of employment necessarily implies the further right of admitting him to the jail, to the cells and to personal contact with the prisoners. The exercise of such authority is in utter conflict with the responsibility which is placed upon the sheriff by this section. The security of the prisoners against escape is jeopardized. It establishes a divided authority over the prisoners and takes away from the sheriff the powers and duties, the exclusive exercise of which, only, are commensurate with his responsibility. Without express statute conferring such authority, in view of the sheriff's duties, we think it cannot be supplied by implication.

We might rest here but several other sections of the statute are pertinent to the interpretation already given. These sections all tend to show that it was the purpose of the legislature to make the sheriff or his deputy, as jailer, responsible in every way for the care, control and safe keeping of prisoners within his custody. Section 30 provides that the sheriff shall keep the jail clean and healthy and pay strict attention to the personal cleanliness of the prisoners at the expense of the country. Section 31 is emphatic in its bearing upon the intent of the legislature in placing the responsibility on the jailer: "Every keeper of a jail shall reside constantly with his family, if he has any, in the house provided for him, if, in the opinion of the county commissioners it is good and sufficient, and if he neglects to do so he forfeits not exceeding $300." The purpose of this section is obvious. Section 32 provides that the jailer at the expense of the county shall furnish a copy of the bible to the prisoners who can read. Section 36 has been quoted by the respondents as tending to show the authority of the commissioners to employ a physician. The sentence which is pertinent reads as follows: "Whenever a convict at the expiration of his sentence is sick and unable to be removed from jail he shall be cared for by the jailer at the expense of the county until the county

commissioners deem it safe for him to be removed." It is claimed that the right of the commissioners to say when it is safe for a prisoner to be removed shows implied authority in the commissioners over the prisoners. But it will be noted that even after the expiration of the sentence a sick prisoner continues in the care of the jailer. The reason for this is obvious and in perfect harmony with the theory that the legislature did not intend that the jail should be invaded by any person not admitted by the jailer.

Section 37 provides that the sheriff or his jailer at the expense of the county may give a prisoner about to be discharged a sum of money not exceeding two dollars and wearing apparel, etc. These sums to be repaid to him by the county. Section 30 provides that the sheriff shall keep a record of the prisoners committed, a description of the prisoners, etc., when they are discharged and time and manner of any prisoner's escape.

Section 39 provides that the jailer shall return a list of prisoners at each criminal session of the court. Section 41 makes the sheriff answerable for delivery of prisoners to his successor. Section 43 makes the sheriff liable for the escape of prisoners if in jail for debt and prescribes the penalty. Section 44 is significant in its bearing upon the interpretation here given and relates to the escape of prisoners through insufficiency of the jail and provides that the county treasurer shall pay to the sheriff the amount paid by him on account of the escape. This section shows that the functions of the sheriff and county commissioners, regarding the condition of the jail and the custody of the prisoners, are entirely distinct.

Section 48 provides that if any keeper suffers a prisoner charged with an offense to escape he shall be fined according to the nature of the offense charged. The county commissioners are not here mentioned or charged with any responsibility for the escape of a prisoner. It would, accordingly, be an anomaly to hold that the county commissioners could authorize a physician to enter the jail who, if so minded, could aid a prisoner in his escape, and thus impose upon the sheriff or keeper a penalty for which he was not responsible and which, under the interpretation claimed, he might be unable to prevent. Finally, section 50 extends the authority of the keeper of the jail to the dead body of the prisoner. He is authorized to dispose of it.

As before suggested, these various statutes all point the same way and are consistent with the expressed intention of the legislature, that

the sheriff or his deputy, as jailer, shall have absolute and exclusive custody and charge of all prisoners confined in the jail. These provisions impose so great a responsibility upon the sheriff or jailer, for the safe keeping of all prisoners, that their interpretation is inconsistent with any other theory than that which vests in the sheriff complete control of the key that unlocks the door that stands between the confinement of the prisoners and access to escape. Nowhere is found any authority, express or implied, conferred upon the county commissioners, in conflict with the authority vested by the statutes, in the sheriff, or his deputy, as jailer.

We are therefore of the opinion that an interpretation of the statute, herein reviewed, by express language, not only gives, but imposes upon, the sheriff or his deputy, as jailer, the sole responsibility for the care, custody and safeguarding of the prisoners; and, by necessary implication, authorize him, alone, when necessary to employ a physician to administer to the prisoners.

Peremptory writ to issue with costs.

C. DOHERTY and A. D. BIRD

vs.

A. D. BIRD and WILLIAM F. TIBBETTS.

Knox. Opinion November 14, 1917.

Plea in abatement; when the same shall be filed. Motion to dismiss. Right of amendment of writ. Plea to be filed when defect is apparent upon face of writ.

This case comes up on exceptions filed upon two grounds. The plaintiffs' original writ alleges that A. D. Bird and Wm. F. Tibbetts, defendants, were co-partners in trade formerly doing business at Rockland under the firm name of Bird and Tibbetts, and summoned them to appear and answer unto C. Doherty and A. D. Bird, both of Rockland, co-partners in trade formerly doing business at Rockland under the firm name of "Doherty and Bird Quarry". The action was in assumpsit for the recovery of the sum of $3,000. The defendant, Tibbetts, filed a motion to dismiss the action upon the ground that "it appears" by the writ therein that one and the same party, A. D. Bird, is both plaintiff and defendant in such action.

Held:

(1) That it cannot be presumed from the inspection of the writ that A. D. Bird, named as plaintiff, was identical with A. D. Bird named as defendant.

(2) That a question of fact was raised which could properly be decided only upon the introduction of evidence.

(3) That a motion to dismiss upon the ground that A. D. Bird was named both as plaintiff and defendant does not lie.

(4) That a plea in abatement must be filed to reach the defect complained of.

On the motion of C. Doherty to amend by striking out the name of A. D. Bird as a co-partner and as a plaintiff on the ground that there was no partnership.

Held:

(1) That the proposed amendment did not introduce a new cause of action.

(2) That the parties in the case could be rightfully understood, and the amendment came within the purview of the statute.

Action on the case. Defendants filed motion to dismiss, which was overruled. Plaintiff, upon motion, was granted leave to amend writ; to which rulings defendants filed exceptions. Exceptions overruled.

Case stated in opinion.

Frank B. Miller, and M. A. Johnson, for C. Doherty.
A. S. Littlefield, for Tibbetts.
R. I. Thompson, for Bird.

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

SPEAR, J. This case comes up on exceptions filed upon two grounds. The plaintiffs' original writ alleges that A. D. Bird and Wm. F. Tibbetts, defendants, were co-partners in trade formerly doing business at Rockland under the firm name of Bird and Tibbetts, and summoned them to appear and answer unto C. Doherty and A. D. Bird, both of Rockland, co-partners in trade formerly doing business at Rockland under the firm name of "Doherty and Bird Quarry." The action was in assumpsit for the recovery of the sum of $3,000. The defendant, Tibbetts, filed a motion to dismiss the action upon the ground that "it appears" by the writ therein that one and the same party, A. D. Bird, is both plaintiff and defendant in such action."

The presiding Justice overruled this motion to dismiss, to which the first exception was taken. The question is, whether a motion to dismiss or a plea in abatement was the proper method of attack. If it can be presumed from the inspection of the writ that A. D. Bird, named as plaintiff, was identical with A. D. Bird, named as defendant, then the defect would appear upon the face of the writ and motion to dismiss would lie. If, on the other hand, it could not be presumed as a matter of fact from the inspection of the writ that A. D. Bird named as plaintiff and A. D. Bird named as defendant were one and the same person, then a plea in abatement should have been filed to reach the defect. We think the latter course should have been pursued. A question of fact was raised which could properly be decided only upon the introduction of evidence. The writ, itself, does not show that the initials A. D. represent the full name of the plaintiff to be the same as the full name of the alleged defendant. For aught that appears the name of the plaintiff may have been Allen D., and that of the defendant, Austin D. If the full name of A. D. Bird as plaintiff, had been stated and corresponded with the full name, of A. D. Bird, as defendant, the inference that both names represented one and the same person would be very much strengthened. But

upon initials, only, we are of the opinion that no legal inference of identity can be drawn. Accordingly, there was no error in overruling the motion to dismiss.

After the motion to dismiss was overruled, the plaintiff then moved to amend his writ by striking out the words "and A. D. Bird, both co-partners in trade formerly doing business at Rockland under the firm name of Doherty and Bird Quarry" so that that part of said writ after amendment shall read as follows: "To answer unto C. Doherty of said Rockland."

"Also to amend the amount of bill in said declaration by striking out twenty-one hundred eighty dollars and fifty-six cents and substituting therefor $1,453.70."

He also moved to amend further by changing his account annexed to correspond with the amendment already made.

The amendment was allowed and the amended count inserted in the declaration. To the allowance of this motion to amend the writ the defendant's second exception was filed. The reason given for offering the amendment was that the plaintiff and A. D. Bird were not co-partners in business; that the plaintiffs' attorney made a mistake in so alleging them; and that, in fact they were tenants in common.

The right of amendment under our statute is very broad. R. S., 1916, Chap. 87, Sec. 11 provides as follows: "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 case can be rightly understood. Such errors and defects may be amended, on motion of either party, on such terms as the court orders." Section 12 reads: "In all civil actions the writ may be amended by inserting additional plaintiffs, or by striking out one or more plaintiffs when there are two or more, and the court may impose reasonable terms."

"In case of tenancy in common, each tenant may bring his several action, but two cannot join against a third, for they have no joint interest." *Farrar* v. *Pierson*, 59 Maine, 561.

It is obvious that the proposed amendment did not introduce a new cause of action. It therefore follows that the parties and the case could be rightly understood and that the amendment readily came within the purview of the statute. The amendment was properly allowed.

Exceptions overruled.

STATE OF MAINE

vs.

SAMUEL HYMAN and MORRIS SHIFFER.

Sagadahoc. Opinion November 15, 1917.

Indictment. Using words "feloniously and maliciously" in an indictment where statute reads "wilfully and maliciously." General rule as to necessity of indictment following wording of statute.

This case comes up on exceptions. The respondents were indicted under Sec. 1, Chap. 121 of the R. S., for setting fire to a building in Richmond, occupied in part by themselves as store and in part as a dwelling house. The statute under which the indictment was found reads as follows: "Whoever wilfully or maliciously sets fire to or causes fire to be set to the dwelling house or any building," etc.

The indictment reads as follows: "The jurors of said State, upon their oath present, that Samuel Hyman and Morris Shiffer feloniously and maliciously did set fire to a certain building," etc.

The respondents demurred. The presiding Justice overruled the demurrer. To this ruling exceptions were taken. Is the indictment sufficient?

Held:

(1) That the word "wilfully" is well defined in criminal law and when used as descriptive of a criminal offense involves evil intent or legal malice.

(2) That the word "felony" or "feloniously" is of a very different character and has no fixed meaning except where it is defined by statute.

(3) That it is not descriptive of any particular offense.

(4) That where the statute makes criminal the doing of an act, "wilfully," it is not suffiicent for the indictment to charge that it was done "feloniously." The words are not synonymous, equivalent or of the same import.

Indictment brought under Chap. 121, Sec. 1, R. S., 1916. Defendants filed demurrer, which was joined by attorney for State. Demurrer overruled pro forma by Justice presiding; to which ruling defendants filed exceptions. Exceptions sustained.

Case stated in opinion.

Edward W. Bridgham, County Attorney, for State.

Harry Manser, and McGillicuddy & Morey, for defendants.

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

SPEAR, J. This case comes up on exceptions. The respondents were indicted under Sec. 1, Chap. 121 of the R. S., 1916, for setting fire to a building in Richmond, occupied in part by themselves as store and in part as a dwelling house. The statute under which the indictment was found reads as follows: "Whoever willfully or maliciously sets fire to or causes fire to be set to the dwelling house or any building, occupied in part for dwelling or lodging house purposes and belonging wholly or in part to himself or to another, or to any building adjoining thereto owned wholly or in part by himself or another, with intent to burn such dwelling house or building shall be punished by imprisonment for not less than one nor more than twenty years."

The indictment reads as follows: "The Jurors of said State, upon their oath present, that Samuel Hyman and Morris Shiffer, both of Richmond, in said county of Sagadahoc, at Richmond, in said county of Sagadahoc, on the twenty-second day of May in the year of our Lord one thousand nine hundred and sixteen, feloniously and maliciously did set fire to a certain building located in said Richmond and occupied in part for a dwelling house by Mrs. George Pushard of said Richmond, with intent to burn said dwelling house, and said dwelling house was thereby burned in the night time of said day, against the peace of the State, and contrary to the form of the statute in such case made and provided."

The respondents demurred, reserving the right to plead over. The presiding Justice overruled the demurrer. To this ruling exceptions were taken. Is the indictment sufficient?

It will be observed that the words of the statute are "whoever willfully and maliciously sets fire."

The words of the indictment are that the defendants did "feloniously and maliciously set fire." The word "feloniously" is substituted for the word "willfully." Do the words "feloniously and maliciously" constitute a sufficient allegation under the statute which reads "willfully and maliciously." Can the word "feloniously" be substituted for the word "willfully"?

While it is undoubtedly better practice to set out any indictable offense fully described in the statute in the language of the statute, yet the rule is well established in this State that the offense may be

set out in language equivalent to that of the statute, or in words of more extended significance. "An indictment should charge the offense in the words of the statute or in words equivalent thereto." *State* v. *Hussey*, 60 Maine, 410; *State* v. *Lynch*, 88 Maine, 195. "Feloniously" is obviously not equivalent to "willfully." Therefore, the direct question arises, is the word "feloniously" of a more extended significance than the word "willfully?" Does it embrace the meaning of the word "willfully," and more? We think not.

The constitution of Maine provides: "In all criminal prosecutions the accused shall have a right . . . . to demand the nature and cause of the accusation. . . . ." The accused, therefore, if indicted for an offense under the statute, has a right to know the nature of the offense, as described in the statute. The word "willfully" is well defined in criminal law and when used as descriptive of a criminal offense involves evil intent or legal malice. When used as descriptive of such an offense the term becomes an essential part of the law of the case. See Words and Phrases, Second Series, title—"Willful, Evil Intent."

The word "felony" or "feloniously" is of a very different character and has no fixed meaning. "Felony in American law, has no very definite meaning except in cases where it is defined by statute." Words and Phrases, Vol. 2, 522. The word "felony" is not the name of any descriptive offense. It is a generic term employed to distinguish certain high crimes, as murder, robbery, rape, arson and larceny from other minor ones known as misdemeanors." *State* v. *Doran*, 99 Maine, 333. "The term 'felony' includes every offense punishable by imprisonment in the state prison." R. S., 1916, Chap. 133, Sec. 11.

It would seem, therefore, that the word "feloniously" is simply used to characterize any offense, punishable by such imprisonment. It is as applicable to arson as to breaking and entering; to breaking and entering as to murder, although different offenses with different penalties. It is a general word used to distinguish the various classes of offenses called felonies from those called misdemeanors, and is not intended to be descriptive of any particular offense. "The word 'feloniously' is employed to classify offenses, but is not a distinct element of a crime. 78 Mo., 240. "The word 'feloniously' is one of those legal adjectives that have grown out of the common law procedure. The word, itself, seems to have no special inherent meaning." *State* v. *Hagard*, 12 Minn., 293.

In no authority do we find the words used synonymously. In a few cases it has been held that an indictment was not bad where the word "feloniously" had been substituted for the word "willfully."

But the weight of authority and reason hold to the contrary. This precise case has been decided in New Hampshire in *State* v. *Gove and Wife* and *State* v. *Card*, 34 N. H., 510. The New Hampshire statute reads: "If any person shall willfully and maliciously burn." Our statute reads: "whoever willfully and maliciously sets fire." These statutes are identical in meaning and in the words used to describe the offense defined. The syllabus states the decision correctly: "Where a statute makes criminal the doing of the act, 'willfully and maliciously' it is not sufficient for the indictment to charge that it was done 'feloniously and unlawfully' or 'feloniously, unlawfully and willfully;' these latter terms not being synonymous, equivalent, of the same legal import, or substantially the same as 'willfully and maliciously.'" Our court in *State* v. *Hussey*, 60 Maine, 410, have referred to this case with approval.

We think this the safer rule to follow. It is better to hold the indictment bad, part of the time, than to make the pleading bad, all the time.

Exceptions sustained.

INHABITANTS OF MACHIAS *vs.* INHABITANTS OF EAST MACHIAS.

Washington. Opinion November 17, 1917.

General rule governing the furnishing of pauper supplies. Rule as to finding of overseers on the question of the necessity of pauper supplies when they have acted in good faith.

In an action to recover repayment for "board, services and medical attendance" at the average rate of about five dollars per week, furnished by the plaintiffs to the minor son of one Davis whose pauper settlement was in the defendant town, it appeared that the son was placed for a time in the Bangor Anti-Tuberculosis Camp, then in the Eastern Maine General Hospital and then in the Fairfield Sanatorium for Tuberculosis, upon the advice of a physician after examination and treatment, and upon the recommendation of the visiting nurse of the County Anti-Tuberculosis Association. Upon exceptions to the ruling of the presiding Justice that these expenditures were recoverable if the plaintiffs succeeded in obtaining a verdict on the other grounds, it is

Held:

1. That under R. S., Chap. 29, Sec. 33, overseers of the poor are bound to relieve persons destitute found in their towns and having no settlement therein.
2. The statute does not prescribe the manner in which nor the extent to which the relief shall be administered and these must depend upon the facts and conditions connected with each call for assistance. The governing rule is that the relief must be reasonable and proper.
3. Nursing and medical attendance have always been regarded as within the meaning of the term pauper supplies, and the fact that they are rendered at an institution within this State specially equipped for the treatment of tuberculosis should not of itself place such services outside the pale of the statute.
4. The nature of the relief furnished here was appropriate and the expense incurred was not extravagant. There was no error in this ruling.
5. Another item in the plaintiffs bill amounting to fifty dollars was paid by the overseers to the Children's Home of Portland under a written contract by which that institution agreed to take another minor child and keep him without further expense to the town. This commitment was without statutory authority and the sum paid was not properly chargeable to the defendants as pauper supplies. The exceptions to the ruling that this item was also recoverable must be sustained.

Action on the case to recover for pauper supplies. Verdict for plaintiff. To the ruling of presiding Justice on the question of what constituted proper charges for pauper supplies, defendant filed exceptions. Judgment in accordance with opinion.

Case stated in opinion.

C. B. & E. C. Donworth, for plaintiffs.

Frederick Bogue, R. J. McGarrigle, and W. R. Pattangall, for defendants.

SITTING: CORNISH, C. J., SPEAR, KING, HANSON, MADIGAN, JJ.

CORNISH, C. J. This is an action to recover repayment for pauper supplies furnished by the overseers of the plaintiff town to the family of one George Davis alleged to have a settlement in the defendant town. The jury found in favor of the plaintiffs for the full amount claimed and their verdict fixed the settlement of the paupers in the defendant town, as is admitted. The contest now is over the nature of the supplies furnished as coming within the contemplation of pauper supplies.

1. The first issue is stated concisely in the bill of exceptions as follows:

"It is admitted, in view of the verdict of the jury that Walter Davis, a minor son of George Davis had his pauper settlement in the defendant town, that he had been found destitute in the plaintiff town and was on said dates in need of immediate relief; and it is also admitted that, at the time these bills were contracted, Walter Davis was suffering from tuberculosis and that the town of Machias actually paid to the sanatorium and hospital mentioned, the sums stated for treatment of Walter Davis, and that he was placed in said institutions by the overseers of the poor of plaintiff town upon the advice of a physician after examination and treatment by the latter, and upon the recommendation of the visiting nurse for the Washington County Anti-Tuberculosis Association. But the defendant contended that the charges above mentioned were not proper charges for pauper supplies. On that point the presiding Justice instructed the jury as follows: 'As to those items, I will instruct you pro forma that they are recoverable by the plaintiff if the plaintiff succeeds in obtaining your verdict.'" To this ruling the defendant excepted.

The items of the plaintiffs' bill on this branch of the case consisted of "board, services and medical attendance" at Bangor Anti-Tuberculosis Camp in November, 1913, and February, 1914, at Eastern Maine General Hospital in January, 1914, and at the Fairfield Sanatorium for Tuberculosis from May, 1914, to September, 1915, a total expenditure of $476.11, covering a period of ninety-two weeks, or practically five dollars per week.

The defendants contend, both in exceptions and in argument, that as a matter of law these charges cannot be recovered as pauper supplies. We find ourselves unable to accede to this view.

R. S., 1916, Chap. 29, Sec. 33, provides that "Overseers shall relieve persons destitute, found in their towns and having no settlement therein," and the expenses so incurred may be recovered of the town chargeable with the support of the pauper. The statute does not prescribe the manner in which nor the extent to which the relief shall be administered. That must depend upon the facts and conditions connected with each call for assistance. The governing rule is that the relief shall be reasonable and proper. It must be suited to the particular needs of the destitute person, whether they be food or clothing or shelter or medical or surgical assistance, or all together. So, too, the situation of the sick admits of such infinite variety that no arbitrary rule for their treatment can be laid down. While the right of reimbursement is purely statutory, being conferred by positive provisions of law, and is not based upon any equitable considerations, yet it is the right and duty of the court to view the nature and extent of the relief in the light of present day conditions. Nursing and medical services have always been deemed included in pauper supplies. The necessity of such services in the case at bar is admitted. Had they been rendered at the patient's home perhaps no complaint would have arisen. The fact that they were rendered at an institution within this State specially equipped for the treatment of tuberculosis should not of itself place such services outside the pale of the statute. Such beneficent institutions were unknown a generation ago, but their worth is now universally conceded. The test in all cases must be the reasonableness and propriety of the relief provided, and it must certainly be admitted that nowhere can this particular disease, infectious in its nature, be more properly treated than in institutions such as these. Not only can relief be afforded, and the danger of infection avoided, but the patient may be restored to

permanent health and a life saved to the community. As was said by the court in discussing the duty of overseers in a case not strictly analagous, "Any other rule in a case like the present would permit the ravages of disease to outrun the benevolence of the statute." *Perley* v. *Oldtown*, 49 Maine, 31-34.

The expense incurred here, an average of five dollars per week, including board, nursing and medical attendance, was not extravagant and the misfortune of a father's pauperism ought not to deprive a sick child in these enlightened days of the reasonable means of treatment and care. Any other doctrine affronts the dictates of humanity.

It is settled law in this State that "when the overseers act in good faith and with reasonable judgment touching the necessity of relief of persons found in need their conclusions will be respected in law." *Hutchinson* v. *Carthage*, 105 Maine, 134; *Bishop* v. *Hermon*, 111 Maine, 58. Their conclusions with regard to the nature and extent of relief should in like manner be respected. In neither case will their decision be final but as they are officers sworn to do their duty it is presumed that they act with integrity until the contrary is shown. *Portland* v. *Bangor*, 42 Maine, 403, 410; *Bishop* v. *Hermon*, before cited.

Here it is admitted that the overseers of the plaintiff town acted upon the advice of a physician after his examination and treatment of the afflicted patient and upon the recommendation of the visiting nurse. They evidently met the problem as they found it and solved it with sound discretion.

The defendant further contends that as the pauper was suffering from tuberculosis, which is declared by R. S., 1916, Chap. 19, Sec. 9, an infectious and communicable disease, this case should have fallen under the control of the local board of health, which under section 69 of that chapter might place the patient in quarantine and charge to the town all supplies for food and medicines.

This contention is without force. Chapter 19 relates to the public health and the prevention of contagious diseases. It has no application in the case at bar. That chapter affects the affluent as well as the destitute and it is expressly provided that supplies furnished thereunder shall not be charged to the pauper account but to the incidental expenses of the town. Sec. 71. They are in no sense pauper supplies. *Eden* v. *Southwest Harbor*, 108 Maine, 489, 495.

Here the supplies were furnished by the overseers of the poor and to persons who were destitute and in need of immediate relief. The admitted facts bring this case within chapter 29, relating to the care of paupers, and not within chapter 19 relating to the care of those afflicted with an infectious disease.

It should be added that the question of the reasonableness and propriety of the relief furnished is ordinarily one of fact for the jury under proper instructions from the court, and not a question of law for the court alone. But under the exceptions and the statement of facts in this case, there was no error in the ruling of the presiding Justice on this point. This exception must be overruled.

2. Another item in the plaintiff's bill amounting to fifty dollars, was paid by the overseers to the Children's Home of Portland under a written contract by which that institution agreed to take another minor child, and keep him without further expense to the town. It has been very recently decided that such a commitment is without statute authority and the sum paid is not properly chargeable to the defendants as pauper supplies. *Inhabitants of Freedom* v. *McDonald,* 115 Maine, 525. The presiding Justice instructed the jury pro forma that this item was also recoverable if the plaintiffs succeeded in obtaining a verdict at their hands. This exception must be sustained. The entry will therefore be,

Exceptions sustained unless within thirty days from the filing of mandate the plaintiffs remit the sum of fifty dollars with interest thereon. In that event exceptions overruled.

PIERRE BEAUDOIN

vs.

LA SOCIETE ST. JEAN BAPTISTE DE BIENFAISANCE DE BIDDEFORD and TRUSTEE.

York. Opinion November 18, 1917.

Health and Accident policies. Proof necessary to recover sick benefits under Health Policy. Rule where person is ill from the result of an accident. Meaning of word "sickness."

This is an action of assumpsit to recover thirteen weeks' sick benefit at five dollars per week. At the conclusion of the evidence the presiding Justice ordered a verdict for the defendant. Upon exceptions to this order the case comes to the Law Court. The plaintiff did not receive a policy of insurance from the defendant society, as it issued none, but became a beneficiary under a contract, manifested by its constitution and by-laws. Article XXVII, Section 1, reads as follows: "Law Concerning Sick Benefits. A member who is sick and unable to work at any occupation that can bring him compensation and who shall have complied with the conditions in the clause of the present article, will receive of the Society, $5.00 per week, during a period of time not exceeding thirteen (13) weeks in one year.

2. To be entitled to sick benefits it will be necessary: 1st. That a member shall have been a member of the Society for six (6) months. 2nd. That he be in good standing. 3rd. That he possess an insignia. 4th. That he shall have given notice of his sickness to one of the members of the visiting committee if he is a resident member and be visited during his sickness by at least three of the members of the said committee and furnish a physician's certificate each time that said committee shall demand it."

This raises the direct question whether a disability, due wholly to an accident, can be regarded as sickness under a sick benefit contract of indemnity? There are several kinds of indemnity insurance contracts, such as life insurance, health insurance, accident insurance, sick benefit insurance, and so on, each occupying its own field of operation, and intended to apply to its own peculiar kind of disability. The case before us illustrates the distinction between an accident and sick benefit indemnity.

Held:

1. That assumpsit does not lie.

2. That, if the plaintiff's contention is tenable, one holding two contracts at the time of injury, might be able to recover on a sick benefit and accident contract, for one and the same cause.
3. That the two contracts are incompatible. One is predicated upon injury, the other upon disease. One is based upon the theory of injury by accident; the other upon the theory of sickness from disease.
4. That these inherent distinctions lead to the rule, that the accident contract is intended to apply to all cases of disability which are the natural and ordinary results of physical injury due to accident; the sick benefit to all cases of disability which are the natural and ordinary results of disease arising from a pathological condition.

Action of assumpsit to recover certain sick benefits. Defendant filed plea of general issue, and also brief statement. At conclusion of evidence, presiding Justice directed verdict for defendant; to which ruling plaintiff filed exceptions. Exceptions overruled.

Case stated in opinion.

Louis B. Lausier, for plaintiff.

N. B. & T. B. Walker, for defendant.

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

SPEAR, J. This is an action of assumpsit to recover thirteen weeks' sick benefit at five dollars per week. At the conclusion of the evidence the presiding Justice ordered a verdict for the defendant. Upon exceptions to this order the case comes to the Law Court. The plaintiff did not receive a policy of insurance from the defendant society, as it issued none, but became a beneficiary under a contract, manifested by its constitution and by-laws. Article XXVII. Section 1 reads as follows: "Law Concerning Sick Benefits. A member who is sick and unable to work at any occupation that can bring him compensation and who shall have complied with the conditions in the clause of the present article, will receive of the Society, $5.00 per week, during a period of time not exceeding thirteen (13) weeks in one year.

2. To be entitled to sick benefits it will be necessary: 1st. That a member shall have been a member of the Society for six (6) months. 2nd. That he be in good standing. 3rd. That he possess an insignia. 4th. That he shall have given notice of his sickness to one

of the members of the visiting committee if he is a resident member and be visited during his sickness by at least three of the members of the said committee and furnish a physician's certificate each time that said committee shall demand it."

In view of the provisions of section two, it is apparent that the plaintiff's declaration, in its present form, will not permit the admission of evidence, necessary to enable him to maintain his action. But as the declaration may be amendable, we do not feel justified in allowing the decision of the case to rest upon this defect. There is an objection, however, which goes to the merits of the case, and upon this we will base our conclusion. The plaintiff in direct examination of a physician called by him propounded this question. Q. Whether or not, medically speaking, a man with a broken leg or any person with an ailment other than a disease, is a sick person, medically speaking. THE COURT: Sickness has a well defined meaning and if this witness should testify that something was sickness that the law does not recognize as sickness, it would not be for the jury. There is no question but that a man with a broken leg cannot work. He suffers great pain. There is no question about that. We all know it; do we not know it just as well as a doctor? Counsel for the plaintiff: I believe the plaintiff ought to show that, at least, medically speaking, a man with a broken leg or any ailment other than disease is, as we say, a sick man, and whatever the answer may be, further we will say that any congregation of men, combining to be an association for benevolent purposes, will at least have in mind such things as, medically speaking, render a person unfit to do such work as he had been doing prior to that time. That is the only purpose . . . . whether or not at that time when the man made the application he was medically sick." The question was excluded and exceptions taken and allowed.

This raises the direct question whether a disability, due wholly to an accident, can be regarded as sickness under a sick benefit contract of indemnity. There are several kinds of indemnity insurance contracts, such as life insurance, health insurance, accident insurance, sick benefit insurance, and so on, each occupying its own field of operation, and intended to apply to its own peculiar kind of disability. The case before us illustrates the distinction between an accident and sick benefit indemnity.

The plaintiff by accident, broke his leg. As a result he suffered the inconvenience, disability and pain incident to his injury. Every fractured leg is accompanied by similar misfortunes, differing only in degree. A fractured leg may also bring more or less physical illness, resulting from the abnormal conditions to which the patient, for the time being, is compelled to submit yet not impair his general health. If the plaintiff's contention is tenable, and the physical illness which flows naturally and normally from an accident, can be classed as sickness, within the meaning of a sick benefit indemnity, then it follows that a person fortunate enough to hold, at the time of his injury, both an accident and a sick benefit contract, may be able to recover under each for the results of one and the same cause. Otherwise, if only one is available, which one? The bare statement of this contention shows the incompatability of the two forms of contract. They are fundamentally different. One is predicated upon injury; the other upon disease; one is based upon the theory of injury from accident; the other upon the theory of sickness from disease.

These inherent distinctions lead to the rule, that the accident contract is intended to apply to all cases of disability which are the natural and ordinary results of external physical injury due to accident; the sick benefit to all cases of disability which are the natural and ordinary results of disease arising from a pathological condition.

There is no evidence in the plaintiff's case tending to show that the external injury from which he was suffering and by which he was disabled, was the natural and ordinary result of disease arising from a pathological condition, hence the entry must be,

Exceptions overruled.

ALFRED P. CATE

vs.

FREDERICK T. MERRILL and CARRIE C. MERRILL.

Cumberland. Opinion November 18, 1917.

Rights of mortgagor and mortgagee as to possession of mortgaged personal property. Right of mortgagee to maintain replevin of mortgaged property. Necessary allegation as to title of mortgagee in an action of replevin. Meaning of word "goods" and what may be included under same. General meaning of words "belonging to."

This is an action of replevin and is reported by the following statement of facts:

The plaintiff's title to the property described in his writ depends on a certain chattel mortgage, a certified copy of which is filed with the case and made a part hereof.

The defendants admit that such a mortgage was given and that it was in default at the time this action was commenced.

The defendants contend and by agreement herein submit to the court that the plaintiff cannot maintain this action of replevin;

1st. Because his writ describes the chattels replevined as "belonging to the plaintiff," whereas his title depends on the mortgage.

2nd. Because the mortgagors were rightfully in possession it is agreed that a demand must have been made upon the defendant, Carrie C. Merrill, and it is agreed that such a demand was made, but no allegation of demand is made in the writ.

3rd. Because an account annexed is no part of a writ of replevin.

4th. Because the writ in question does not particularly describe the place where the chattels were detained.

5th. Because the writ commands a replevin of both beasts and chattels.

If the court finds that the plaintiff's form of writ is proper and such a writ as to enable him to maintain this action under the writ and pleadings, then judgment is to be for the plaintiff.

Held:

1. That a mortgagee may replevy goods held under a mortgage in default.
2. That he may declare on such goods as, "belonging to the mortgagee."
3. That the words "belonging to" import general ownership.

4. That general ownership, or legal title, is in the mortgagee, after default.
5. That the statute of redemption does not change the character of the mortgage contract nor affect the quality of the title of the mortgagee.
6. That demand is matter of proof, not of pleading.
7. That articles replevied may be upon a schedule attached instead of being written upon the writ itself.
8. That the statute relating to the replevin of "beasts restrained" does not apply to the replevin of beasts held as goods or chattels.
9. That the term "goods" includes cattle for the purposes of replevin.
10. The writ and pleadings must be held to be sufficient to enable the plaintiff to maintain his action.

Action of replevin reported to Law Court upon certain agreed statements. Judgment for plaintiff.

Case stated in opinion.

William C. Eaton, for plaintiff.

H. C. Wilbur, for defendant.

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

SPEAR, J. This is an action of replevin and is reported by the following statement of facts:

The plaintiff's title to the property described in his writ depends on a certain chattel mortgage, a certified copy of which is filed with the case and made a part hereof.

The defendants admit that such a mortgage was given and that it was in default at the time this action was commenced.

The defendants contend and by agreement herein submit to the court that the plaintiff cannot maintain this action of replevin;

1st. Because his writ describes the chattels replevined as "belonging to the plaintiff," whereas his title depends on the mortgage.

2nd. Because the mortgagors were rightfully in possession it is agreed that a demand must have been made upon the defendant, Carrie C. Merrill, and it is agreed that such a demand was made, but no allegation of demand is made in the writ.

3rd. Because an account annexed is no part of a writ of replevin.

4th. Because the writ in question does not particularly describe the place where the chattels were detained.

5th. Because the writ commands a replevin of both beasts and chattels.

If the court finds that the plaintiff's form of writ is proper and such a writ as to enable him to maintain this action under the writ and pleadings, then judgment is to be for the plaintiff.

If the court finds that the plaintiff cannot maintain this action under this writ and pleading, then judgment is to be for the return of the goods together with damages assessed at a total of fifty ($50) dollars.

The first objection raised by the defendant is that the plaintiff describes himself as the general owner of the property by the use of the words "belonging to the plaintiff" whereas he has only a special title in the property depending upon his mortgage. It is established law that a mortgagee may maintain replevin of the mortgaged chattels when the mortgage is in default or before default if the mortgage does not provide for the retention of possession in the mortgagor. *Partridge* v. *Swazey*, 46 Maine, 414; *Ferguson* v. *Thomas*, 26 Maine, 499; *Pickard* v. *Low*, 15 Maine, 50; *Ingraham* v. *Martin*, 15 Maine, 375.

The agreed statement shows that the mortgage was in default at the date of the writ, and consequently the plaintiff was entitled to bring an action of replevin.

Did he declare in proper form?

The phrase "belonging to" imports general ownership or an unqualified title. The question, therefore, raised by the first objection is one of pleading. After default of a mortgage, is the allegation, that the mortgagee is the owner of the mortgaged property, sufficient to authorize the admission of evidence, that his ownership or title depends upon a mortgage which has been defaulted, but still subject to redemption? Or is his title of that special character, which requires him to declare his special, instead of his general, ownership? This question is on the law side of the court, and must be determined upon the application of legal rules. The first question, therefore, which arises in determining the validity of these pleadings, depends upon the character of the title vested, by the mortgage and its default, in the mortgagee. If he holds the legal title, we can discover no reason why he cannot proceed in his pleadings or in his form of action, upon the character of the title vested in him by law, notwithstanding that subsequent action of the mortgagor may divest him of the title.

This question seems to have been settled in favor of the plaintiff in *Donnell et al.* v. *G. G. Deering Co.*, 115 Maine, 32, 97 Atl., 130. The court say: "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 an equity of redemption. He has no title to the property and therefore has no right in it incident to ownership." *Flanders* v. *Barstow*, 18 Maine, 357.

The phrase "absolute at law" as above used may need a word of explanation. A personal mortgage is a contract which conveys in terms the legal title, upon a condition subsequent. The only thing that prevents the contract from conveying a title "absolute at law," is the condition. Considered as a contract, if the condition is not performed, nothing then intervenes to prevent the contract from being consummated, and the title becoming "absolute at law." At common law this would be the case. There was no right of redemption, until equity crept in to prevent a forfeiture. Modern American Law, Vol. 8, 287, paragraph 6. Therefore at common law the title would become "absolute at law" upon default to perform the condition, and vest an indefeasible title, but for the provision of the statute, which, at this point, intervenes, and gives the mortgagor sixty days after foreclosure in which to redeem. But the statute does not change the character of the title conveyed by the mortgage contract, nor affect the quality of the title of the mortgagee. He may be divested by redemption. But upon failure to redeem, without any new act, his title continues "absolute at law" under his contract, and becomes indefeasible, under the statute. It, therefore, follows that after condition broken his title remained "absolute at law" until it was redeemed by performing the condition, or became indefeasible by a failure to perform. The allegation in the writ describing the chattels replevined as "belonging to the plaintiff" was properly pleaded.

The second objection is without merit. Demand is a matter of proof. *Littlefield* v. *Railroad Co.*, 104 Maine, 126.

"The third objection is, that a schedule is no part of a writ of replevin. The writ reads: We command you, that you replevy the goods and chattels following, viz: 2 black walnut divans," and numerous other articles.

The complaint is, that the schedule of the articles enumerated, beginning with "2 black walnut divans", is on a separate sheet of paper, attached to the writ, in the proper place following the command to replevy, instead of being written on the paper on which the writ is printed. Upon hearing the writ read, no one could detect whether the schedule was written on the writ or on the attached sheet. Yet the distinction here urged has received in some states the sanction of the courts. It was never so sanctioned in this State and if it had been, we should feel the time had tardily come when so transparent a distinction should be supplanted by the introduction of a rule bearing the impress of reasonable interpretation. Such a rule has been held to apply to an action of trover, and is equally applicable to an action of replevin. *Stinchfield* v. *Twaddle*, 81 Maine, 273.

The fourth objection should have been raised by demurrer. *Gardner* v. *Humphrey*, 10 Johnson, 53.

The fifth objection is without merit. The statute for the replevin of "beasts distrained" does not apply. In Vermont under a statute almost verbatim like ours the court held that "goods" included cattle, and sustained an action of replevin for seven cattle. *Eddy* v. *Davis*, 35 Vermont, 247. The word "goods" simply and without qualification, will pass the whole personal estate when used in a will, including stocks and bonds. *State* v. *Bartlett*, 55 Maine, page 211. "Goods. The plural of good; a word which has a very extensive meaning, and is of large signification. It is generally understood to mean personal estate as distinguished from realty, and to embrace every species of property which is not real estate or freehold." 20 Cyc., 1262. Our courts have recognized this rule in actual practice. *Lewis* v. *Smart*, 67 Maine, 206, involved the replevin of cattle, as goods and chattels. No question was raised as to the form of the pleading. It seems to be taken as a matter of course that cattle were included in the word "goods." The court in the first sentence of the opinion say: "The owner or person entitled to the possession of chattels may, under our statutes, replevy them from any one who has wrongfully taken them, or who coming rightfully into possession of them, wrongfully detains them from him."

It should be here noted that the court in the paragraph quoted used the word "chattels" interchangeably with the word "goods," as in the replevin statute the word "goods" is the only word employed to embrace the various classes of personal property that may be replevied.

The writ and pleadings must be held to be sufficient to enable the plaintiff to maintain his action. Under the stipulation in the report the entry must be,

Judgment for the plaintiff.

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

Cumberland. Opinion November 20, 1917.

Executors and administrators. Proof necessary in actions against executors or administrators to recover for board and lodging furnished deceased.

Assumpsit to recover for board and lodging furnished Hannah B. Hogan, deceased. It is before the court on general motion to set aside the jury's verdict in plaintiff's favor.

Mrs. Hogan made her home for many years with the plaintiff. She devised all of her property, a small homestead valued at about $1,000, to her only son whom she made executor of her will. The plaintiff contends that in consideration of board and maintenance in his household the deceased had promised a number of years prior to her death to divide her property in equal shares between the son, the plaintiff's wife and her step-daughter, and he relies upon both express and implied promise to maintain this action.

Held:

1. In cases of this nature it must appear that the parties understood or, under the circumstances should have understood, that compensation of some sort was to be made for the services rendered and sustenance furnished.
2. The right of recovering in actions of this kind depends either upon an express or implied promise, and the evidence must show a valid and satisfactory basis for such a promise.

Action of assumpsit to recover the sum of $805.00 for board and lodging furnished Hannah B. Hogan, deceased. Defendant filed plea of general issue. Verdict for plaintiff in the sum of $504.00. Defendant filed motion for new trial. Motion sustained.

Case stated in opinion.

Connellan & Connellan, and Harry H. Cannell, for plaintiff.
William T. Hall, Jr., and Frederic J. Laughlin, for defendant.

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

MADIGAN, J. This is an action of assumpsit for board and lodging furnished Hannah B. Hogan, deceased. It is before the court on a general motion to set aside the jury's verdict in favor of the plaintiff. Mrs. Hogan left two children, the defendant and the plaintiff's wife, and a step-daughter. She had made her home for many years in the plaintiff's household. By will she left all of her property, a small homestead valued at about $1,000, to her son, contrary to the expectations of the plaintiff, who contends that at least ten years before Mrs. Hogan's death she agreed to leave her property in equal shares to the son, daughter, and step-daughter.

As the basis for the action there must be evidence of either an express or implied promise. An express promise the plaintiff urges is found in the alleged agreement to leave one-third of her property to the plaintiff's wife. The only evidence supporting this contention is found in the testimony of the step-daughter. Her story is to the effect that some fourteen years before the mother's death the step-daughter accused the mother of having wrongfully obtained the title to the property, to which she says the mother made no denial; that the step-daughter told the deceased if she would make her home in the plaintiff's family during the balance of her life and leave the property in equal shares to herself and Mrs. Hogan's two children it would be all right, to which she says Mrs. Hogan agreed; and that some years later when the mother was ill the witness through a closed door heard Mrs. Hogan say to the plaintiff that she wished to make disposition of her property and the plaintiff assured the deceased that that was all settled, she was to stay there and the property was to go to the three children.—The witness testified that on neither occasion was the subject of board or its price discussed. Attacked as it is by other testimony we find here no convincing evidence of an express promise. It is unsupported by any testimony except that of the witness, and resembles an ultimatum by the witness rather than a contract between the deceased and the plaintiff. Mrs. Hogan stated to others that she felt she had done enough for her daughter and her family and that her property should go to her son. She cooked,

washed, scrubbed, lugged coal, swept and dusted in the plaintiff's household, practically up to a short period before her death. The daughter was ill and incapacitated for labor for a long time and spent much time away from home. Several years preceding her death, while the deceased was keeping house in Bath and the plaintiff was practically blind, he with his family asked Mrs. Hogan to take them in. For some six or eight months they lived with the mother, she doing dressmaking to support them. This testimony disproves not only the express but also the implied promise. It must appear in cases of this nature that the parties understood, or under the circumstances, should have understood, that compensation of some sort was to be made for the services rendered and sustenance furnished. *Leighton* v. *Nash*, 111 Maine, 525. There is not the slightest evidence that talk of board was ever mentioned and the services rendered by the deceased to the plaintiff and his family during their health and sickness indicated that the same was compensation sufficient for benefits received. Her labor made it possible for the plaintiff to sustain his family without hired help. She received no unusual consideration, and was housed no better than a maid of all works. In our judgment the evidence is insufficient to sustain the plaintiff's claim.

Motion sustained. New trial granted.

THOMAS E. SKOLFIELD, et als., *vs.* STEPHEN LITCHFIELD.

Cumberland. Opinion November 20, 1917.

Wills. Devise creating an estate tail. Power of devisee to destroy by conveyance the remainder or entail. General rule as to expression or words creating an estate tail.

This is a real action in which the demandants claim title to the premises described in the writ as devisees and remaindermen under the will of Thomas Skolfield, and was submitted to the presiding Justice at the October term, 1916, of the Supreme Judicial Court for Cumberland County upon an agreed statement of facts, with the right of exception in matters of law. The presiding Justice ordered judgment for the defendant, and the case is before the court on the plaintiffs' exceptions to that order. Four other cases follow the decision in the case at bar.

Held:

1. That a devise to a person and his heirs, with a devise over, in case he should die without issue, vests in the first devisee an estate in fee tail, and a remainder in the second devisee.
2. By Chap. 78, Sec. 10, R. S., 1916, it is provided that a person seized of land as a tenant in tail may convey it in fee simple. Such conveyances bar the estate tail and all remainders and reversions expectant thereon.
3. Under our statutes a devise to a person means to such person and his heirs.
4. The language of the testator must be construed to create an estate tail in the first devisee, Frances R. P. Skolfield, in four-tenths of the real estate of Thomas Skolfield, with a remainder to the children of his brother, the demandants. By the provision of the statute before cited she could convey the same in fee simple and thus bar the estate in remainder of the demandants.

Writ of entry to recover possession of certain real estate in the town of Brunswick, Cumberland County, Maine. Defendant filed plea of general issue, with brief statement setting up the Statute of Limitations. The case, with several others in which the same issues were involved, were submitted to presiding Justice upon agreed statement of facts, with the right of exceptions in matters of law. The presiding Justice ordered judgment for defendant; to which ruling demandants filed exceptions. Exceptions overruled.

Case stated in opinion.
Emery G. Wilson, for plaintiffs.
Wheeler & Howe, for defendant.

SITTING: CORNISH, C. J., SPEAR, KING, HANSON, MADIGAN, JJ.

HANSON, J. This is a real action in which the demandants claim title to the premises described in the writ as devisees and remaindermen under the will of Thomas Skolfield, and was submitted to the presiding Justice at the October term, 1916, of the Supreme Judicial Court for Cumberland County upon an agreed statement of facts, with the right of exception in matters of law. The presiding Justice ordered judgment for the defendant, and the case is before the court on the plaintiff's exceptions to that order. Four other cases follow the decision in the case at bar. The agreed statement follows:

"Thomas Skolfield, late of Brunswick in the County of Cumberland, died in 1866 seized and possessed of all of the premises demanded in these several actions, leaving a last will and testament which was duly admitted to probate in the Probate Court for said County, a copy of said will and testament, marked "A," being hereto annexed and made a part of this agreed statement.

Frances R. S. Perkins, the adopted daughter of the testator referred to in his will and otherwise known as Frances R. P. Skolfield, died in said Brunswick on March 12, 1914, unmarried, leaving no issue.

The demandants, Thomas E. Skolfield and Clement S. Skolfield, are children of Clement Skolfield, the brother of the testator, and the demandant Emery G. Wilson is the son of a deceased daughter of said Clement, said daughter having survived said Thomas, the three demandants being all the heirs-at-law of said Clement Skolfield.

After the death of the testator, Thomas Skolfield, his widow, Rebecca or Rebekah, and his adopted daughter, Frances, remained in actual and exclusive possession of all the real estate left by Thomas, including the premises demanded in these actions, until the dates of their conveyances hereafter described.

Said Rebecca and said Frances conveyed the premises demanded in these several actions by warranty deeds, duly recorded in the Registry of Deeds for said County, dated May 6, 1874, November 27, 1874, February 27, 1877, February 26, 1878 and July 28, 1874, respectively.

The defendants or tenants and those under whom they claim have been in actual, open, peaceable, notorious and exclusive possession of the premises demanded of them, holding under and by virtue of their respective deeds and believing that they held the fee, ever since the dates of the respective conveyances by Rebecca and Frances above described.

The defendants, Marion L. Purington and Clarence M. Purington are the widow and sole heir-at-law of Edward C. Purington, late of said Brunswick, deceased.

If upon the foregoing statement of facts the presiding Justice shall determine that the demandants are entitled to judgment, he shall also determine, upon further hearing, the value of the premises demanded in each action and all improvements or betterments to which the tenants may be entitled under any form of pleading in the same manner and with the same effect as such values would be determined by a jury under the statutes of Maine, and judgment rendered accordingly; otherwise judgment to be entered for the defendants."

We have before us the will in question and find that little aid is afforded in the solution of the question at issue aside from the clause devoted to the devise under which the demandants claim. Therefore such part of the exceptions as is necessary to raise the only question to be considered, is here reproduced:—

"The plaintiff's claim title to the demanded premises as devisees under the will of Thomas Skolfield, late of Brunswick.

The defendant claims title through subsequent conveyances under Frances R. P. Skolfield, deceased, who held as devisee under the will of the said Thomas Skolfield.

The title of both parties to this action depends upon the construction of the following clause in the will of the said Thomas Skolfield, 'I give, devise, and bequeath to Frances R. P. Perkins, my adopted daughter, four tenth parts of all my estate real, personal and mixed, exclusive of my household furniture, and in the event of the said Frances R. S. dying unmarried, leaving no issue, it is my will that the said four tenth parts of my estate shall go to the children of my brother Clement Skolfield, to have and to hold to them, their heirs, executors, administrators and assigns forever.'

The presiding Justice ruled that this clause in said will created an estate tail in the said Frances R. P. Skolfield and that she had broken

the entail by her conveyance to the defendant's predecessor in title and rendered judgment for the defendant."

The demandants claim that Frances R. P. Skolfield "took an estate in fee simple conditional liable to become complete or to be entirely defeated by the happening of the contingency named in the will," i. e. the event of the said Frances R. P. Skolfield dying unmarried, leaving no issue, which, according to the agreed facts, happened.

The defendants contend that "the devise created an estate tail in Frances R. P. Skolfield, with a remainder to the demandants."

It is the opinion of the court that the ruling of the presiding Justice, that the clause in the will of Thomas Skolfield above quoted created an estate tail in the said Frances R. P. Skolfield, and that she had broken the entail by her conveyance to the defendant's predecessor in title, was correct.

Counsel for both parties have cited many authorities, reference to some of which, in view of the settled law, will be unnecessary.

Words of like import to those used in the clause requiring our construction, came before the court in *Fisk* v. *Keene*, 35 Maine, 354, and the questions arising in the case at bar were fully considered, and it was there held that "A devise to a person and his heirs, with a devise over, in case he should die without issue, vests in the first devisee an estate in fee tail, and a remainder in the second devisee." It was also held that by the provisions of the statute, Chap. 91, Sec. 6, (1852) that "one seized in fee tail may bar the entail, and all remainders, by a conveyance in fee simple." Sec. 10, of Chap. 78, of the R. S., of 1916, makes similar provision in these words: "A person seized of land as a tenant in tail may convey it in fee simple. . . . . Such conveyances bar the estate tail and all remainders and reversions expectant thereon." The statute has remained unchanged in this respect since *Fisk* v. *Keene*, supra. To the same effect is *Richardson, in Equity*, v. *Richardson*, 80 Maine, 585, where the testator devised any remainder of his estate, left at his wife's decease, to two persons named by him, to go to the survivor of them, if the other died without children, and if both died without children, to go to the testator's grandchildren then living. It was there held, "that this is a devise of an estate tail by implication, to the two persons first named, and that they may by our statutes, convey the title to the property by deed in fee simple." In *Richardson* v. *Richardson*, supra, the court

cites with approval *Allen* v. *Trustees of Ashley School Fund,* 102 Mass., 262, where the court said: "It is well settled in this Commonwealth, that, after a devise of real estate in fee, a devise over in case the first devisee shall die 'without leaving issue,' or 'without leaving heirs of the body,' looks to an indefinite failure of issue, and therefore cannot take effect as an executory devise, but the first devise in fee is cut down by the subsequent devise to an estate tail, and the subsequent devisee takes an estate in remainder. The same rule of construction applies, when the first devise is to two persons, and the devise over, in case of the death of either, leaving no issue, is not to the survivor, but to a stranger."

As the court observed in *Richardson* v. *Richardson,* supra, it may not be amiss to say that the cases speak of devises to persons "and their heirs," and then over. Under our statutes a devise to a person means to such person "and his heirs," See also *Hall* v. *Cressey,* 92 Maine, 514.

The language of the testator must be construed to create an estate tail in the first devisee, Frances R. P. Skolfield, in four tenths of the real estate of Thomas Skolfield, with a remainder to the children of his brother, the demandants. By the provision of the statute before cited she could convey the same in fee simple and thus bar the estate in remainder of the demandants.

The entry will be,

Exceptions overruled.

HENRY E. COOLIDGE, Admr.,

vs.

WORUMBO MANUFACTURING COMPANY.

Androscoggin. Opinion November 20, 1917.

Negligence. Burden of proof as to negligence of defendant and due care on part of plaintiff. Rule as to proving contributory negligence under and by virtue of Public Laws, 1913, Chapter 27.

Action on the case for damages for personal injuries incurred by the plaintiff's intestate, James Fitzgerald, while employed by the defendant. The jury returned a verdict for the plaintiff for $3706.25, and the case is before the court on the defendant's general motion for a new trial.

Held:

1. A jury may return a verdict based upon inferences properly drawn, but such inferences must be drawn from facts proved in the case, and not merely upon conjecture or guess work.
2. The provision relating to due care on the part of the plaintiff's intestate, as set out in Public Laws, 1913, Chap. 27, does not affect the rights of the parties in this case, for the reason that the injury complained of occurred in 1911, about two years before such provision was made.
3. We fail to see anything in the evidence to justify holding the defendant liable for an accident so clearly due to the negligence of its employees, the risk of which the plaintiff's intestate must be held to have assumed.

Action on the case to recover damages for injuries sustained by the plaintiff's intestate through the alleged negligence of defendant company. Defendant filed plea of general issue, and also brief statement. Verdict for plaintiff in the sum of $3706.25. Defendant filed a motion for a new trial. Motion sustained. New trial granted.

Case stated in opinion.

Francis M. Carroll, of Boston, *and Bion B. Libby*, for plaintiff.

McGillicuddy & Morey, for defendant.

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

HANSON, J. Action on the case for damages for personal injuries incurred by the plaintiff's intestate, James Fitzgerald, while employed by the defendant. The jury returned a verdict for the plaintiff for $3706.25, and the case is before the court on the defendant's general motion for a new trial.

The defendant was engaged in building an addition to its mill in Lisbon Falls. Temple Brothers had the contract for the brick and mason work. The carpenter work was performed by another contractor. The plaintiff's intestate was in the general employment of the defendant, and performed such work in and about the premises as occasion presented, and the defendant through its superintendent directed. At the time of the injury complained of, the plaintiff's intestate was employed, with other servants of the defendant, in hoisting lumber for use on the roof of the building. A place had been provided and had been used by them in hoisting such lumber, but it appears that at the time of the injury the elevator well, while temporarily unused by Temple Brothers, was used by the plaintiff's intestate and his fellow servants as above. Two counterbalancing cars were used in the elevator well. On the afternoon before the accident, while hoisting planks, one or more planks slipped from the sling securing them and fell to the bottom of the well, striking and injuring the cross piece of the car which was there secured. The other car was suspended at the top of the opposite side of the well. The declaration sets out among other things "that it was the duty of the defendant to furnish the said Jas. J. Fitzgerald with a safe place in which to perform said work, but that it failed in said duty and knew or by the use of reasonable diligence should have known that said elevator was then in a defective, unsafe and dangerous condition and likely to cause injury to its employees employed in or about said shaft; that while the said Jas. J. Fitzgerald was engaged as aforesaid and while he was at all times in the exercise of due care, and not knowing of the defective and dangerous condition of said elevator, by reason of its defective and unsafe condition said elevator broke, whereby that platform of said elevator then at the top of said shaft as aforesaid fell down through said shaft and some part of said elevator in falling struck the said Jas. J. Fitzgerald then standing on the third

floor of said building engaged in his duties as aforesaid and threw him down through said shaft so that he struck on the second floor."

The testimony does not show how the accident occurred, or the position of Mr. Fitzgerald at the time of the accident. Was he doing something that the defendant was bound to anticipate that he might do, and which, therefore, it was bound to provide for his doing safely? Again the case does not furnish an answer, but plaintiff's counsel urges (1) that "there is no evidence that Fitzgerald was injured through failure on his own part to exercise ordinary prudence. In this action, tried after his decease, he is presumed to have been in the exercise of due care at the time of injury, and the burden is on the defendant to prove contributory negligence, rather than on the plaintiff to prove that Fitzgerald's injuries were not due to any lack of due care of his own," citing Public Laws, 1913, Chapter 27; *Curran* v. *Railway Co.*, 112 Maine, 98; and (2) "that from the facts which were directly testified to, and which appear in the record, the jury might properly have inferred the further fact, which is undoubtedly true, that Fitzgerald was struck by some portion of the elevator device released by the breaking of the cross-piece. This might be either the cable and whatever was attached to it rising through one well, or the car falling through the other well, or both. The jury could apply their knowledge of natural laws to the facts adduced in proof and infer that, while leaning over the elevator shaft, a blow received on the back of his head from the falling elevator hurled Fitzgerald to the floor below." He was working at general work as he had been for months, in a place of some danger, but with appliances in good condition. He was as well acquainted with the place and the manner in which the work was to be done as the defendant was. He needed no instruction. It is claimed by the plaintiff that the injury to the cross-piece of the elevator was the cause of the injury to the plaintiff's intestate. The plaintiff's intestate was working with the others when the planks fell the day before crushing the cross-bar of the lower car; he was nearer the car than two of the plaintiff's witnesses. On the day of the injury he began work with the others, in the same place, with the lower car in full view. Counsel for the plaintiff in his brief states the situation in these words: "On the morning of the accident Fitzgerald was stationed on the third floor, guiding the lumber as it was being hoisted to the fourth floor. The platform of the top car was at the roof level and directly over Fitz-

gerald's head, and during the progress of the work some lumber, as it was hauled up, swayed against the cable attached to the bottom of the suspended car and on reaching the top struck against the flooring of this car." The plaintiff's theory is that the lumber was landed on the fourth floor. If that is the fact, then Fitzgerald must have known, or it must be held that he knew that, whatever the effect was, lumber did in fact strike the cable and the bottom of the suspended car, and that such use was improper and dangerous, and in no manner due to the negligence of the defendant. He, of all others, must have known about the lumber striking the car above his head and so near his head that the swaying against the cable and striking the car were within his clear view and hearing. However that may be, the controlling question remains,—was the defendant negligent? Did it have notice of the defect causing the injury and fail to repair it? Here the plaintiff has the burden of proof, and in this we think he has failed signally, and for these reasons: The machinery connected with the elevator, and the elevator itself, were not the property of the defendant; the elevator well was not in itself an unsafe place in which to hoist the lumber, and if unsafe in this instance it was rendered so by the plaintiff's intestate, or by his fellow-servants, or both, in their careless use of the appliances furnished them, a condition over which the defendant had no control and in which it cannot be held responsible.

It does not appear that the injury to the lower elevator car was the proximate cause of the accident, and the case does not show how the accident happened, or by whose neglect.

It is claimed by the plaintiff that there was direct connection between the injury to one of the elevators the day before and the accident itself—that the accident would not have occurred if the cross-bar had not been injured the day before, and that the jury could properly infer that the falling elevator struck the plaintiff's intestate; but the testimony does not authorize us to accept the plaintiff's contention as correct. The whole matter is left to conjecture. True, a jury may return a verdict based upon inferences properly drawn, but such inferences must be drawn from facts proved in the case, and not merely upon conjecture or guess work. The provision relating to due care on the part of the plaintiff's intestate as set out in Public Laws, 1913, Chap. 27, does not affect the rights of the parties in this case, for the reason that the injury complained of occurred in 1911, about two years before such provision was made.

Was the accident due to the defendant's negligence in not repairing one elevator over night, or to the negligence of the crew of which the decedent was a member, in carelessly striking the other elevator the following day? Of these two possibilities, which is right? The case does not show, nor is there anything in the testimony to lead a fair and reasoning mind to one conclusion rather than to the other.

Again, the witnesses say that the work was done carelessly, and the suspended elevator may have been so injured by planks raised against it as to cause the accident independently of the injury to the other the day before. If so, the accident was the result of the negligence of all the servants employed, including the plaintiff's intestate. It is a matter of considerable doubt from the evidence which elevator was at the top, or in fact whether the lumber was raised in that part of the well occupied by the top elevator, and it is pointed out by defendant's counsel that lumber could not be raised in that part of the well occupied by the elevator as claimed in the writ. The facts brought out are important only as bearing upon the question of the defendant's negligence.

On the morning of the accident the work proceeded the same as before the injury to the elevator, and in a most careless manner. The planks in their ascent were permitted carelessly to strike the cable holding the elevators, and as carelessly to strike the bottom of the suspended elevator, all of which must have been under the observation of Mr. Fitzgerald, whether he was negligent or not, and for two hours on that morning such condition existed, was known to Fitzgerald, and unknown to the defendant. We fail to see anything in the evidence to justify holding the defendant liable for an accident so clearly due to the negligence of its employees, the risk of which the plaintiff's intestate must be held to have assumed. *Cote* v. *Jay M'f'g Co.*, 115 Maine, page 300; *Elliott* v. *Sawyer*, 107 Maine, 196.

The principal witness at a former trial was the principal witness in the case at bar. His testimony on his own admission is just the opposite of his former testimony,—not upon one fact, but upon a series of facts and circumstances connected with the work, the machinery, and his own movements during the morning of the accident; so that no reason can be found to view his testimony in any other light than that of a swift witness. He offers no excuse or explanation for the change in his testimony. His testimony at this time was vital to the plaintiff's case. Without it the plaintiff could

not recover. It bears the stamp of inherent incredibility. If the jurors believed him they erred, as they have in their verdict, for a careful study of the case reveals no ground upon which the defendant can be held to answer under the law for the unfortunate accident to the plaintiff's intestate.

The entry will be,

Motion sustained.
New trial granted.

MARGARET C. D. CLARK, by CHARLES L. ANDREWS, Her Guardian, Petitioner for Partition,

vs.

BOSTON SAFE DEPOSIT AND TRUST CO.

Franklin. Opinion November 20, 1917.

Wills. Waiver of provision of will. Right of waiver being personal. Rule as to guardian being permitted to file waiver.

1. When the right of dower was abolished and the widow given a right by descent in the estate of her husband, the same statutory provision for waiving the provisions of the will and accepting the rights given to her by law were retained as they had previously existed.
2. The privilege of a widow waiving her rights under the will of her husband is a purely personal right and its exercise rests in her personal discretion alone. If she is non compos her guardian cannot make the election for her.

Petition for partition by guardian of Margaret C. D. Clark, insane adult. Defendant filed statement denying that Margaret C. D. Clark was seized in fee of any part of said premises described in said petition, and setting forth that the title to said premises, for which petition was demanded, was in the defendant under and by virtue of the last will and testament of Franklin J. Clark, husband of said Margaret C. D. Clark. Upon certain agreed statements, case was reported to Law Court for such decision as the law and facts require. Petition dismissed.

Case stated in opinion.

A. M. Spear, Andrews & Nelson, and F. W. Butler, for plaintiff.

Richards & Rollins, for defendant.

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

HALEY, J. This is a petition for partition of a lot of land situated in Farmington, Franklin County, and is reported to this court upon an agreed statement. The petitioner is the guardian of Margaret C. D. Clark, the widow of Franklin J. Clark, late of said Farmington.

Franklin J. Clark died, leaving property in Maine of the value of ten to twelve thousand dollars and in Massachusetts of the value of about sixty-five thousand dollars. The only real estate in Maine of which he died possessed is that mentioned in the petition for partition, and was appraised at seven thousand dollars. His widow has been hopelessly insane for the past fourteen or fifteen years, and has had no lucid intervals. For several years prior to her husband's death, and ever since, she has been cared for at the McLean Hospital in Waverly, Mass. By the will of Mr. Clark, which was duly proved and admitted to probate, the defendant was named as executor and trustee and has qualified as such executor and trustee.

By the terms of the will the sum of between forty and fifty thousand dollars was left in trust to the defendant, the income, and any part of the principal which might be necessary, to be used by the said trustee for the comfortable support and maintenance of the widow during her lifetime.

In February, 1915, Charles L. Andrews was appointed guardian of the widow by the Probate Court of Franklin County. May 22, 1915, an instrument purporting to be a waiver of the provisions of the will of Mr. Clark, signed Margaret D. Clark, by her guardian, was filed in the Probate Court of Franklin County. The waiver of the widow was ordered dismissed. The guardian, at the same time he filed the instrument purporting to be a waiver, filed a petition setting forth the facts in regard to the insanity of Mrs. Clark, and stated, "that it would be for the advantage and that her best interest demanded that the said will be waived, and that she receive her distributive share of said estate as the widow of said Franklin J. Clark" . . . , and prayed the court to direct and allow the guardian to waive the provisions of said will and to order them waived for her. After notice

and hearing, the Judge of the Probate Court made a finding which concluded as follows: "After due consideration of the provisions in said will made for the insane widow, the court is of the opinion that they are ample, and that it would not improve her condition, or the certainty of her proper support and maintenance, should the provisions in said will relating to said widow be waived. For these reasons the prayer of the petitioner is denied."

The provisions of the statute under which the guardian claims to maintain the petition is found in Sec. 13, Chap. 77, R. S., of 1903, (Sec. 13, Chap. 80, R. S., 1916) as follows: "When a specific provision is made in the will for the widow or widower of a testator or testatrix . . . such legatee or devisee, within six months after the probate of said will, . . . may make election and file a notice thereof in the probate court whether to accept said provision or claim the right and interest by descent, herein provided."

A similar provision existed before dower was abolished in this state, whereby the widow had the same privilege of election to accept the provision made in the will for her or to waive it, and when the right of dower was abolished and the widow given a right by descent in the estate of her husband, the same statutory provisions for waiving the provisions of a will and accepting the rights given to her by law were retained. In all the courts in which the subject has been discussed it has been held that the privilege of waiving the provisions of a will and accepting the provisions made by law are the same, whether it is a dower right or a right by inheritance. It has been the practice in this state, without exception so far as we are informed, to consider the widow's right to waive the provisions of her husband's will as personal to the widow, and counsel have failed to cite a case in which the right now claimed by the petitioner has been allowed in any court, except where it has been held that the equity practice conferred upon the court the authority to waive in behalf of a *non compos* widow the provisions of her husband's will, or where by statute the authority was expressly given to the guardian; but it is not claimed by counsel that our equity practice grants such authority to the court, and the opinions are unanimous upon statutes similar to ours that the right is personal, that the guardian or court cannot elect or waive for the insane widow.

In *Insurance Co.* v. *Allison*, 108 Maine, page 330, the court said: "The fact that Mrs. Allison personally gave her consent to the decree

may be disregarded, for it is practically conceded and such is the law, that while Mrs. Allison is under guardianship as an habitual drunkard she is incapable of giving consent, the same as if she had been adjudged insane. She is conclusively presumed to be incapable of conducting her affairs. She can not transact any business. She can not make a valid deed or bond. She can not waive the notice of the protest of a bill. She can not waive the provisions of her husband's will, and elect to take dower. She cannot do anything which involves the exercise of discretion and judgment . . . . The exercise of the right is an election, and involves the exercise of judgment, to do which Mrs. Allison is incapable. . . . . The right to consent was personal to her. She might exercise it or not, according to her fancy or her judgment. No one else could exercise it for her, in the absence of statute authority, except under the decree of a court having jurisdiction to authorize its exercise."

In *Crenshaw* v. *Carpenter*, 69 Ala., 572, reported in 44 Am. Rep., 539, it is stated that the right of the widow to waive the provision made for her in her husband's will in lieu of dower is personal, and if she is insane her right is defeated. The court cited many opinions to sustain the above proposition, and also quoted from Scribner on Dower, 469, as follows: "Except where otherwise provided by law, the statutory right conferred upon the widow, in cases of the character now under consideration, is regarded as a strictly personal right, and can not be exercised by another person in her behalf. In the application of this rule, it has been held, that the incapacity of a widow to elect by reason of insanity, furnishes no sufficient cause for its relaxation. IX Ruling Case Law, page 104, states: "The right of election is personal to the widow. If she is *non compos mentis*, the guardian can not make the election for her."

The privilege of a waiver is purely a personal right, and its exercise rests in her personal discretion alone. *Pinkington* v. *Sargent*, 102 Mass., 68; *Sherman et als.* v. *Newton, Exr.*, 72 Mass., 308; *Penhallow* v. *Kimball*, 61 N. H., 596; *Kennedy* v. *Johnson*, 60 Pa., 450; *Griswold* v. *Butler*, 3 Conn., 227; *Welch* v. *Anderson*, 28 Mo., 293; *Van Steenwyck* v. *Washburn*, 59 Wis., 483; *Crozier, Applet.*, 90 Penn. St., 384, 35 Am. Rep., 666.

In view of the statement in the petitioner's brief that, "in Massachusetts the court has decided, upon a similar statute, squarely against us, in like manner have several other states. And I find no

state where the precise question in controversy has been decided in our favor," it is useless to cite further authorities on the proposition that the right is personal and cannot be exercised by the guardian.

But the petitioner contends that *Brown* v. *Hodgdon*, 31 Maine, 66, is authority for the position here assumed, and, in a very ingenious argument, attempts to demonstrate it by assuming that the allegations in the reason of appeal in that case, that the widow for a long time "before the decease of her said husband was and ever since has been insane," was proved although the court did not so decide, as the opinion states. And further assuming that the widow did not claim dower, although the opinion shows, on page 66, that the petition for allowance set forth the fact that she had, and if the waiver which she signed was the same (as it undoubtedly was) as the waiver signed by the guardian for the ward in this case, it was a waiver of the provisions of the will and an election and a claim of dower. Assuming these statements to be true, it is a very ingenious argument, but in *Van Steenwyck* v. *Washburn*, supra, the court discussed *Brown* v. *Hodgdon* and said: "It is apparent the case fails to sustain the position to which it is cited, that the guardian may elect," and in *Pinkington* v. *Sargent*, supra, the court discussed *Brown* v. *Hodgdon* and construed the opinion as against the claim of the plaintiff in this case, in which construction we concur.

For the purposes of argument, assuming the facts in *Brown* v. *Hodgdon* were as the petitioner claims, it is very apparent that it was contrary to all authority at the time, and an irregular proceeding that has never been followed by the courts of the state, or of any other state, cannot establish the proposition contended for because an irregular proceeding does not create a precedent. The rule has been changed in some of the states by statute, and many states now allow the guardian of an insane widow to waive the provisions of the will made in her behalf, in some cases, when it appears to him, and, in others, when it appears to the court, that the best interests of the insane widow requires it. It is seldom done for the benefit of the relatives of the insane widow. But in the absence of any statute in this state authorizing it, we adopt the language from *Crossier, Appellant*, supra, "that the law has been so understood and practiced without challenge for the last century, is apparent from the fact, that a similar claim has never been made with sufficient zeal to establish a precedent."

Petition dismissed.

GEORGE G. HAY *vs.* MARY A. FORTIER.

Cumberland. Opinion November 22, 1917.

Contract. Consideration. Promise to forbear bringing suit as sufficient consideration for a new promise. Estoppel. Rule as to a promise of payment of money then due being sufficient consideration for new contract.

The defendant, a surety on a fifteen day bond the conditions of which had not been complied with, promised the creditor to pay at once $100 and the balance due under the bond before a specified time, provided the creditor would accept those terms of settlement and forbear action on the bond. The creditor, on his part, in consideration of such part payment at once, and the defendant's promise to pay the balance on or before the time specified, agreed to forbear and did in fact forbear, action on the bond until after the time specified. The defendant paid the $100 forthwith as agreed, but no more.

In an action by the creditor against the defendant based upon her special promise to pay the balance due under the bond as agreed,

Held:

1. A promise to forbear and give time for the payment of a debt followed by actual forbearance for the time specified, or for a reasonable time when no time is named, is a sufficient consideration for a promise to pay the debt.
2. The payment, or promise of payment, of money which is then due and payable by virtue of an existing valid contract of the promisor is not in contemplation of law a sufficient consideration for any new contract.
3. The creditors promise to forbear action on the bond was, therefore, without a legal consideration and not binding on him, and he could not have been compelled to forbear as he agreed to do.
4. But when a contract, not originally binding for want of mutuality, is executed by the party not bound to perform his part, so that the other party has actually received the benefit contracted for, the latter will be estopped from refusing performance on his part on the ground that the contract was not originally binding on the other, who has, nevertheless, performed it.
5. Having enjoyed the forbearance of the plaintiff from bringing action against her on the bond for the full period agreed upon, the defendant is now estopped from refusing performance on her part on the ground that the contract was not originally binding on the plaintiff, who did in fact perform it and she has received the benefit thereof.

Action on the case to recover upon a special promise made by defendant to pay a certain balance due under a bond signed by her and others and upon which she was liable. By agreement of parties, case was reported to Law Court upon certain agreed statements, the Law Court to render judgment according to the rights of the parties, and for such amount as the Law Court deems meet and proper. Judgment in accordance with opinion.

Case stated in opinion.

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

F. W. Clair, for defendant.

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

KING, J. The case made by the agreed statement is this: The defendant became a surety on a fifteen day bond given by one Henry H. Sawyer to the plaintiff. The conditions of the bond were not complied with and the defendant was notified of her liability under the bond and requested to make payment thereof. On February 4, 1915, the defendant's attorney wrote the attorney of the plaintiff as follows: "I have seen Mrs. Fortier who says it will be a great hardship to pay this entire amount at the present time as the other signers are worthless. She suggests . . . that she will pay you one hundred dollars next week, if the papers are regular, and settle the balance by payments the whole bill to be paid before your April Term of Court. . . ." To that the plaintiff, through his attorney, replied sending copies of the papers and saying: "I am willing to accept one hundred dollars on account, providing you send same to me immediately and the balance on or before the First Tuesday of April. . . ." The defendant paid the one hundred dollars forthwith, but no more. The plaintiff waited till long after the first Tuesday of April, and on June 1, 1915, brought an action of debt on the bond against the principal and all the sureties. Mrs. Fortier answered to that action at the return term thereof, and at a subsequent term, on November 3, 1915, by agreement, that action was "discontinued without costs and without prejudice," the counsel of the respective parties signing the docket entry to that effect. Why that action was thus discontinued does not appear in this case. On the following day, November 4, 1915, this action was brought against Mrs. Fortier based upon a

breach of her alleged special promise to pay the balance due under the bond before the April term of court, as stated in the correspondence referred to. The declaration is not made a part of the case, but the parties stipulate that it "is in due form." The defense is that the alleged promise on which the action is based was without a legal consideration and is, therefore, non-enforceable.

We think the agreed statement justifies the conclusion, that the defendant promised to pay at once $100, and the balance due under the bond before the April term of court, *provided* the plaintiff would forbear action on the bond; and that the plaintiff on his part, in consideration of such part payment at once, and the promise to pay the balance on or before the time specified, agreed to forbear, and did in fact forbear, action on the bond until after the time specified. And a promise to forbear and give time for the payment of a debt followed by actual forbearance for the time specified or for a reasonable time when no definite time is named, is certainly a sufficient consideration for a promise to pay the debt. *Moore* v. *McKenney*, 83 Maine, 80, 90.

On the other hand, it is obvious that the defendant by her special promise did not agree to do anything that she was not then legally bound to do. Her liability under the bond was then due and payable. She might then have been required to pay it all forthwith. And it is a well recognized principle, that the payment, or promise of payment, of money which is then due and payable by virtue of an existing valid contract of the promisor, is not in contemplation of law a sufficient consideration for any new contract. *Wescott* v. *Mitchell*, 95 Maine, 377, 383; *Dunn* v. *Collins*, 70 Maine, 230; *Wimer* v. *Worth Township Poor Overseers*, 104 Pa. St., 317; *Mathewson* v. *Strafford Bank*, 45 N. H., 104; *Parmelee* v. *Thompson*, 45 N. Y., 58; *Bedford's Exr.* v. *Chandler*, 81 Vt., 270, 273; 6 R. C. L., 664. The defendant, therefore, contends that the plaintiff's promise to forbear action on the bond was without a legal consideration and not binding on him, in other words, that he could have brought action on the bond immediately after the part payment was made, in total disregard of his promise to wait until the April term of court. We think that contention is sound, and well supported by authorities. In *Warren* v. *Hodge*, 121 Mass., 106, the court said: "It is too well settled to require discussion or reference to authorities, that an agreement to forbear to sue upon a debt already due and payable, for no other con-

sideration than a payment of a part of the debt, is without legal consideration, and cannot be availed of by the debtor, either by way of contract or estoppel."

But it does not follow, as the defendant claims, that this action against her is not maintainable, simply because the plaintiff's promise to forbear action on the bond could not have been enforced against him during the specified period of forbearance. "If a contract, although not originally binding for want of mutuality, is nevertheless executed by the party not originally bound, so that the party asserting the invalidity of the contract has actually received the benefit contracted for, the latter will be estopped from refusing performance on his part on the ground that the contract was not originally binding on the other, who has performed." 6 R. C. L., 890. Granting that the parties, through the correspondence referred to, entered into a bilateral contract, and that there was want of mutuality in that contract because the plaintiff was not bound to perform his part of it, nevertheless, he did fully perform the contract on his part, and the defendant received the full benefit contracted for. Having enjoyed the forbearance of the plaintiff from bringing action against her on the bond for the full period agreed upon, the defendant is now estopped from refusing performance on her part on the ground that the contract was not originally binding on the plaintiff, who did, nevertheless, perform it and she received the benefit thereof.

It is, therefore, the opinion of the court that this action is maintainable, and that the plaintiff is entitled to judgment against the defendant for one hundred seventy-five dollars and sixty cents and costs, with interest from the date of the writ.

So ordered.

AMERICAN AGRICULTURAL CHEMICAL COMPANY

vs.

HATTIE A. WALTON.

Waldo. Opinion November 22, 1917.

Rights of mortgagees of real estate in relation to title and possession of the mortgaged property. Right of mortgagee to possession in absence of agreement or stipulation to contrary. Rents and profits of mortgaged property.

1. In this State the legal title and right of possession of mortgaged real estate unless otherwise agreed, is in the mortgagee and so continue in him until a full and complete performance of the condition of the mortgage, or a tender equivalent thereto.
2. In the absence of a stipulation to the contrary, either express or implied, the mortgagee is entitled to take possession of the mortgaged property at any time either before or after breach of condition. But in such case if the mortgage is afterwards redeemed the mortgagee must account for the clear rents and profits.
3. The right of the first mortgagee to take possession of the mortgaged premises was not affected in any way by the fact that the plaintiff as the secured mortgagee took possession of the premises in 1915. The second mortgagee had no more right to hold possession of the premises against the first mortgagee than the mortgagor would have had if the second mortgage had not been given.
4. The first mortgagee having the legal title and right to the possession of the mortgaged premises could lease it, subject, of course, to its being redeemed; and the evidence shows that he did lease it to the defendant on January 12, 1916 for one year at a rental of $100.

Action of replevin. Defendant filed plea of general issue and also brief statement. At close of evidence, by agreement of parties case was reported to Law Court for decision, upon so much of the evidence as legally admissible. Judgment in accordance with opinion.

Case stated in opinion.

Williamson, Burleigh & McLean, for plaintiff.

Arthur Ritchie, for defendant.

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

KING, J. This case comes before us on report. It is an action of replevin for about 30 tons of hay. The material facts, as we find them from the report, are these:

William Walton, husband of the defendant, on April 9, 1912, mortgaged his farm, on which the hay was cut, to L. N. Richards to secure $2500. Thereafter, on March 5th 1913, Mr. Walton mortgaged the same farm to the plaintiff. That second mortgage was foreclosed and the equity of redemption therefrom expired July 9th 1915. Immediately thereafter the plaintiff, through its attorneys, took possession of the farm and placed Mr. Walton in charge, making an arrangement with him to cut the hay for the year 1915, at the plaintiff's expense, and to care for and harvest the other crops at the halves. Walton cut the hay for the plaintiff, for which he was paid, and harvested the crops, turning over to the plaintiff its one-half thereof as agreed.

In November, 1915, Mr. Richards, the mortgagee of the first mortgage, began foreclosure of that mortgage by publication, the equity of redemption therefrom expiring November 4th, 1916. On the 12th of January, 1916, Mr. and Mrs. Walton still living on the farm, Mr. Richards, the mortgagee and holder of the first mortgage, gave a written lease of the farm to Mrs. Walton, the defendant, for the term of one year, at a rental of one hundred dollars payable October 10th, 1916, the lessee to pay the taxes. When that lease was given and accepted the Waltons told Mr. Richards that they could not redeem the mortgage, and that, so far as they could do so by parol, they would and did release to him their right to redeem.

April 8th 1916, the plaintiff, through its attorneys, wrote Mr. Walton inquiring if he would like to hire the farm of the plaintiff company for that year, to which no reply was made. Just before the haying season of 1916 the plaintiff's attorneys telephoned Mr. Walton "and asked him if he wouldn't take care of the gathering of the hay for us; and he then told me that the first mortgagee had leased the premises to his wife, and that he was going to cut the hay." The plaintiff notified Mrs. Walton that it claimed the hay on the farm for 1916 and should hold her responsible for it. But she cut

the hay claiming it under her lease, and the plaintiff has brought this action of replevin against her for that hay. Is the action maintainable? We think not.

In this State the legal title and right of possession of mortgaged real estate, unless otherwise agreed, is in the mortgagee and so continue in him until a full and complete performance of the condition of the mortgage, or a tender equivalent thereto. *Stewart* v. *Davis*, 63 Maine, 539, 544; *Gilman* v. *Wills*, 66 Maine, 273; *Allen Co.* v. *Emerton*, 108 Maine, 221, 224. In the absence of a stipulation to the contrary, either express or implied, the mortgagee is entitled to take possession of the mortgaged property at any time either before or after breach of condition. *Brastow* v. *Barrett*, 82 Maine, 456; *Bank* v. *Wallace*, 87 Maine, 28; R. S., Chap. 95, Sec. 2. But in such case, if the mortgage is afterwards redeemed, the mortgagee must account for the clear rents and profits.

Mr. Richards, the mortgagee in the first mortgage, had the right to take possession of the mortgaged premises at any time and receive the rents and profits. His right to possession was not affected in any way by the fact that the plaintiff, as the mortgagee in the second mortgage, took possession of the premises in 1915. Richards could take possession at any time against the mortgagor or against any one claiming under the mortgagor, and the plaintiff stood in the mortgagor's place.

That the first mortgagee exercised his right to take the possession of the mortgaged premises and receive the rents and profits there can be no doubt. On January 12, 1916, he executed a lease of the premises to the defendant. Having the legal title and right to the possession of the property he could lease it, subject, of course, to its being redeemed. We can entertain no doubt from the report that Mrs. Walton had the possession of the premises under her lease from the first mortgagee from and after the time that lease was given to her in January, 1916. If Mr. Walton had been, up to that time, in charge of the property for the plaintiff, after it took possession in July, 1915, it is plain that he yielded up the premises to Mr. Richards when the lease was given. But had he objected, or had the plaintiff itself objected, to the first mortgagee taking possession, any such objection would have been futile. Undoubtedly the second mortgagee had the right to take possession of the premises, as it did in 1915, and receive the rents and profits thereof, so long as the first mortgagee did not exer-

cise his right and take possession of the property. But when he did take possession he was entitled to receive all the rents and profit accruing thereafter, with the liability, of course, to account for them in case of redemption of his mortgage.

In the opinion of the court that is what happened in this case. In January, 1916, the first mortgagee asserted his right of possession of the mortgaged premises, and from that time his tenant, the defendant, was in possession of the property under her lease and had the right to the hay for 1916 which she harvested, and which is the subject of this action.

Accordingly the entry must be,

Judgment for defendant and for a return of the property.

ELMER E. ELLIS,

Petitioner for Leave to Enter Appeal from Probate Court In Re Estate of Harriet F. Ellis.

Kennebec. Opinion November 22, 1917.

Probate appeals. Discretionary right of presiding Justice to grant leave to enter an appeal.

1. The remedial provisions of Sec. 33, Chap. 67, R. S., are not limited to cases where the appellant has omitted "to claim" an appeal, but they also include cases where an appellant has omitted to "prosecute his appeal" which he had duly claimed.
2. The petitioner's appeal was never entered in court within the meaning of the statute, because it had not been served as required by statute.
3. Until the reasons of appeal are served, as the statute provides they shall be, the appellate court has no jurisdiction to act upon the appeal, and can do nothing more than dismiss it, as was done in this case.
4. The reasons of appeal not having been served, as the statute requires that they must be, the appellate court had no jurisdiction of the matter and no authority to order service of the reasons of appeal.

5. The phrase "defect of notice" as used in Sec. 33, Chap. 67, R. S., includes cases where there is an omission to give any notice of the reasons of appeal, as well as cases where the notice given is defective.
6. A petition for leave to enter and prosecute an appeal, under the provisions of Sec. 33, Chap. 67, R. S., in which the petitioner alleges, that he seasonably claimed an appeal, "but that through accident, mistake, defect of notice, or otherwise without any fault on his part, said appeal papers were not properly served upon the adverse party who appeared before the Judge of Probate, as required by law," and "that justice requires a revision of the decree" appealed from, contains sufficient allegations of the jurisdictional facts which are prerequisites to the maintenance of such a petition.
7. A petition for leave to enter and prosecute an appeal from the decree of the Judge of Probate when heard by the presiding Justice of the Supreme Court is addressed to his discretion and his decision whether or not the petition should be granted is final and not subject to exception, at least so far as all questions of fact involved are concerned.

Petition for leave to enter appeal from decree of Judge of Probate. Appellee filed motion to dismiss, which motion was overruled by presiding Justice and petitioner was granted leave to enter his appeal. To this ruling, appellee filed exceptions. Exceptions overruled.

Case stated in opinion.

Andrews & Nelson, for petitioner.

Carl C. Jones, for appellee.

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

KING, J. This case comes up on exceptions to a ruling granting the petitioner leave to enter his appeal from a decree of the Judge of Probate for Kennebec County.

The provisions of statute, so far as material in this case, are these: Any person aggrieved by a decree of a Judge of Probate, with certain exceptions not important to be noted here, may appeal therefrom to the Supreme Court to be held within the county, if he claims his appeal within twenty days from the date of the proceeding appealed from. R. S., 1916, Chap. 67, Sec. 31. Within the time limited for claiming an appeal, the appellant shall file, in the probate office, his bond to the adverse party for such sum and with such sureties as the judge approves, conditioned as provided for in the statute, and he shall also file in the probate office the reasons of appeal, and shall,

fourteen days at least before the sitting of the appellate court, serve all the other parties, who appeared before the Judge of Probate in the case, with a copy of such reasons, attested by the register. R. S., Chap. 67, Sec. 32. Section 33 of said chapter reads as follows: "If any such person from accident, mistake, defect of notice, or otherwise without fault on his part, omits to claim or prosecute his appeal as aforesaid, the supreme court, if justice requires a revision, may, upon reasonable terms, allow an appeal to be entered and prosecuted with the same effect, as if it had been seasonably done; but not without due notice to the party adversely interested, nor unless the petition therefor is filed with the clerk of said court within one year after the decision complained of was made; and said petition shall be heard at the next term after the filing thereof."

The petitioner's appeal with the reasons of appeal, and the bond to the adverse party, all as required by statute, were seasonably filed in the probate office within twenty days from the date of the decree appealed from.

At the next term of the appellate court, the October term, 1916, of the Supreme Judicial Court for said county, the appeal was "dismissed for want of service." Thereupon the petitioner presented this petition, under the provisions of Sec. 33, Chap. 67, R. S., for leave to enter and prosecute his said appeal, alleging therein, "that through accident, mistake, defect of notice, or otherwise, and without any fault on his part, said appeal papers were not properly served upon the adverse party who appeared before the judge of probate in the case, as required by law." He also stated in his petition "that justice requires a revision of the decree of the judge of probate," and he asked that leave to enter his appeal be granted. At the March term, 1917, of said court, the personal notice ordered on said petition having been proved, the appellee filed a motion that the petition be dismissed for the following reasons:

1. That from the decree of the Judge of Probate mentioned in said petition an appeal was had by the said Elmer E. Ellis, within the time allowed for appeals, said appeal was duly entered in the Supreme Judicial Court in and for the County of Kennebec and was dismissed by the presiding Justice.

2. That if no appeal was claimed or prosecuted by the said Elmer E. Ellis within the time allowed it was not by reason of any accident, mistake, defect of notice, or otherwise without fault on his part, as alleged in said petition for leave to enter his appeal.

3. That the petitioner gives no reasons in his petition for leave to enter his appeal why justice requires a revision of the decree of the Honorable Judge of Probate.

4. That the above entitled petition for leave to enter an appeal is irregular, unauthorized and insufficient.

Thereupon, at said March term, a hearing was had before the presiding Justice upon said petition and the motion to dismiss and, as stated in the exceptions, "the Justice ruled as a matter of law that the petitioner was entitled to the relief prayed for, denied the motion of the respondent and granted permission to enter the appeal." To that ruling the exceptions before us were taken.

1. It is claimed in support of the exceptions that inasmuch as the petitioner seasonably took his appeal and filed in the probate office his reasons of appeal, and the bond required by the statute, and his appeal was dismissed by the Supreme Court, he has had his appeal and, therefore, his petition does not come within the meaning of said Sec. 33. We think that claim is not sustainable. The remedial provisions of Section 33 are not limited to cases where an appellant has omitted "to claim" an appeal, but they also include cases where an appellant has omitted to "prosecute his appeal" which he had duly claimed. Such is plainly the meaning of the words of the statute, "omits to claim or *prosecute* his appeal as aforesaid." See *Sproul* v. *Randall*, 107 Maine, 274, 277; *Gurdy's Appeal*, 103 Maine, 356. The petitioner's appeal was never entered in court within the meaning of the statute, because it was not served, as the statute requires. Until the reasons of appeal are served, as the statute provides they shall be, the appellate court has no jurisdiction of the matter, and can do nothing more than dismiss it, as was done in this case. In the brief for the appellee it is suggested that the petitioner's remedy for the lack of service of his reasons of appeal was to obtain an order of service from the appellate court, "thus preserving his appeal absolutely." It is a sufficient answer to that suggestion, that the appellate court had no jurisdiction of the matter, because the reasons of appeal had not been served as required by the statute. It had no authority to order service of the reasons of appeal. No such an order was made in *Gurdy's Appeal*, 103 Maine, 356, as the appellee suggests. In that case the original appeal was properly served, entered in court, went to the Law Court on appellant's exceptions and was there argued and a decision made on the question raised. It was

on the petition thereafter filed for leave to enter an appeal that the Supreme Court ordered notice. That, of course, it had authority to do under the express provisions of Section 33 requiring "due notice" of the petition to the party adversely interested.

If the appellee contends that the provisions of Section 33 do not include cases where there is an entire want of service of the reasons of appeal, as distinguished from "defect of notice," as may have been the fact in this case, the answer to that contention is, that the court held otherwise in *Sproul* v. *Randall*, 107 Maine, page 277, saying: "We think however the spirit, if not the strict letter, of Sec. 30 (now Sec. 33) includes an omission to give any notice, and also an omission to enter the appeal."

2. The second reason, stated in the motion to dismiss as a ground for dismissal, is a denial of the truth of the allegations of the petition. This is not now urged in support of the exceptions. A mere denial of the truth of the allegations of the petition is not a reason for dismissing it. Moreover, under the motion to dismiss the allegations of the petition are to be taken as true.

3. It is objected that the allegations of the petition are not sufficient, and for that reason the exceptions should be sustained. We think there is no merit in that objection. The statute specifies certain jurisdictional facts, namely, "accident, mistake, defect of notice, or otherwise without fault on his (the petitioner's) part," as prerequisites to the maintenance of such a petition; and these jurisdictional facts must be alleged and proved. In this case they were alleged in the exact language of the statute.

Those allegations were sufficient, and when proved the court could proceed to inquire whether "justice requires a revision" of the decree appealed from. And inasmuch as the appellee moved to dismiss the petition, which motion is in effect a demurrer, all those allegations of fact made in the petition were to be taken as true. *Gurdy's Appeal*, supra, *Carter et als., Petitioners*, 110 Maine, 1, 4. It was not necessary, we think, that the petition should aver wherein it would appear that the petitioner's omission to enter or prosecute his appeal was from accident, mistake, defect of notice, or otherwise without fault on his part. That is a matter of proof and it need not be specifically alleged. Technical rules of pleading should not be required in cases of this kind. *Danby* v. *Dawes*, 81 Maine, 30. Nor was it necessary to allege why justice requires a revision. It is only necessary that

the fact be established that justice requires a revision. And the allegation of that fact need not be alleged. *Carter et als., Petitioners,* supra. In the case at bar that fact was alleged and established.

4. The fourth ground for dismissal, as set out in the appellee's motion, is that the "appeal is irregular, unauthorized and insufficient." We do not find that the appellee has suggested in his brief, or could suggest, any ground why the petition for leave to enter the appeal "is irregular, unauthorized and insufficient," other than what is comprised in the first and third reasons specified in his motion to dismiss, that is, (1) that the petitioner took his appeal and must be held to have prosecuted it, and (3) that the allegations of his petition for leave to enter an appeal are not sufficient. But those objections we have already considered and found not sustainable.

Finally. It has been distinctly held in our decisions that a petition for leave to enter an appeal from a decree of the Judge of Probate when heard by the presiding Justice of the Supreme Court is addressed to his discretion and his decision whether or not the petition should be granted is final and not subject to exception. *Graffam* v. *Cobb,* 98 Maine, 200, 206; *Savage, Pet'r,* v. *Chase,* 92 Maine, 252; *Goodwin, Pet'r,* v. *Prime,* 92 Maine, 355. In this case, therefore, all questions of fact necessarily involved in the question whether or not leave to enter the appeal should be granted, were conclusively determined by the presiding Justice, and are not open under the bill of exceptions, notwithstanding it is there stated that "the Justice ruled as a matter of law," for such a statement could not change a question of fact to one of law. And we entertain doubt if the ruling excepted to related to any question of law that was not concluded by the decision of the Justice, to whose discretion was addressed the determination of the question whether the petitioner ought under the provisions of the statute to be allowed to enter his appeal. Nevertheless, we have considered all the questions, both of law and fact, involved in the ruling complained of, and are of the opinion that no error was committed.

Exceptions overruled.

ETTA MERITHEW *vs.* SIMEON ELLIS.

Waldo. Opinion November 24, 1917.

Rule as to conveyance of property in consideration of future support being voidable as to then existing creditors. Rule where under an agreement for support the same has been actually furnished in good faith. Consideration. Emancipation of children. Rule where a father enters into a contract with his emancipated child to pay for services rendered by such child, or where a conveyance is made by the father to the child on account of such services so rendered.

In a real action to recover possession of property which the defendant alleges had been conveyed in fraud of existing creditors, it is

Held:

1. A conveyance of a debtor's entire property in consideration of future support is purely voluntary and prima facie voidable as to existing creditors.
2. But if, in the performance of such an agreement by the grantee, the support has been actually furnished in good faith so that full value has been subsequently paid, prior to the assertion of rights by creditors, the conveyance will be upheld.
3. The conveyance from mother to daughter in this case had been paid for at full value at the time of attack and must therefore stand.
4. The evidence upon the defendant's claim for improvements under R. S., Chap. 109, Secs. 20, 24, 25 and 26 is so meagre that it is impossible to form an intelligent judgment on this point. The case will therefore be remanded to nisi prius in order that a determination of that question alone may be made.

Real action. Plea of nul disseizin filed by defendant and also brief statement. At close of testimony, by agreement of parties, case was reported to Law Court to render such judgment as the rights of the parties require. Judgment in accordance with opinion.

Case stated in opinion.

Eugene C. Upton, and Miss Aurelia E. Hanson, of Malden, Mass., for plaintiff.

Robert F. Dunton, for defendant.

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

CORNISH, C. J. Real action. Plea nul disseizin with brief statement claiming compensation for improvements. On report.

The real estate in question was conveyed to Henrietta H. Reed on April 18, 1888. After its purchase Mrs. Reed procured credit at the store of John M. Ames & Son of Stockton Springs, the last item of the account being dated March 15, 1889, and on that date the balance due was $33.66.

On June 6, 1889, while this balance was still unpaid, Mrs. Reed, a widow, conveyed the premises, consisting of a small house and lot, to her daughter Flora B. Reed, then fifteen years old, the consideration being the oral agreement of the daughter to care for her mother during her life. The debt from Mrs. Reed to Ames and Son remaining unpaid, they brought suit against her on December 22, 1894, and attached her real estate. Judgment was rendered for the plaintiff in this suit at the January term, 1896, and after seizure on execution the property in question was sold at sheriff's sale on February 26, 1896, to the judgment creditors, Ames and Son, and a sheriff's deed was duly executed and delivered to them.

The plaintiff's title is derived from Flora B. Reed, by deed dated November 2, 1901; the defendant's from Ames and Son under the sheriff's deed through various mesne conveyances.

After her purchase of the property in 1888, Mrs. Reed continued to occupy the premises until her eviction by the sheriff in September, 1902, during the alleged ownership of one Devereaux, a grantee in the defendant's chain of title, and she paid all taxes assessed thereon according to the plaintiff's testimony. Flora B. Reed remained on the premises until November 2, 1901, when she conveyed to her sister, the plaintiff, who agreed to continue the support of the mother during the remainder of her life. After the eviction in September Mrs. Reed, however, went to Belfast to again live with her daughter Flora, and remained with her until her death, March 3, 1903.

The issue here is between the plaintiff the source of whose title is the deed of June 6, 1889, the consideration of which was admittedly an agreement for future support of the grantor by the grantee, and the defendant, the source of whose title is the sheriff's deed based on

a judgment in behalf of an existing creditor of the grantor whose debt was unpaid when the conveyance in consideration of future support was given.

The defendant attacks the deed of June 6, 1889, from the mother to her minor daughter, relying upon the familiar principle that a conveyance of a debtor's entire property in consideration of future support is purely voluntary and prima facie voidable as to existing creditors. Such is the law. *Webster* v. *Withey*, 25 Maine, 326; *Rollins* v. *Mooers*, 25 Maine, 192; *Egery* v. *Johnson*, 70 Maine, 258; *Graves* v. *Blondell*, 70 Maine, 190; *Spear* v. *Spear*, 97 Maine, 498.

But another rule is of equal force, that if in the performance of such an agreement, the support has been actually furnished in good faith so that the consideration has been subsequently paid, the conveyance will be upheld. "Such a conveyance will not be set aside at the instance of creditors, after the support has been furnished in reliance on it, which in value exceeds that of the property conveyed." 12 R. C. L., 547. *Kelsey* v. *Kelley*, 63 Vt., 41; 20 Cyc., 493; *Harris* v. *Brink*, 100 Iowa, 366; *Walker* v. *Cady*, 106 Mich., 21; *Long Branch Banking Co.* v. *Dennis*, 56 N. J. Eq., 549. These cited cases are all in equity, but there is no logical reason why the justice of the principle should not be applied in an action at law when the facts warrant it. The case at bar affords a striking illustration of its efficacy. At the time when in March, 1889, Mrs. Reed owed Ames and Son a small balance of $33.66, she was the owner of this little home, bought with her pension money and worth as is admitted by the defendant's counsel in argument about one hundred dollars. She had no other property. She was in ill health and had previously been helped by the town. She had two daughters, Flora aged then fifteen, and Etta aged twenty-two. Flora was at work among the villagers and earning money on her own account. Under these circumstances the mother gave the property to the younger daughter in consideration of the oral agreement to care for her during the rest of her life. There is no claim of any actual fraud on the part of either mother or daughter. That deed was immediately placed on record, and therefore Ames and Son had constructive notice of the transaction. Had they then taken steps to set the conveyance aside as fraudulent, they would have been within their legal rights. But they sat by and allowed the daughter to pay the consideration which she had agreed to pay. For twelve years, that is from the time when she was fifteen up to the

time when she was twenty-seven years of age, she did care for and support her mother, and then on November 2, 1901, she conveyed the property to her older sister who in turn agreed to carry out the same contract. During all this time they remained in undisturbed possession.

For almost six years Ames and Son allowed the daughter to perform her agreement before they brought suit on their claim and it was not until September, 1902, thirteen years after the deed was given, that the mother was evicted and possession taken by a predecessor of the defendant in title.

That the daughter contributed to the support of the mother at an expense far greater than the value of the property, before Ames and Son made any move to enforce their rights, is apparent from the evidence. The value of the property was only one hundred dollars and certainly she contributed greatly in excess of twenty dollars per year for the five years after she received her deed. At the time the creditors began proceedings full consideration had therefore been paid and the conveyance was no longer voidable. On what principle of law should the creditors be allowed to step in and appropriate property that had been paid for in full? What preferential rights had they under these circumstances? As the court said in *Kelsey* v. *Kelley*, 63 Vt., 41, before cited, "The defendants, until they had furnished the full support were like a purchaser bona fide in every respect except they had not fully paid the contract price of the property purchased. . . . But although he does not pay full value at the time of purchase, if such payment is made in full before he is made aware of the infirmity of his purchase, he is fully protected."

Here thirteen years elapsed before the daughter was made aware of even the alleged infirmity of her purchase. Six of these years had been during her minority and seven after attaining her majority.

The fact that Flora was a minor at the time of the conveyance and agreement does not destroy her rights. Obviously she had been emancipated by her mother. As defined by our court "Emancipation must be by consent, express or implied, of the parent if living, and is an entire surrender of all right to the care, custody and earnings of the child as well as a renunciation of parental duties." *Lowell* v. *Newport*, 66 Maine, 78. It "occurs by the voluntary act of the parent in surrendering the rights and renouncing the duties of his position, or, in some way conducting the relation thereto in a manner

which is .inconsistent with any further performance of them." *Monroe* v. *Jackson*, 55 Maine, 59; *Carthage* v. *Canton*, 97 Maine, 473, 476. Here the daughter was working and earning on her own account and the mother dealt with her as with a stranger. She did not claim her services because of the filial relationship but contracted for them under the agreement entered into between them, and that agreement necessarily implied emancipation. It provided that the daughter should support the mother. This she could not do if her mother was still to claim and take her earnings. This principle has been well stated in these words: "Since however a father may emancipate his minor child it has been held that if he does so and enters into a bona fide contract with the child to pay for services performed by the child under such contract, such services are a sufficient consideration to support a conveyance by the father to the child as against the father's creditors." 20 Cyc. 532.

For these reasons it is the opinion of the court that the plaintiff should prevail. The conveyance from mother to daughter with value fully paid at the time of attack by creditors must stand.

The defendant sets up a claim for improvements made by himself and his predecessors, but the evidence is so meagre and unsatisfactory on this branch of the case that it is impossible to form an intelligent opinion on this important point. The case will therefore be remanded to nisi prius in order that a determination of that question alone may be made, as provided by R. S., (1916), Chap. 109, Secs. 20, 24, 25 and 26.

In this way exact justice will be done to all the parties in interest.

Case remanded to nisi prius for further proceedings in accordance with opinion.

FRED S. THOMPSON,

Appellant from Decree of Judge of Probate, In Re Estate of Henrietta T. Nickels.

Waldo. Opinion November 24, 1917.

Jurisdiction of Probate Court. Decrees of Probate Courts on all matters within its jurisdiction. Effect of valid appeal from Probate Court. Questions open upon appeal from the ruling of the Supreme Court. Appeal from findings of fact. Doctrine of dependent relative revocation. Evidence necessary to give Supreme Court of United States jurisdiction of a writ of error to the State Court. Wills.

On exceptions to the dismissal of a petition to revoke and vacate a decree of the Probate Court, allowing the will of Henrietta T. Nickels it is

Held:

1. The finding of facts by the Justice presiding in the Supreme Court of Probate are conclusive and not to be reviewed by the Law Court if the record shows any evidence to support them. It is the finding of facts without evidence that can be challenged by exceptions.
2. The finding of the presiding Justice that the petitioner's signature to the original petition for the probate of this will had not been obtained by fraud, misrepresentation and concealment is amply sustained by the evidence.
3. The finding that the petitioner here had not withdrawn as a petitioner for the probate of the will, had not become a remonstrant, and had not been so recognized, is also supported by the record.
4. The Probate Court had full jurisdiction of the parties and of the cause, and the weight and sufficiency of the evidence in sustaining the will in question were matters to be determined by that court. The weakness or the strength of that evidence did not affect the jurisdiction and the Supreme Court of Probate properly excluded that evidence on this petition to vacate the decree. It would be admissible in a hearing on appeal from the decree but not on a petition to revoke the decree itself for lack of jurisdiction.
5. The petitioner has not been deprived of property without "due process of law" in violation of the fifth and fourteenth amendments of the Federal Constitution.

Petition to revoke and vacate decree of Probate Court, Waldo County, Maine; petitioner having been a party to proceedings asking that said decree be made. To the ruling of Justice at Supreme Court of Probate, petitioner filed exceptions. Judgment in accordance with opinion.

Case stated in opinion.

Eugene C. Upton, George F. Gould, and Miss Aurelia E. Hanson, of Malden, Mass., for appellant.

William P. Whitehouse, Henry W. Swasey, Robert F. Dunton, and Robert T. Whitehouse, for appellees.

SITTING: CORNISH, C. J., SPEAR, KING, HANSON, MADIGAN, JJ.

CORNISH, C. J. This is a petition to revoke and vacate a decree of the Probate Court of Waldo County made on May 12, 1914, admitting to probate and allowing the will of Henrietta T. Nickels dated November 9, 1911.

A brief history of this somewhat protracted litigation is necessary to a proper conception of the case. Mrs. Henrietta T. Nickels, a resident of Searsport, died on February 28, 1914. She had made a will dated November 9, 1911, which was executed in legal and proper form and which for the sake of convenience we designate as the original will. On November 26, 1913, she signed another will but as this instrument had only two attesting witnesses instead of three as required by statute, it was invalid. R. S., (1903), Chap. 76, Sec. 1 (R. S., 1916, Chap. 79, Sec. 1). A codicil thereto dated November 29, 1913, was invalid for the same reason.

Under these circumstances, a petition was presented to the Judge of Probate asking for the admission to probate and the allowance of the original will. This petition was signed by all the heirs at law including Fred S. Thompson the petitioner in the pending proceedings, and alleged that "said deceased legally executed a will which existed at the time of her death and which has never been revoked; that said will was, on or about the 29th day of November, 1913, destroyed by the testatrix purely and only for the purpose of making some new disposition or alteration as shown by the drafts filed herewith, but because of failure of due execution of said drafts such disposition or alteration cannot take effect; that said will cannot be obtained,

although all reasonable diligence has been used to find and obtain it, and that the instrument hereunto annexed is a true copy of said will as aforesaid."

Upon this petition notice was duly ordered returnable May 12, 1914, and on that day after hearing duly had a decree was entered approving and allowing this original will. From this decision Fred S. Thompson appealed to the Supreme Court of Probate, assigning two reasons of appeal.

First, that the original will was revoked, cancelled, annulled and destroyed by the testatrix in her lifetime.

Second, that said decree was not made or signed by the Judge of Probate at the time or place of holding said term of court, to wit, on the twelfth day of May, 1914, at Belfast, but subsequently at Unity on the twentieth day of May, 1914, after said term of court had been adjourned.

This second reason was not pressed.

The Supreme Court of Probate heard this appeal at the September term, 1914, and after ruling pro forma that Fred S. Thompson, the appellant, was an aggrieved person within the meaning of R. S., (1903), Chap. 65, Sec. 23, ordered, adjudged and decreed,

First, that the decree of the Judge of Probate be affirmed.

Second, that the original will be approved and allowed as the due and lawful will.

Third, that the subsequent instruments be disallowed and rejected.

Exceptions to the rulings of the Supreme Court of Probate were then taken by the appellant. These were overruled by the Law Court and the decree of the Probate Court affirmed. *Thompson, App't*, 114 Maine, 338, announced January 3, 1916. The ground of the decision was that as Thompson was one of the petitioners asking for the probate of the will, he could not be deemed an "aggrieved person" within the meaning of R. S., (1903), Chap. 65, Sec. 28, when it was the granting of his own petition from which he was attempting to appeal and he had received what he had asked for.

Subsequent to this decision Mr. Thompson filed this petition in the Probate Court to revoke and vacate the decree of May 12, 1914, allowing the original will. The alleged grounds of revocation will be considered later. After due notice and hearing, the Judge of Probate on August 8, 1916, entered a decree denying and dismissing this petition. From this decree Mr. Thompson took an appeal to the

Supreme Court of Probate, alleging twenty-seven distinct reasons of appeal. These reiterate the petitioner's contentions in varying forms of expression, but the substance of them is, lack of jurisdiction in the Probate Court to make the original decree, lack of power in the court to apply the doctrine of dependent relative revocation, lack of evidence on which to base the invocation of that doctrine if otherwise legally applicable, the exclusion of all evidence touching the proceedings at the hearing of May 12, 1914, in the Probate Court except on the question of fraud connected with the signing of the original petition by Mr. Thompson, and finally that the petitioner had been deprived of his property without due process of law. This appeal was fully heard by the Supreme Court of Probate and decision was rendered on December 4, 1916, dismissing the appeal and affirming the decree of the Probate Court.

The case is now before the Law Court upon the appellant's exceptions to this order of dismissal and to the rulings of the Supreme Court of Probate upon certain requests presented by the petitioner. Those requests were seventy-seven in number. Two were subsequently withdrawn, one was granted, and seventy-four were refused. Such has been the protracted course traveled by this estate since May, 1914. However complicated that course may seem, the issues presented at this time are plain and not difficult of solution.

Our first inquiry should be as to the legal status of this case.

It is familiar law that the Probate Court is without common law jurisdiction, and is limited in its powers to those directly conferred by statute and to those necessarily incident to the execution of such powers. But it is equally well settled that its decrees in matters within its jurisdiction and within its statute-given authority are conclusive unless vacated or revoked. *Snow* v. *Russell*, 93 Maine, 362-376. Using the term jurisdiction in its strictly appropriate sense it must appear not only that the Probate Court had jurisdiction over the parties and the cause but also that all the proceedings prescribed by law have been rigidly complied with. *Taber* v. *Douglass*, 101 Maine, 363. All these tests have been met here. Mrs. Nickels was a resident of Waldo County at the time of her decease. The probating of her will was within the exclusive jurisdiction of the Probate Court of that County and all the statutory requirements connected therewith were strictly observed. The petition showing the jurisdictional facts, the order and proof of notice and the decree of May 12,

1914, admitting the original will to probate were all in proper form. That decree therefore, unless revoked or vacated, stands and is conclusive.

An appeal from that decree was taken by this petitioner to the Supreme Court of Probate and thence on exceptions to the Law Court. But the Law Court held that Mr. Thompson who undertook to appeal was not entitled to do so, and the appeal was therefore null and void. *Thompson, App't,* 114 Maine, 338, already cited. In effect the Law Court dismissed the appeal, without passing on the merits of the case and the decree of the Probate Court stood as if not appealed from. *Cleveland* v. *Quilty,* 128 Mass., 579. A valid appeal vacates a valid decree ipso facto; but a void appeal gives the Appellate Court no jurisdiction and leaves the original decree in full force and virtue. *Milliken* v. *Morey,* 85 Maine, 340. Hence it is that the mandate in *Thompson, App't,* 114 Maine, 338, disregarded the intervening decree of the Supreme Court of Probate, overruled the exceptions and affirmed the decree of the Probate Court. This affirmation was really surplusage. It added nothing to the existing decree of the Probate Court, because the Law Court, like the Supreme Court of Probate, was without jurisdiction to entertain the appeal, since it was presented by a party not aggrieved by the original decree. Nor did the addition of that affirmation subtract anything. The original decree of the Probate Court stood unrevoked. The mandate of the Law Court neither strengthened it nor weakened it, and that original decree still stands unappealed from in the eye of the law, as the judgment of the Probate Court of Waldo County, and is conclusive, unless it can be successfully attacked in the pending proceeding.

Such is the status of this cause, and we now come to the pending petition to vacate this decree. Brought in the Probate Court and denied there, appealed to the Supreme Court of Probate and denied there, it is now before the Law Court on exceptions to the rulings of the Supreme Court of Probate. Under these exceptions the only questions open for determination in this court are questions of law. The findings of fact by the Justice presiding in the Supreme Court of Probate are conclusive and not to be reviewed by the Law Court if the record shows any evidence to support them. It is the finding of facts without evidence that can be challenged by exceptions. *Eacott, App't,* 95 Maine, 522; *Costello* v. *Tighe,* 103 Maine, 324; *Palmer's Appeal,* 110 Maine, 441; *Gower, App't,* 113 Maine, 156.

This brings us to a consideration of the grounds of attack which the petitioner arrays against the validity of the original decree of the Probate Court allowing the will of May 9, 1911.

These are condensed and succinctly set forth by the petitioner in his bill of exceptions and we will consider them seriatim.

First—"Because his signature to the petition to allow said instrument had been obtained by fraud and misrepresentation and concealment."

This refers to the petitioner's contention that he was led to believe that two foster children of Mrs. Nickels had been legally adopted and were therefore her heirs at law; that afterwards he learned that they had not been legally adopted and therefore were not her heirs; and had he been informed of that fact earlier, he would not have asked for the probate of the will, as his share as an heir at law would have exceeded his interest as legatee under the will.

This contention presented purely a question of fact and was passed upon by the Justice presiding adversely to the petitioner's contention. Under the rule before stated, his finding is conclusive and is not reviewable here if there is any evidence to substantiate it. A careful study of the record reveals abundant evidence that there existed neither fraud, misrepresentation nor concealment, which led to the signing of the petition for probate by the petitioner. He was one of seven petitioners. The petition stated truly and fully the names of all the heirs at law of the deceased who were also the petitioners, and it did not contain the names of these foster children. Moreover at a conference held in Portland on March 24, 1914 at the office of Mr. Henry W. Swasey, who had been Mrs. Nickels' confidential adviser, had drawn her will of 1911 and was acting as counsel in the probate of the will, but who has since deceased, the entire situation was discussed in the presence of the petitioner and full opportunity was given him for complete and exact information. The conduct of Mr. Swasey has been attacked by the petitioner, but such attempted reflections are entirely unsupported by the evidence. The record discloses that throughout the whole proceedings Mr. Swasey acted with entire frankness, fairness and a high sense of professional honor in every respect. Nor did any other person seek to mislead or deceive the petitioner. This ground of assault is without merit.

Second, "Because he had withdrawn as petitioner and become a remonstrant and had been so recognized."

This was also a question of fact for the presiding Justice and was found to lack support. It would be valueless to detail the evidence warranting the finding. Not only was there some evidence to substantiate it but it was ample and convincing. The petitioner takes nothing by this exception.

Third—The third alleged reason for revocation is: "Because the Court had exceeded its jurisdiction and had no jurisdiction to allow such instrument; That it was not proved ever to have been her will; That if she had executed a will, it had admittedly been destroyed by her, and no evidence was introduced before the court or was before the court in May, 1914, that she destroyed it in the belief that she had executed a later legal one; or that it had continued unrevoked as a will up to the date of her death, and that, therefore, there had been a failure of due process of law, and a violation of the fifth and fourteenth amendments of the Constitution of the United States."

Under this assignment the petitioner does not attempt to attack the jurisdiction of the Probate Court by showing that certain statutory prerequisites were not complied with as in *Taber* v. *Douglass*, 101 Maine, 363, where the legality of adoption proceedings was at issue, and although the decree stated that "the written consent required by law has been given thereto," the court held that this was contrary to the truth as imported by the entire record, and that the record itself showed the court to be without jurisdiction. The decree was therefore vacated on petition. Here the record contains all the prerequisites and clothes the court with complete jurisdiction.

Nor does the petitioner set up fraud in the probating of the will as in *Merrill Trust Company, App't,* v. *Hartford,* 104 Maine, 566, where it was proved that the supposed will was not in fact signed by the supposed testator nor by some person for him at his request and in his presence, was not in fact subscribed in his presence by three credible attesting witnesses not beneficially interested nor was probated without legal evidence of such facts. No charge of such fraud is made here. These two cases upon which the petitioner relies apparently with great confidence are clearly distinguishable from the case at bar.

The basis of the attack here and the testimony offered to substantiate it are in substance that the evidence before the Judge of Probate was insufficient to warrant his finding that the testatrix had

destroyed the first will in the belief that she had executed a later legal one, and that she had not destroyed the first animo revocandi if the subsequent instrument should prove to be invalid.

The presiding Justice properly excluded this evidence. The sufficiency of the evidence in support of the original will and its evidentiary force was a matter for the Judge of Probate to determine. Its strength or its weakness was for him and did not affect the jurisdiction of the court itself. The petitioner fails to note the distinction here involved. To adopt the language of the court in *Rockland* v. *Hurricane Isle,* 106 Maine, 172, "The fallacy in the argument is in the misuse of the words, jurisdiction and jurisdictional facts. It confounds facts giving jurisdiction with evidentiary facts after jurisdiction has been conferred." The evidence which the petitioner sought to introduce would be admissible in a hearing on an appeal from the decree but not on a petition to vacate the decree. Its exclusion by the presiding Justice therefore was not error.

It may not be inappropriate to add however, although it is in strictness beside the issue, that in our opinion the decision of the Judge of Probate was in accordance with the law and the evidence. The doctrine of dependent relative revocation is firmly established. Mr. Jarman states it as follows: "When the act of destruction is connected with the making of another will so as fairly to raise the inference that the testator meant the revocation of the old to depend upon the efficacy of the new disposition intended to be substituted, such will be the legal effect of the transaction; and therefore if the will intended to be substituted is inoperative from defect of attestation or any other cause, the revocation fails also and the original will remains in force." 1 Jarman Wills, Vol. 1, page 148. See *In re Knappen,* 75 Vt., 146; *Gardiner* v. *Gardiner,* 65 N. H. 230, and especially *Strong's Appeal,* 79 Conn., 123.

The evidence warranted the Judge of Probate in drawing the inference that the testatrix "meant the revocation of the old to depend upon the efficacy of the new disposition intended to be substituted." The testimony of Mr. Dunton, the attorney who drew the new will, giving his conversations with Mrs. Nickels, taken in connection with all the other circumstances in the case, lead straight to that inference.

The original will of 1911 had been lost or destroyed, but Mr. Swasey had made and kept an examined copy of the instrument and this was presented for probate in place of the original. The statute

permits this. R. S., 1903, Chap. 66, Sec. 9 (R. S., 1916, Chap. 68, Sec. 9). "A will may continue to exist, though the paper it was written upon is destroyed." *Thompson, App't,* 114 Maine, 338, 340, citing *Rich* v. *Gilkey,* 73 Maine, 595. The authenticity of the copy was abundantly proved and the witnesses to that will were produced and their testimony given, one orally and two by deposition. The will of 1911 was in our opinion established by plenary evidence as the last will and testament of Mrs. Nickels.

It is unnecessary to discuss specifically the seventy-four requests for rulings which were refused. They all are crystallized in the three grounds of attack already considered, and the principles involved in all, so far as material, have been sufficiently covered.

We find no error in their refusal.

FEDERAL QUESTION.

Finally the petitioner claims that he has been deprived of property without "due process of law" in violation of the fifth and fourteenth amendments of the constitution of the United States.

An exact and comprehensive definition of the term "due process" of law as applicable to all possible cases and circumstances has not been successfully attempted. Its application to the precise question involved in each case has been deemed sufficient. In general terms however it is understood to mean "law in the regular course of administration through Courts of justice, according to those rules and forms which have been established for the protection of private rights;" or "law according to the settled course of judicial proceedings or in accordance with fundamental principles of justice enforceable in the usual modes established in the administration of government with respect to kindred matters." 6 R. C. L., 434. See *Eames* v. *Savage,* 77 Maine, 212. As stated in *ex parte Wall,* 107 U. S., 265, it is "that kind of procedure which is suitable and proper to the nature of cases and sanctioned by the established usages and customs of the Courts."

Such due process of law, or law of the land, has been measured out to the petitioner here and we have searched in vain for any infringement of his constitutional rights. A will duly executed by a citizen of this State has been duly and legally admitted to probate in this State in accordance with those rules and forms which have been established in such proceedings. An attempt to appeal failed through no other fault than that of the petitioner. But that failure was also

in accordance with the same established rules. From the beginning to the end, the petitioner's constitutional rights have been carefully safeguarded.

Moreover, according to the testimony of the petitioner's own witness, who was also acting as associate counsel, no Federal question was presented to the Judge of Probate at the hearing on this petition in July, 1916. According to the findings of the Justice presiding in the Supreme Court of Probate no Federal question was entertained or considered by him. In order to give the Supreme Court of the United States jurisdiction of a writ of error to the State Court, it must appear not only that a Federal question was presented for decision by the State Court but that its decision was necessary to the determination of the cause and that it was decided adversely to the party claiming a right under the Federal Laws or Constitution or that the judgment as rendered could not have been given without deciding it. *Pierce* v. *Somerset Railway,* 171 U. S., 641, (88 Maine, 86).

The case at bar obviously falls within this rule.

Exceptions overruled.
Decree of Supreme Court of Probate affirmed with costs.

THE YORK SHORE WATER COMPANY *vs.* WILLIAM B. CARD.

York. Opinion November 24, 1917.

Rights of water companies and like corporations to abandon proceedings already begun under power of "Eminent domain." Rule as to cities and towns taking land for "ways." Rule as to whether a condemnor of property may abandon same after damages for taking property have been fixed.

The directors of the plaintiff corporation, in furtherance of its powers of eminent domain, on September 6, 1913, voted to take by purchase or otherwise certain property belonging to the defendant. On December 22, 1913, the company filed in the office of the County Commissioners a description of the property and a declaration that it "has taken and hereby does take" the property so described. The defendant, on July 7, 1914, filed a petition with the County Commissioners for assessment of damages, and after hearing duly had, the commissioners filed their award on November 3, 1914, fixing the amount at eleven hundred dollars. No appeal was taken by the company, but on March 31, 1915, the company gave the defendant a written notice of so called abandonment of the condemnation proceedings and surrender of the property taken thereunder. The defendant disregarded this notice and on the first Tuesday of June, 1916, he filed with the commissioners a petition asking that a warrant of distress issue against the company to compel the payment of the award.

Upon a bill in equity brought by the company to restrain the further prosecution of this petition, it is,

Held:

1. That R. S., (1903), Chap. 23, Sec. 7, (R. S., 1916, Chap. 24, Sec. 7), providing that damages for laying out highways are not recoverable until the town has actually entered upon and taken possession of the real estate has no application to the case at bar.
2. That after condemnation proceedings have been perfected and the damages for the land taken have been finally ascertained and adjudged by the proper tribunal, the corporation thereby acquires a vested right to hold and use the land taken on payment of the compensation awarded, and the land owner acquires a vested right to have and recover the damages awarded.
3. The attempted abandonment here came too late. The result of the award was to give the defendant a vested interest in the damages which the company could not avoid at that stage of the proceedings.

Bill in equity asking that defendant be restrained from prosecuting a petition asking the issuance of a warrant of distress to compel the payment of a certain amount of damages on account of the taking by plaintiff company under eminent domain proceedings property belonging to defendant. Temporary injunction was granted and case was reported to Law Court on bill and answer. Judgment in accordance with opinion.

Case stated in opinion.

Ralph W. Hawkes, for plaintiff.

John C. Stewart, for defendant.

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

CORNISH, C. J. The York Shore Water Company was authorized and empowered by its charter "to take and hold by purchase or otherwise any lands or other real estate necessary. . . . for the protection of said Chase's Pond" its source of supply. Private and Special Laws, 1895, Chap. 125, Sec. 3, and Private and Special Laws, 1911, Chap. 256, Sec. 3. "Said corporation shall be liable to pay all damages that shall be sustained by any persons by the taking of any lands or other property . . . . ; and if any person sustaining damage as aforesaid and said corporation cannot mutually agree upon the sum to be paid therefor, such person or said corporation may cause the damage to be ascertained in the manner prescribed by law in case of damage by laying out highways." Section 4.

In furtherance of the power of eminent domain thus conferred the directors of the company on September 6, 1913, voted to take by purchase or otherwise certain land situated on the northerly side of Chase's Pond, a portion of which belonged to this defendant. On December 22, 1913, the company duly filed in the office of the County Commissioners of York County a declaration and description of said real estate as the first step towards taking the same by condemnation proceedings and in conformity with R. S., (1903), Chap. 56, Sec. 11. (R. S., 1916, Chap. 61). This declaration alleged that the company "finds it necessary for its purposes and uses in the protection of the water shed of Chase's Pond in said town of York to take land within the limits of the water shed of said Pond in said town of York, and being duly authorized by law to take such land

whenever it is necessary for its purposes and uses. Therefore said York Shore Water Company has taken and hereby does take a certain tract," as described in a certain plan filed therewith.

The defendant as owner of a portion of the land so taken, on the seventh day of July, 1914, filed with the County Commissioners a petition containing a copy of said taking, asking that board to fix a time for hearing, to view the premises, hear the parties and assess the damages in the manner provided by law. After due notice given to the company, a hearing was had on August 13, 1914, at which both parties were present and participated. On November 3, 1914, the County Commissioners filed their award assessing damages in the sum of eleven hundred dollars and ordering the company to pay that amount to the owner, Mr. Card. No appeal was taken from this award but on March 24, 1915, the company executed and on March 31, 1915, delivered to Mr. Card a written notice of so called abandonment and surrender of the condemnation proceedings and of the property taken thereunder.

After reciting the facts relating to the declaration and description of December 22, 1913, except that it is now said to have been made "with a view of taking the same for the purposes of said corporation as for public use," this notice of abandonment alleges that the company has never entered upon the premises or taken possession thereof, and that it "hereby abandons and surrenders up to you all its right, title and interest if any, in said premises, and thereby notifies you of its intention not to take said property or make any claims thereto under said proceedings."

Mr. Card disregarded this notice of abandonment and on the first Tuesday of January, 1916, more than a year after the award had been made, he filed with the Commissioners a petition, asking that a warrant of distress issue against the company to compel the payment of the award. On February 23, 1916, the company brought this bill in equity to restrain the further prosecution of that petition and upon bond given by the company a temporary injunction was granted. Subsequently the cause was reported to the Law Court on bill and answer.

The main point at issue is the legal right of the company to abandon its eminent domain proceedings at the time it attempted to do so on March 24, 1916.

The first contention on the part of the company is that damages are not recoverable or payable until it has actually entered upon and taken possession of the real estate, and rests its argument upon R. S., (1903), Chap. 23, Sec. 7. This is the chapter regulating the location, alteration and discontinuance of highways, and section 7 relating to the assessment of damages includes this provision: "But said Commissioners or officers shall not order such damages to be paid, nor shall any right thereto accrue to the claimant, until the land over which the highway or alteration is located, has been entered upon and possession taken, for the purpose of construction or use." That clause however has no application to the case at bar. True, the section of this company's charter providing for damages, specified that either the person or the corporation might "cause the damage to be ascertained in the manner prescribed by law in case of damage by laying out highways." But this did not incorporate all the provisions of chapter 23 into the charter. It simply provided a tribunal and the method of procedure in ascertaining the damage. The County Commissioners were thereby made the tribunal to estimate the amount, and any person aggrieved by the estimate could appeal to the Supreme Judicial Court, where the issue could be determined by a jury, or if the parties so agree by a committee of reference. That is the limit of the incorporation.

The rights of the public in the appropriation of an easement in laying out highways are quite different from the rights of a corporation, like a water company, in taking land by right of eminent domain. The reason why the provision is inserted in section 7, that no right to damages accrues to the claimant until the land over which the highway is located has been entered upon and possession taken for the purpose of construction and use is because under section 9, a time not exceeding two years is allowed for making and opening the way and until it is opened the commissioners have the power to discontinue it. In such a case the question of damages is governed by section 10: "When the way is discontinued before the time limited for the payment of damages, the Commissioners may revoke their order of payment and estimate the damages actually sustained and order them paid. Any person aggrieved may have them assessed by a committee or jury as herein provided." In other words the statute permits through discontinuance proceedings the practical abandonment of proceedings for laying out a way and provides for the assess-

ment of such damages as may have been sustained under those conditions. In the case of a taking of land by a public service corporation no such statutory provision obtains.

In *Furbish* v. *Co. Commissioners*, 93 Maine, 117, 130, the court expressed a doubt as to the applicability of Section 10 to cases other than those for land taken for ways and the doubt was well founded. It was evidently not the intention of the legislature to incorporate into the charter of this water company anything more than the words of the act clearly express, the ascertainment of the amount of damage by the same tribunal as estimates damages when a highway is located and with the same rights of appeal to the Supreme Judicial Court. This is the definite limit.

In the second place the plaintiff claims that independent of the statute above considered it had the general right to abandon its eminent domain proceedings at any time before the same were finally closed and rights of appeal had elapsed, even after hearing and award by the County Commissioners.

At what stage a condemnor may abandon condemnation proceedings has been frequently considered by the courts both of England and of this country, and a learned and valuable summary of authorities may be found in the note to *Cunningham* v. *Memphis R. R. T. Co.*, (126 Tenn., 343), 30 A. & E. Ann. Cas., 1058-1062.

These authorities however depend to a great extent upon the general statutes of the respective jurisdictions or the special act under which the condemnation is authorized and therefore in most instances can hardly be regarded as precedents here. Generally speaking they are divided into two groups, one group, holding that the rights of the parties are not vested until the award is paid or the land is occupied, the other group holding that by the confirmation of the award the rights of the parties are vested and abandonment is then precluded. The author of the above note states the principle as follows: "In the absence of statute fixing the time within which a discontinuance may be had, the general rule is unquestioned that an eminent domain proceeding may be discontinued at any time before the rights of the parties have become reciprocally vested." 30 A. & E. Ann. Cas., 1062, cited above. The question then arises at what stage in the proceedings have the rights of the parties become reciprocally vested? This is answered by our own court in these words: "We regard it settled by the great weight of authority that after such pro-

ceedings have been perfected and the damages for the land taken have been finally ascertained and adjudged by the proper tribunal, the corporation thereby acquires a vested right to hold and use the land taken on payment of the compensation awarded, and that the land owner acquires a vested right to have and recover the damages awarded." *Furbish* v. *Co. Commissioners*, 93 Maine, 117-129.

In that case eminent domain proceedings were instituted by a water company and the company itself petitioned the County Commissioners to estimate the damages. Hearing was had, report filed and at the next regular term of the County Commissioners the report was entered on the docket as accepted and the proceedings closed. Subsequent to this the company attempted to abandon the proceedings and the court held that it was too late. The only difference in facts between that case and the case at bar is that the time of taking an appeal had expired, and the report of the commissioners had been accepted at the next term of the Commissioners Court, and before the notice of abandonment had been given. But we do not regard these differences as affecting the rights of the parties here, and we are of opinion that in this case, as in the Furbish case, the attempt at discontinuance came too late. The acceptance of the report by the same board who had made it was a merely routine matter which affected neither the validity nor the force of the award.

Nor is the fact that the time for appeal in the case at bar had not expired when the notice of abandonment was given, material. The award of the County Commissioners stood as a judgment until and unless it was appealed from. No appeal had been entered when the attempt to abandon was made and none has since been filed so far as the record shows. That award then in this case was existing at the time the abandonment notice was given and the owner of the land had a vested right to have that award paid subject to be divested by an appeal and by a subsequent award by the appellate tribunal. Under these circumstances we think that the criterion laid down in the Furbish case for the limit of the right of abandonment governs here. By its taking the company had acquired a vested right to hold and use the land on payment of the compensation awarded and by the hearing and award Mr. Card acquired a vested right to have and recover the damages awarded. See *Kimball* v. *Rockland*, 71 Maine, 137; *Imbescheid* v. *R. R. Co.*, 171 Mass., 209; *Hellen* v. *Medford*, 188 Mass., 42; *Turner* v. *Gardner*, 216 Mass., 65.

In *State* v. *Bangor and Brewer*, 98 Maine, 114, 128, this court said: "When Bangor and Brewer had each, at a legal meeting of their voters consented to take or purchase the bridge, to make it free as provided in the acts of 1895 and 1901, and the value of the bridge property had been determined, the rights of all parties became vested and the statutes then became imperative upon both cities to pay the price awarded by the committee and to take the bridge under eminent domain as authorized by section 1 of the statute of 1901. The Bridge Company had no option, and neither Bangor nor Brewer could by any action at any meeting called subsequently to that in which the vote had been had, rescind their former vote, or escape the duty imposed by the act of 1901."

In *Sprague* v. *No. Pac. Ry. Co.*, 122 Wis., 509; 100 N. W., 842, it was held that after the report of the commissioners was filed, it had the effect of a judgment and after judgment there can be no discontinuance.

The conclusion at which we have arrived is consistent with justice and fair dealing. To hold otherwise is to make a farce of legal proceedings. To permit a corporation after taking property from its owner by the high hand of eminent domain, and having its value determined by a designated tribunal, and the award made, to then repudiate at its will the entire proceeding and vanish from legal sight, is to play fast and loose with the rights of property. If the award is deemed too large the corporation has its right of appeal, but it cannot substitute abandonment for appeal, otherwise the property of private citizens would be at the mercy of public service corporations.

If the plaintiffs contention is sound, what would hinder a corporation from condemning and abandoning the same property as many times as it might see fit, until finally an award has been secured that is satisfactory? A doctrine that would permit such a procedure would be a travesty on justice. A voluntary nonsuit cannot be taken after an adverse verdict rendered.

We think the safe, sound and logical rule is that concisely stated by the author of the recent digest of Maine Reports as follows: "The result of an award on proper proceedings is to give both parties a vested interest, one to the property and the other to payment, a result which neither can avoid." Lawrence Dig. Vol. 1, page 392.

The entry will therefore be,

Temporary injunction dissolved.
Bill dismissed with costs.

CARL F. MCCANN *vs.* HERBERT F. TWITCHELL.

Cumberland. Opinion November 24, 1917.

Malpractice. Rule of law where presiding Justice calls the attention of the jury to certain inadmissible testimony or statements made during the progress of the trial and directs them to disregard the same.

Action to recover damages for alleged malpractice in setting and treating the plaintiff's left arm.

Held:

THE EXCEPTIONS.

Assuming that it was error for the plaintiff to testify that the defendant said to him in the conversation between them that he, the plaintiff, could do him no harm as "he was protected by a liability insurance," we think such error is not a sufficient ground for a new trial, in view of the fact that the presiding Justice, upon his own motion, and before the case was argued to the jury, ordered the statement struck from the record and instructed the jury to pay no attention to it in their consideration of the case.

THE MOTION.

The plaintiff was bound to exercise ordinary skill and reasonable care and diligence in his treatment of the case, and to use his best judgment in the application of his skill to the case. Whether or not he did so was a question of fact for the jury which they decided in the plaintiff's favor.

A careful study of the evidence does not convince the court that the verdict of the jury is wrong, either as to the defendant's liability, or as to the amount of damages awarded the plaintiff.

Action on the case to recover damages for alleged malpractice. Defendant filed plea of general issue. Verdict for plaintiff for $4900. The case comes up on exceptions and the usual motion for a new trial. Motion and exceptions overruled.

The questions raised under the exceptions are clearly presented by the following excerpt from the bill of exceptions:

"Q. What further conversation took place in Dr. Brock's office on the 10th day of January, the date given by the doctor, when you and your brother and Dr. Twitchell were there, about the arm?

A. Well, I had been coming three weeks or so, and I had been manipulated at the Maine General under ether, and I had been

coming there, and the arm was continually getting worse, and I was mightily provoked, and I told Dr. Twitchell in a very straightforward way that I was provoked. He said there—

MR. STROUT: State what happened.

Q. State what you said, give the words?

A. Well, I told him that, and about the only thing I had was my two arms, and that I wanted the use of those arms, and I said it in strong language, which I don't remember just what I said, but he says—

Q. What did Dr. Twitchell say?

A. Well, he says that I couldn't do him any harm, that he was protected by a liability insurance. (Objected to)

MR. MOREY: Simply the conversation that took place in the office that they went into. They went on and told the whole conversation, or parts of the conversation. I was just asking for the whole conversation of which they asked a part, nothing further; it seems to me we are absolutely within our rights."

To the admission of the above testimony, defendant's counsel seasonably filed exceptions, and at the close of the evidence and before arguments, the presiding Justice made the following statement:

"There was certain testimony introduced, drawn out inadvertently from the last witness, the plaintiff, Mr. McCann, this morning, relating to conversation he had with Dr. Twitchell, the defendant, in which allusion was made to conversation he had with Dr. Twitchell, and as a part of that, as I recollect it, he said that Dr. Twitchell, informed him that it didn't make so much difference to him, or words to that effect, because he had liability insurance. On consideration of that, I feel that it has a tendency to prejudice the rights of the defendant, and I shall instruct the stenographer to strike out that remark, and I shall also instruct the jury to disregard it. Insurance is something that we take for our buildings. We take on our automobiles, liability. We take on our lives. It is no indication that we intend to be careless in operating, or we intend to set our buildings afire, or that we intend to take any chances with our lives or our health, and for that reason I think it would create an unfair impression in the jury's mind, and I instruct the reporter to strike it from the record, and I also instruct and request the jury to pay no attention to that evidence when they come to consider the case. You may proceed."

Defendant claimed that he was injuriously affected by the admission of the testimony above referred to and that the subsequent instructions of the presiding Justice did not and could not overcome the effect of the testimony on the minds of the jury; that the plaintiff, on account of his conduct in introducing the testimony as he did, was entitled to no special consideration, and that the only way to fully protect the rights of the defendant and insure a full and impartial trial on the merits was to sustain the exceptions and order a new trial.

Case stated in opinion.

McGillicuddy & Morey, for plaintiff.

Strout & Strout, for defendant.

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

KING, J. Action to recover damages for alleged malpractice in setting and treating the plaintiff's left arm. A verdict of $4900 for the plaintiff was returned, and the case comes up on the defendant's exception and motion for a new trial.

1. The excerpts from the bill of exceptions, printed by reporter, clearly states the questions presented thereunder.

Assuming, though not so deciding, that it was error for the plaintiff to testify that the defendant said, in a conversation with him concerning his liability for negligence in treating the arm, that he, the plaintiff, could do him no harm as he was protected by a liability insurance, we think such error should not be deemed a sufficient ground for a new trial in view of the fact that the presiding Justice, upon his own motion, and soon after the admission of the statement, ordered it struck from the record and instructed the jury to pay no attention to it in their consideration of the case, explaining to them fully why they should not do so.

It is not an infrequent occurrence in the trial of causes before a jury that inadmissible statements are made by witnesses before an objection is interposed, and sometimes such statements are erroneously admitted against objection. In such instances a common practice is, if the court becomes convinced, before the case is submitted to the jury, that an error has occurred, to order the inadmissible testimony struck from the record and to instruct the jury to dis-

regard it. If such an error could not be cured in that way, then many trials would go for naught, for nothing more can be done to correct the error.

While there are cases to be found in some jurisdictions holding that the erroneous admission of objectionable evidence is not cured by its withdrawal coupled with an instruction to the jury not to consider it, such cases are exceptional. The great weight of authorities is in support of the rule that ordinarily the erroneous admission of improper evidence is cured, or so far cured as to be no longer a sufficient ground for a new trial, by being withdrawn or struck from the record and an instruction given to the jury to disregard it entirely.

Our own court so decided in *State* v. *Kingsbury*, 58 Maine, 238, where it said: "When proper instructions are given, such admission is not deemed a ground for a new trial." See also to same effect *State* v. *Fortin*, 106 Maine, 362, 384. The following are a few of the many cases in other jurisdictions where the rule has been approved. *Ward* v. *Preston*, 23 Cal., 469; *Corbin* v. *Dunklee*, 14 Colo., App. 337, 59 Pac., 842; *Orr* v. *Garabold*, 85 Ga., 373, 11 S. E. 778; *Paris & D. R. Co.* v. *Henderson*, 89 Ill., 86; *Shepard* v. *Goben*, 142 Ind., 318; *Baker* v. *Oughton*, 130 Iowa, 35; *Costello* v. *Crowell*, 133 Mass., 352; *Dykes* v. *Wyman*, 67 Mich., 236; *Holmes* v. *Moffat*, 120 N. Y., 159; *Rathgebe* v. *Penn. R. Co.*, 179 Pa. St., 31; *New York L. E. W. R. R. Co.* v. *Madison*, 123 U. S., 524; *Penn. Co.* v. *Roy*, 102 U. S., 451. In the latter case, Mr. Justice Harlan, speaking of the defendant's contention that an error in admitting evidence could not be cured by an emphatic direction by the court that the jury should not consider it, said: "It cannot be sustained upon principle, or by sound reason, and is against the great weight of authority. . . . The presumption should not be indulged that the jury were too ignorant to comprehend or were too unmindful of their duty to respect, instructions as to matters peculiarly within the province of the court to determine. It should rather be, so far as this court is concerned, that the jury were influenced in their verdict only by legal evidence. Any other rule would make it necessary in every trial, where an error in the admission of proof is committed, of which error the court becomes aware before the final submission of the case to the jury, to suspend the trial, discharge the jury, and commence anew. A rule of practice leading to such results cannot meet with approval."

In the case at bar, shortly after the objectionable statement was made and permitted to stand, the presiding Justice, upon his own motion, and before the arguments, ordered the statement struck from the record, and then clearly and emphatically directed the jury not to regard it at all in their consideration of the case. It is to be presumed that the jury followed those instructions, *State* v. *Kingsbury*, supra, and that their verdict was based upon the legal evidence presented. We are, therefore, of the opinion that the defendant's exception must be overruled.

2. THE MOTION.

On November 14, 1914, the plaintiff, a young man of thirty years of age, was thrown from an automobile, and as a result the ulna of his left arm was broken and the head of the radius of the same arm was dislocated. He was at once removed to his home and the defendant took charge of his case. The broken ulna was set and the arm put in splints, but nothing was done in respect to the dislocated radius. The plaintiff claims that the defendant negligently failed to discover that the radius was dislocated, and that he did not properly treat the same after he did know of it.

After ten days the splint was removed, and the plaintiff claims that he then complained to the defendant, when an attempt was made to flex the arm, that there was a "locking" feeling at the elbow, but that the defendant did not then appear to regard that complaint seriously. On the 12th day of December, at his own insistence, as the plaintiff claims, X-Ray pictures of the arm were taken at the Maine General Hospital and they disclosed that the head of the radius had been dislocated in the accident and had remained so. A few days after that, at the defendant's suggestion, the plaintiff went to the Maine General Hospital where an unsuccessful effort was made by the defendant and other physicians to pull the radius into position, the patient being then etherized. After that the defendant for a few weeks treated the arm by flexing and moving. Dr. Abbott, who examined the arm after the X-Ray pictures were taken, advised that the only thing to be done would be to have an operation and excise the radius whereby the bones might be brought somewhat into normal position. But, as the plaintiff claims, the defendant advised against an operation. On the 27th of January, 1915, the plaintiff went to the Carney Hospital at Boston where an operation was performed on the arm and the

head of the radius was cut off and the bones placed in apposition, but union did not take place and the ulna did not remain set. A second operation was performed June 5, 1915, and the ends of the bones were morticed and fastened together, but again the bones would not unite. The next and last operation was performed December 11, 1915, when a piece of the plaintiff's shin bone was cut out and fitted into the arm bones, and a union took place, so that the plaintiff now has a shorter, but fairly serviceable, arm.

The testimony was conflicting as to the care and attention which the defendant gave in his treatment of the plaintiff's injuries on the night of the accident. In behalf of the plaintiff it is contended that the defendant was then urgently requested by the plaintiff's brother to do everything possible and spare no expense to properly care for the plaintiff, and to have an X-Ray machine used to determine the extent and nature of his injuries, and that the defendant replied that everything was all right, and that it was only a simple break. On the other hand, the defendant testified in substance, that he suspected there might be a dislocation of the head of the radius, but that the arm was so much swollen that he could not then determine that, and that he did not feel that it was safe to etherize the plaintiff owing to his then physical condition as indicated by his breathing. And he denies that he was requested to have the X-Ray used, and says that suggestion came from him.

The plaintiff also claims that the defendant did not use ordinary care, nor exercise his best judgment in his treatment of the arm, after its condition was disclosed by the X-Ray pictures, that he advised against an operation, although that was the only thing to have done, and negligently treated the arm for sometime by flexing it when it should have been immediately operated on.

But it will serve no useful purpose to attempt here any extended analysis of the evidence bearing upon the issues of fact in the case. No legal propositions, by which the defendant was bound in the discharge of his duty to the plaintiff, were in dispute. It is not urged that he did not possess the ordinary skill of members of his profession in like situation. He was bound to exercise ordinary skill and reasonable care and diligence in his treatment of the case, and to use his best judgment in the application of his skill to the case. Whether or not he did that was an issue of fact for the jury. They have decided that issue in the plaintiff's favor.

A careful study of the evidence does not satisfy us that their verdict is wrong, either as to the defendant's liability, or as to the amount of damages awarded the plaintiff. Evidence was introduced tending to show that the plaintiff's disbursements and liabilities necessarily incurred on account of the injuries to his arm amount to nearly fourteen hundred dollars. His suffering has been severe and long continued, and his arm is permanently crippled, though somewhat serviceable. The amount of the verdict is not shown to be so excessive that it ought to be disturbed.

Exception and motion overruled.

NORTHERN PACIFIC RAILWAY COMPANY

vs.

PLEASANT RIVER GRANITE COMPANY, et al.

Washington. Opinion November 24, 1917.

General rule as to what persons are liable for freight charges. Railroads.

On June 12, 1913, the Granite Co. delivered a stone working lathe and equipment at Columbia, Maine, to the Maine Central Railroad Company, then operating the Washington County Railway, to be shipped over its line and connecting lines to William Smith as consignee at St. Cloud, Minnesota. A bill of lading in standard form was issued for the shipment, signed by the defendant and by the agent of the initial carrier, naming the consignee, the destination of the shipment and describing the property shipped. The lathe and equipment were transported in accordance with the terms of the bill of lading to their destination at St. Cloud and the consignee was notified of their arrival, but refused to receive them. They remained on the car at St. Cloud for 86 days and then the car was sent to the Minnesota Transfer, some distance from St. Cloud, where the lathe and equipment were placed in charge of a warehouse company for storage. The plaintiff is the last of the connecting carriers and brings this action to recover the sums it has paid as the freight charges of the preceding carriers, and its own freight charges, and the demurrage and storage charges. The goods were shipped on a flat car. Their weight did not exceed 17,100 pounds. 24,000 pounds is the admitted minimum weight of a carload of

machinery as fixed by the Interstate Commerce Commission. The freight charges of each carrier were based on the rates established by said Commission, and were computed on 24,000 pounds weight. The rate charged for demurrage is the rate established by the Commission.

Held:

1. No cause of action is proved against the defendant Arthur J. Dalot, and he is entitled to judgment in his favor and for his costs.
2. The carrier's contract and right to recover compensation for his services arise from the circumstances of his employment. He has the right to look for his compensation to the party who required him to perform the service. And his right to receive his freight from the shipper or consignor cannot be made to depend upon what may prove to be the legal effect of the negotiations between consignor and consignee upon the title to the property which is the subject of transportation.
3. The statement printed on the back of the bill of lading that the "owner or consignee shall pay the freight and all other lawful charges accruing on said property and, if required, shall pay the same before delivery," in no way relieves the consignor or shipper of his liability to pay the freight if the carrier sees fit to look to him for his compensation. The contract of the consignor and that of the consignee are not considered to be inconsistent with each other.
4. The last of the connecting carriers over whose lines a through shipment of goods is made may pay the preceding carriers their lawful freight charges against the goods and recover the same, together with its own freight and other lawful charges incident to the shipment, of the party liable for the freight.
5. The lathe and equipment covered practically the whole of the flat car, and constituted a carload of machinery as that term is understood in the transportation of such freight, and we conclude that the carriers were entitled to compute their freight on the basis of the minimum weight of a carload of such merchandise.
6. The plaintiff had the right to keep possession of the shipment until its lawful charges should be paid. But in keeping possession of it after its arrival at its place of destination the plaintiff was required to act with reasonable prudence and discretion. It could not incur unnecessary and unreasonable expenses in keeping possession of the property and hold the defendant liable therefor.
7. The court is of opinion that it was imprudent, unreasonable and unnecessary for the plaintiff, under the facts disclosed, to keep the goods on the car at St. Cloud at a demurrage charge of one dollar per day for 86 days, and that it should have unloaded the shipment and released the car at least two months sooner than it did, thus reducing the demurrage charge to $26.

Action of assumpsit to recover for freight charges, demurrage and storage on certain machinery carried by rail from Columbia, Maine, to St. Cloud, Minn. Defendants filed plea of general issue. At close of testimony, with consent of parties, case was reported to Law Court

for determination of the rights of the parties, upon so much of the evidence as legally admissible. Judgment in accordance with opinion.

Case stated in opinion.

C. B. & E. C. Donworth, for plaintiff.

H. H. Gray, for defendants.

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

KING, J. This case comes up on report. It is an action to recover for freight, demurrage and storage on a certain stone working lathe and equipment shipped from Columbia, Washington County, Maine, to one William Smith at St. Cloud, Minnesota.

It may be stated at the outset that no cause of action is proved against the defendant, Arthur J. Dalot, and the word defendant as herein used refers only to the Pleasant River Granite Company.

On June 12, 1913, the defendant delivered the lathe and equipment at Columbia to the Maine Central Railroad Company, then operating the Washington County Railway, to be shipped over its line and connecting lines to William Smith as consignee at St. Cloud, Minnesota. A bill of lading in standard form was issued for the shipment, signed by the defendant and by the agent of the initial carrier, naming the consignee, the destination of the shipment, and describing the property shipped. The lathe and equipment were transported in accordance with the terms of the bill of lading to their destination at St. Cloud and the consignee was notified of their arrival, but he refused to receive them, not, however, on account of any default or neglect of duty on the part of any of the carriers over whose lines the shipment was made. The plaintiff is the last of the connecting carriers and brings this action to recover such sums as it has paid as the freight charges of the preceding carriers, and for its own freight charges, and for demurrage and storage charges.

1. As to the defendant's liability. It claims that it is not liable at all because it was not the owner of the property at the time of the shipment, the title thereto, as it claims, being then in said William Smith by virtue of a sale of the lathe and equipment from the Granite Company to him. Considerable evidence was presented, on the one side and the other, bearing on that issue of title. But we do not deem it necessary to determine that issue.

We can entertain no doubt that the defendant, the shipper of the property, is liable to pay the freight and all other lawful charges accruing against the property incident to its shipment. The carrier's contract and right to recover compensation for his services arise from the circumstances of his employment. He has the right to look for his compensation to the party who required him to perform the service. And such is the well settled doctrine.

In *Holt* v. *Wescott*, 43 Maine, 445, 451, the court said: "Without further citations, we think the general rule deducible from them to be, that in all cases where goods are shipped by a consignor under a contract, or for his benefit, he is originally liable for freight, and that the insertion in a bill of lading of a provision that the goods are to be delivered to the consignee, &c., 'he or they paying freight', will not, of itself, relieve him from that liability; that provision being designed for the benefit of the carrier, he may waive it if he choose so to do, and resort to his employer, the consignor, for his freight, unless there is some special stipulation by which that employer is to be exonerated." To the same effect the court of Massachusetts held, in *Wooster* v. *Tarr*, 8 Allen, 270, saying: "The shipper or consignor, whether the owner of the goods shipped or not, is the party with whom the owner or master enters into the contract of affreightment. It is he that makes the bailment of the goods to be carried, and as the bailor, he is liable for the compensation to be paid therefor." Again, in *Finn* v. *Railroad Corporation*, 112 Mass., 524, the court said: "We do not think the carrier's contract and right to receive his freight can be made to depend upon what may prove to be the legal effect of the negotiations between consignor and consignee upon the title to the property which is the subject of transportation." See also 4 R. C. L., page 857; 4 Elliott on Railroads, Sec. 1569; 2 Moore on Carriers (2d Ed.) pages 669, 670; 6 Cyc., page 500.

The defendant delivered the lathe and equipment to the initial carrier, requested that the shipment be made, and signed the bill of lading. And it does not appear that the carrier had any information concerning any negotiations between the consignor and consignee as to a sale of the property from the former to the latter. But the defendant urges in support of its contention the fact that there is printed on the back of the bill of lading a provision that the "owner or consignee shall pay the freight and all other lawful charges accru-

ing on said property, and, if required, shall pay the same before delivery." We think that provision in no way relieves the consignor or shipper of his liability to pay the freight if the carrier sees fit to look to him for his compensation. That stipulation was plainly designed for the benefit of the carrier, and to make expressly definite his rights against the consignee; it expressly makes the consignee liable for the freight, and asserts the carrier's right to have payment for his services before delivery of the goods transported, but it does not relieve the shipper or consignor from his contract to pay the freight. The contract of the consignor and that of the consignee are not considered to be inconsistent with each other.

We are therefore of opinion that the defendant, the shipper and consignor of the goods shipped, is liable to pay the freight and all other lawful charges accrued against the goods shipped as incident to the shipment.

And it is too well settled to require the citation of authorities, that the last of the connecting carriers, over whose lines a through shipment of goods is made, may pay the preceding carriers their lawful freight charges against the goods and recover the same, together with its own freight and other lawful charges incident to the shipment, of the party liable for the freight.

2. But the defendant contends that the claims set forth in the plaintiff's writ are excessive. They are (1) the freight charges of the several carriers, including the plaintiff, amounting to $194.40; (2) demurrage at St. Cloud for 86 days at $1.00 per day; and (3) $5.50 paid for unloading the goods, and $174.00 paid a warehouse company for storing them.

It is admitted that the freight charges of each carrier are based on the rates established by the Interstate Commerce Commission; and they are computed on a weight of 24,000 pounds, which is the minimum of a carload of machinery as fixed by the Commission. But the net weight of the goods shipped did not exceed 17,100 pounds, and the defendant claims that the freight charges should be computed on that weight. This raises the question of fact whether the goods shipped fairly and reasonably amounted to a carload. They were transported on a flat car. It would be unprofitable to incorporate here a detailed description of the lathe and its equipment as disclosed in the record. Its most bulky part consisted largely of hard pine timber, a few sticks being 14 inches square and not less than 28 feet long, and there were

two constructed hard pine frames each 6 feet square and 5 feet high, and much other timber, shafting, fittings and appliances. The defendant contends that the goods shipped did not occupy all the space of the car, and that the carrier might have used the balance of the space for other freight. On the other hand, in behalf of the plaintiff, some witnesses were called who testified that they saw the loaded car and that the lathe and equipment covered practically the whole of it, and constituted a carload as that term is understood in the transportation of such freight. Considering all the evidence, and in view of the fact that the shipment was a through transportation of machinery from Maine to Minnesota, and if the whole of the car was not actually occupied by the lathe and its equipment any unoccupied space probably could not have been reasonably utilized for other freight, we conclude that the carriers were entitled to compute their freight on the basis of the minimum weight of a carload of such merchandise.

The rate per day of the demurrage charge is not questioned, but the length of time for which the charge is made is challenged.

Upon the arrival of the car at St. Cloud the plaintiff was immediately informed that the consignee would not receive the goods. It so notified the defendant and asked it for orders as to the disposition of the goods, but received none. August 2, 1915, about 26 days after the car arrived at St. Cloud, the plaintiff wrote the defendant as to the matter, saying in part, "We have been exceedingly lenient in holding the car on the track this length of time, but immediate disposition must be given. . . . Unless you arrange for a payment of these charges, we will have to dispose of the shipment with a view of recovering them, and, if we do not, look to you for the deficit. . . There are no facilities at St. Cloud, Minnesota, for storing this shipment; otherwise would have placed in public storage at your expense and risk in order to release our equipment. Of course it is possible to unload the machinery on the right of way, but I do not believe you would care to have it exposed to the elements in that manner. It has, however, become a very old matter, and your immediate attention is requested."

This letter discloses the situation. The plaintiff had the right to keep possession of the shipment until its lawful charges should be paid. But in keeping possession of the shipment after its arrival at its place of destination the plaintiff was required to act with reason-

able prudence and discretion. It could not incur unnecessary and unreasonable expenses in keeping possession of the property and hold the defendant liable therefor. The property might have been unloaded on the plaintiff's right of way, as it admits, or it could have been taken to a public warehouse, as was in fact done. We do not hold that the plaintiff acted imprudently in taking the property to the warehouse at Minnesota Transfer, although at an additional freight charge of $33.60. But we do hold that it was imprudent, unreasonable and unnecessary for the plaintiff, knowing that it was highly improbable that the defendant would give any orders for the disposition of the shipment, to keep the goods on the car at a demurrage charge of one dollar per day for 86 days, in other words, to make the freight car a place of storage for such merchandise and for such a length of time. And in the opinion of the court the plaintiff should have unloaded the shipment and released the car at least two months sooner than it did, thus reducing the demurrage charge to $26.

An error was made in the writ as to the storage charge, the rate paid being $2 per month instead of $6, and the corrected charge for storage paid is $36.

The court, therefore, finds the amount the plaintiff is entitled to recover of the defendant to be $265.90, made up as follows: the freight charges, including the plaintiff's, amounting in all to $194.40; the demurrage of $26, for 26 days; the $5.50 paid for unloading, and the $36, paid for storage, together also with $4 which would have been the expense of storing the goods for the extra two months they were kept on the car.

Accordingly the entry will be,

Judgment for the defendant Arthur J. Dalot and for his costs.

Judgment for the plaintiff against the Pleasant River Granite Company for $265.90, with interest from the date of the writ, and costs.

MEMORANDA DECISIONS

CASES WITHOUT OPINIONS

MARY J. TUTTLE *vs.* CUMBERLAND COUNTY POWER & LIGHT CO.

Cumberland County. Decided July 21, 1917. This is an action to recover damages for personal injuries claimed to have been received by the plaintiff while she was a passenger on one of the defendant's electric cars.

At the conclusion of the testimony, the defendant's attorney moved the court to direct a verdict for the defendant, which motion was overruled. The jury returned a verdict for the plaintiff for $400. The case is before the court on the defendant's exception to the refusal of the presiding Justice to direct a verdict for the defendant, and upon general motion for a new trial.

The testimony upon the vital questions involved was conflicting, and different conclusions might be drawn from the evidence by different minds. The case was therefore properly submitted to the jury for their finding upon the issues involved. We are of opinion that the testimony warranted the jury in finding that the plaintiff was in the exercise of due care, and that her injury was caused by the negligence of the defendant. The weight of the evidence sustains the claim of the plaintiff that the signal of two bells was given prematurely and that following the same, and as a direct result thereof she was thrown from the car and injured. The first claim is abundantly proved by the plaintiff's testimony, the latter claim that she was thrown from the car, is corroborated by witnesses for the defendant. It follows that the exceptions and motion must be overruled. So ordered. *Hinckley & Hinckley*, for plaintiff. *Bradley & Linnell, and William Lyons*, for defendant.

WINNIE B. SMITH *vs.* ELLEN B. DOTEN.

Androscoggin County. Decided July 21, 1917. This is an action to recover damages for alleged fraudulent representations in the sale of a farm and certain personal property thereon located in South Lewiston. The jury returned a verdict for the plaintiff in the sum of $1000. The case is before the court on the defendant's general motion for a new trial.

The evidence discloses many details as to the acreage, use and former occupation of the farm in question, the location of its several parts, the amount of hay cut in previous years, the taxes, and the conferences leading up to the sale, further reference to which is unnecessary. It is sufficient to say that a careful reading of the evidence discloses no error in the finding of the jury. The case presented questions to the jury peculiarly within the scope of their duty, and they had the opportunity to see the witnesses and weigh their testimony, and consider its value. No reason appears to justify disturbing the verdict. Motion overruled. *McGillicuddy & Morey*, for plaintiff. *Newell & Woodside*, for defendant.

ISAAC N. SPOFFORD *vs.* HORACE BICKFORD.

Androscoggin County. Decided August 1, 1917. Action of replevin for a black horse. The verdict was for the defendant, and the case comes before the Law Court upon the plaintiff's motion for a new trial.

It is undisputed that the defendant purchased the horse in question of the plaintiff and fully paid for it. Thereafter he told the plaintiff that the horse was too young or too quick, and the parties then made some arrangement whereby the defendant left the black horse with the plaintiff and took from him a sorrel horse. A few days later the defendant returned to the plaintiff the sorrel horse and took the black horse home. The plaintiff's claim at the trial was that the defendant resold the black horse to him in exchange for the sorrel horse. He

testified that when the sorrel horse was driven back to his place by the defendant, a few days after the exchange, it was too sick to be driven, and that it was left in his stable for that reason, the defendant borrowing the black horse to drive home with. The sorrel horse did not recover from that sickness, but died in a few days at the plaintiff's stable.

On the other hand, the defendant contended that the arrangement between him and the plaintiff was that he should take the sorrel horse on trial for a few days and if it satisfied him he was to keep it in place of the black horse, that upon trial the sorrel horse proved wholly unsatisfactory and he returned it to the plaintiff and took his black horse home.

The issue in the case was one of fact, whether the defendant resold the black horse to the plaintiff in exchange for the sorrel horse. Upon that issue the testimony was conflicting. It will serve no useful purpose to restate it here. If the jury accepted the testimony of the defendant and his witnesses the verdict was justified. An examination of the evidence does not convince the court that the jury manifestly erred in deciding the issue of fact involved between the parties in the defendant's favor, and accordingly the motion for a new trial must be overruled. So ordered. *Newell & Woodside,* for plaintiff. *McGillicuddy & Morey,* for defendant.

EMILIO R. LEMBO *vs.* CHARLES K. DONNELL.

Androscoggin County. Decided August 1, 1917. Action on the case wherein it is alleged that the defendant performed an illegal operation on the plaintiff's wife to produce a miscarriage, and thereafter negligently and unskilfully treated her, whereby the plaintiff was put to large expense for nursing, medicine and medical attendance for her, and was deprived of her companionship and services for a long space of time. Upon trial the jury returned a verdict of $881.58 for the plaintiff, and the case is now before the Law Court upon a motion by the defendant for a new trial based upon the allegations

that the verdict is against the weight of the evidence and that the damages awarded are excessive.

We have examined and studied the evidence with care, and we are by no means satisfied that the finding of the jury in the plaintiff's favor was erroneous. Whether they found against the defendant upon both, or only upon one, of the allegations upon which the action is based, this court cannot now determine; but that is immaterial, for we think the evidence is abundantly sufficient to justify the jury in finding that both of those allegations were established.

Neither is it made to appear to the court that the damages awarded are excessive. The plaintiff's wife became infected with blood-poisoning as a result of the criminal operation on her. The defendant attended her for about four weeks following the operation. Under his treatment she became desperately ill, and as soon as another physician was called she was removed to a hospital where her case was diagnosed as almost hopeless. She remained in the hospital seven weeks during which time ten operations were performed to remove pus from different parts of her body. She had recovered only in part at the time of the trial,—about six months after she left the hospital. The evidence shows that the plaintiff was put to large expense for nursing, medicine, and medical and surgical services in an effort to save his wife's life and to restore her to health as much as possible. The jury may well have found from the evidence that his actual disbursements and liabilities necessarily incurred on that account amounted to substantially $600. In view of that fact, and also that the plaintiff was deprived of the services of his wife for a long space of time, and that he suffered great anxiety and distress of mind on account of her serious illness, an award of $881.58 damages in his favor cannot be regarded as excessive. Motion overruled. Judgment on the verdict. *Newell & Woodside,* for plaintiff. *Tascus Atwood,* for defendant.

SEWALL L. STAPLES *vs.* WARREN K. EMERY, et als.

Waldo County. Decided August 24, 1917. Action to recover for services. Defendant claimed an entire contract, that plaintiff was guilty of a breach thereof, and further claimed damages in recoup-

ment for that breach. Plaintiff denied that the contract was an entire one, and further claimed that defendant, by failure to make payments as agreed upon, was guilty of violation of the contract which did exist. No exceptions are presented and it must be assumed that proper instructions were given to the jury. The evidence is bluntly conflicting but the issues, under proper instructions, were issues of fact within the province of the jury to determine.

After a careful examination of the testimony, we are unable to say that the jury so manifestly erred as to require the verdict to be set aside. Motion overruled. *Dunton & Morse,* for plaintiff. *Tascus C. Atwood,* for defendant.

EDWARD E. RANKIN, Trustee, In Equity, *vs.* HELEN FARRAND.

Knox County. Decided September 18, 1917. This bill in equity was brought by a trustee in bankruptcy to set aside two conveyances made to the defendant by her husband who was declared an involuntary bankrupt nine months thereafter.

The plaintiff sets up two grounds for relief; first, that the conveyances were without consideration and therefore void as to existing creditors; and second, that they were made for an inadequate consideration and for the purpose of hindering, delaying and defrauding creditors, the defendant participating in the fraud.

The sitting Justice after hearing the cause and fully considering the evidence, found that the proof was "not sufficient to sustain the essential allegations of the bill necessary to be established to entitle the plaintiff to the relief prayed for." He therefore ordered the bill to be dismissed.

This finding has the force of a verdict of a jury and is not to be reversed unless it is manifestly contrary to the weight of the evidence. After carefully considering the record and the arguments of counsel, the court, is of opinion that the finding of the sitting Justice was fully justified on both branches of the case, but we think the defendant is entitled to costs.

The entry will therefore be, appeal dismissed. Bill dismissed with costs. *A. S. Littlefield,* for plaintiff. *Edward K. Gould,* for defendant.

MAINE MILL SUPPLY CO. *vs.* D. FINKELMAN.

Androscoggin County. Decided September 20, 1917. This is an action of assumpsit on a check for $200. dated January 17, 1916, drawn by the defendant and made payable to the order of the plaintiff. Payment upon the check was seasonably stopped. The vital point at issue was one of fact, namely, whether as the plaintiff claimed, the check was given in payment of merchandise purchased and of other agreed items; or, as the defendant contended, was given without consideration, and as a personal loan to one Alpren, one of the parties interested in the plaintiff corporation. The jury found in favor of the defendant.

Upon plaintiff's motion for a new trial it is sufficient to say that a careful study of the evidence does not warrant the setting aside of the verdict. There are sharp contradictions on many points, and while the witnesses for the plaintiff outnumber those for the defendant, we are unable to say, that in the light of all the circumstances the true weight of the evidence was so manifestly on the side of the plaintiff as to compel the rejection of the verdict.

Nor can the plaintiff's exceptions to a portion of the charge of the presiding Justice be sustained. No error in law is claimed. The court was simply summarizing, as was his duty, the contentions of the parties. If, in so doing, any misstatement was made as to the defendant's claims, attention should have been called to the specific fact so that the error could be corrected before the jury retired. If the court failed to fully state the claims of the plaintiff, additional instructions should have been requested. Neither was done. Any statement as to the nationality of the parties was harmless, as the parties and witnesses on both sides were of the same nationality as abundantly appears. Motion and exceptions overruled. *Benjamin L. Berman, and Jacob H. Berman,* for plaintiff. *Robert M. Pennell,* for defendant.

FRED CLARK *vs.* JENNIE E. DILLINGHAM.

Somerset County. Decided October 16, 1917. The action of the plaintiff is brought upon defendant's promissory note, the making of

which is not denied. Defendant, however, alleges in defense that the plaintiff did not carry out the undertakings to be by him performed regarding the consideration for the note. The jury rendered a verdict for the defendant, and the plaintiff is here upon the general motion for new trial.

The evidence is, as usual, conflicting. The burden of showing the verdict to be wrong rests upon the movent. *Sterns* v. *Hudson*, 113 Maine, 154, 155; *Cobb* v. *Cogswell*, 111 Maine, 336, 338. Even though the evidence preponderates against the verdict and even though the court might have arrived at a conclusion different from that reached by the jury, if there be evidence upon which the verdict may rest, the motion should be overruled, unless the conclusion is warranted that the jury reached its verdict, improperly or was, in finding it, improperly influenced. *Gregor* v. *Cady*, 82 Maine, 131, 137; *Dickey* v. *Bartlett*, 114 Maine, 435, 436; *Greenlaw* v. *Milliken*, 100 Maine, 440, 442; *Prescott* v. *Black*, 105 Maine, 357, 358; *Hubbard* v. *Marine, Etc., Co.*, 105 Maine, 384. The motion for new trial must, we think, be overruled. Motion for new trial overruled. *Merrill* v. *Merrill*, for plaintiff. *Walton & Walton*, for defendant.

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

Cumberland County. Decided October 20, 1917. This case comes before the Law Court on the defendant's general motion for a new trial. It is an action on an account annexed for labor and materials furnished in building a dam. The jury returned a verdict for the full amount claimed by the plaintiff, $499.63. At the trial a question was raised as to the amount of the bill, the defendant claiming that the plaintiff agreed that the cost of the dam would not exceed $280; on the other hand the plaintiff contended that the figure given was only its estimate of the cost, and that the contract was for the plaintiff to build the dam at cost plus 10% for profit. But the real vital question at the trial was that of the defendant's liability—whether he agreed to see that the plaintiff was paid for building the dam; and that is the only question considered in the brief for defendant in support of his motion.

In 1913 the plaintiff built a concrete bridge for the town of Cornish across Little River, so called, a small stream running through the village of Cornish. Just before the completion of the bridge a movement was started by some of the citizens of the village to have a dam built, just southerly of and close to the bridge, to raise a head of water and thereby create a pond to cover up a low and unsightly section, and thus improve the general appearance of the village. Subscriptions for the purpose, in sums from one to ten dollars, were obtained from upwards of fifty persons, and some verbal pledges were made. The defendant was interested in the project, he obtained some of the subscriptions and had conversations with Mr. Sanders of the plaintiff company, before the completion of the bridge, as to the cost of the proposed dam, and concerning the progress being made in obtaining the subscriptions.

Both parties agree that there was a final conversation between them on the bridge before the work of building the dam was started. As to that conversation Mr. Sanders testified: "Mr. Small told me that he didn't have money enough subscribed at that time to build the dam, and that some was down on paper and some was promised by word of mouth, but that he felt justified in telling me to go ahead and build this dam, and that he would see that I got the money for it. That was the final talk that I had with him." On the other hand, Mr. Small flatly denied that he told Sanders to go ahead with the work and that he would see that he got his money for it. He said that he told him at that final conversation, that sufficient funds had not been pledged to pay for the work, and that he "didn't think there was any doubt but that we could get further subscriptions on the list." A Mr. Copp was called in behalf of the defendant and testified that he was present at that final conversation between the parties and that he felt sure Mr. Small did not tell Sanders to go ahead with the work and he would see that he got paid for it.

Thus it plainly appears that upon that disputed issue as to the defendant's liability the evidence was sharply conflicting. It is strongly urged that it is not reasonable to suppose the plaintiff would have built that dam relying solely for his pay upon so many small subscriptions as the case discloses, the real practical value of which does not appear to have been made certain to it. On the other hand, it is urged that it is likewise unreasonable to suppose that the defend-

ant, being interested in the project only in common with other citizens of the town, would personally obligate himself to pay the plaintiff for the work.

Whether or not the defendant directed the plaintiff to build the dam and promised to see it paid for the work, was a question of fact. At a previous trial of this case a jury decided that question of fact in the plaintiff's favor. That verdict was set aside because of the exclusion of a certain letter written by the attorney for the plaintiff to one of the subscribers and offered in evidence by the defendant as tending to show that the plaintiff relied solely upon the subscriptions for its pay for the work. At this last trial, with that letter admitted, the jury likewise have decided that the defendant became personally liable to the plaintiff for building the dam. There is nothing in the record to indicate that the verdict does not represent the fair and unbiased judgment of the jury upon the disputed issues involved in the case. Although this court might have reached a different conclusion as to the defendant's liability, had that question been primarily presented to it for decision, nevertheless, it has not been made to appear that the verdict of the jury in the plaintiff's favor is so clearly wrong that it should be set aside. Accordingly the entry will be, motion overruled. *P. A. Bowie*, for plaintiff. *Walter P. Perkins, and William Lyons*, for defendant.

HENRY J. CONLEY *vs.* DENNIS A. MEAHER.

Cumberland County. Decided October 23, 1917. This was an action of assumpsit to recover for personal services, and for interest on several sums of money which had been loaned by the plaintiff to the defendant between and including the dates of November 21, 1891, and December 31, 1902. The jury returned a verdict for the defendant, and the case comes before the court on the plaintiff's general motion for a new trial.

The action was commenced in January, 1910, and was continued from term to term for reasons satisfactory to the court, until at the

April term, 1916, three auditors were appointed. There was a hearing before the auditors at which it appears the matters in dispute between the parties were fully heard, and upon which hearing the auditors reported at the October term of the court, as follows: "Nothing due plaintiff from the defendant, nothing due defendant from plaintiff."

The case was tried by able counsel, and the presiding Justice presented with appropriate instruction the only question involved,— "whether interest shall be allowed to the plaintiff for sums of money which from time to time he entrusted to the defendant." The claim for wages having been waived, the issue was therefore confined to the item of interest charged in the account annexed to the writ.

We have examined the record with care, and have had the benefit of the charge to the jury which counsel has printed with the case, and we find no reason to question the fairness of the trial or the justice of the verdict, nor does the plaintiff point out, as it is his duty to do, wherein the verdict is against the law, the evidence, and the weight of the evidence. The auditors selected are among the most eminent practitioners at the bar, and in addition to their finding, the vital question involved was passed upon by the jury. No reason has been advanced, and we can see none, to justify granting the motion for a new trial. Motion overruled. *Henry J. Conley*, pro se. *Dennis A. Meaher, and Augustus F. Moulton*, for defendant.

LAWRENCE V. JONES, Trustee, *vs.* ABRAHAM M. SHIRO, et als.

Penobscot County. Decided October 24, 1917. This is an action of trover brought by a trustee in bankruptcy to recover the value of certain personal property alleged to have been converted by the defendants.

The defendants claim title to the greater part of the property by virtue of a mortgage given to one of them dated November 11, 1914, recorded November 13, 1914, and foreclosed November 6, 1915, and the balance by virtue of a purchase in the same name on November 8, 1915.

The plaintiff attacks these two conveyances on the ground that they were without consideration and therefore void as to creditors. All the testimony introduced by the plaintiff to substantiate his contention came from the mortgagor Ross and the written examination of two of the defendants, one of whom was the mortgagee, taken in the bankruptcy court. They absolutely denied the claim of the plaintiff and testified that both conveyances were for full and bona fide consideration and negatived the charge of fraud in every particular. Supplementing and corroborating their evidence was the testimony of the witnesses offered by the defendants.

The plaintiff however insists that these witnesses for both himself and the defendants lack credence, that their testimony in many respects is inconsistent and improbable, that the transactions were not in accord with the usual custom of business men, and because of this weakness of the defendants' claim they ought not to prevail. The defendants reply that the transactions were reasonable and the testimony true. It is unnecessary to discuss the evidence in detail. There was little outside that of the parties to the transaction.

The presiding Justice directed a verdict for the defendants. Upon plaintiff's exceptions to this ruling it is *Held:*

1. That fraud is never to be presumed but must be proved.

2. That the burden rested on the plaintiff to prove the existence of fraud in this case by evidence that is full, clear and convincing.

3. That while fraud may be inferred from facts and circumstances, the plaintiff's evidence here falls short of the legal requirement.

4. That by calling the parties to the transactions, the plaintiff made them his own witnesses, and it is not permitted a party to discredit his own witnesses either directly by showing that they are unworthy of credit or indirectly by showing by other witnesses that they have made contradictory statements. The plaintiff has endeavored to establish his case by calling the parties who were known to be hostile and by arguing the improbabilities and inconsistencies of their testimony. This was insufficient.

5. That taken as a whole and considering all the circumstances, the evidence would not justify a jury in finding a verdict for the plaintiff. Therefore a verdict for the defendants was rightly ordered by the presiding Justice. Exceptions overruled. *Morse & Cook,* for plaintiff. *W. R. Pattangall,* for defendants.

ABRAM SHAPIRO *vs.* MRS. HENRI SAMPSON.

Androscoggin County. Decided November 14, 1917. This is an action for a month's rent. The defendant moved out of the plaintiff's tenement just before the middle of the month, without giving notice. A party moved in on the 26th day of the same month. The controversy was whether this occupancy for the first of the next month was temporary or permanent. The plaintiff contended that the party was in the house from February 26th to March 1st for the purpose of keeping the water pipes from freezing.

The case was heard without the intervention of a jury and the presiding Justice found in favor of the plaintiff. Exceptions do not lie to a finding of fact unless a contrary inference, only, can be drawn from the evidence. In jury waived cases exceptions are limited to questions of law, and the only question of law is whether there is any evidence to support the finding. There is some evidence to support the finding in the case at bar, and the finding must stand. See *American Sardine Co.* v. *Olsen,* 117 Maine. Exceptions overruled. *J. G. Chabot,* for plaintiff. *McGillicuddy & Morey, and Harry Manser,* for defendant.

ANDREW B. EVANS *vs.* HARPER & GOOGIN COMPANY.

Androscoggin County. Decided November 14, 1917. This case comes up on the usual motion by the defendant. While the plaintiff was running a circular saw his right hand was thrown upon the saw and he lost his thumb and three fingers and maimed the index finger. The plaintiff has brought suit to recover damages for this injury, alleging substantially four grounds of negligence. First, that the saw was cracked; second, that the carriage was so constructed "that it held the bundle of edgings to the left of the saw but on the right of the saw there was no support for the pieces when they should be cut off by the saw but would drop in such a way as to obstruct the saw and

force the bundle remaining to rise up into the saw and then be thrown back with great force and violence, thereby rendering the operation of the saw extremely hazardous;" third, that there was no covering to the saw; fourth, that the plaintiff was inexperienced and was set to work upon the saw without any instructions as to the risk and hazard attending the operation of it.

As to the first allegation the evidence shows that the saw was cracked about an inch or an inch and a half from the base of the teeth and had had a hole drilled at the upper end of the crack to check its going further. But neither the plaintiff's testimony nor any other evidence in the case, tends to show that the crack in any way contributed to the accident. The only reasonable inference from all the evidence is that it did not. As to the construction of the table upon which the edgings were fed to the saw, there is no evidence whatever which tends to support the plaintiff's allegations. On the contrary the evidence of the plaintiff seems to negative them, as shown by the following question and answer: Q. I will ask you if it was any pile of edgings that you had to the right of the saw that in any way interferred with the pushing of the edgings on to the saw? A. No, sir.

The chief claim with respect to the table is that it did not extend beyond the saw so as to support the edgings that had been cut off. But there is no evidence whatever tending to show that this construction, if faulty, in any way contributed to the accident.

As to the third complaint that there was no covering to the saw there is no evidence tending to show that this deficiency, if a defect, in any way contributed to the accident. The evidence, therefore, completely fails to establish the negligence of the defendant with respect to any or all of the allegations above enumerated.

As to the fourth allegation, the plaintiff's own admission as to what he told the defendant, Googin, was amply sufficient to excuse Googin from giving the plaintiff any instructions as to the use of a circular saw. The plaintiff on cross-examination gave the following testimony: Q. Did you tell Mr. Ferguson that you had sawed thousands of cords of wood on one of these saws? A. I said that probably I might have sawed a thousand cords of wood but never sawed a bundle of edgings. Q. Now then, you did tell him you had probably sawed? A. I told him that I told Mr. Googin that I had but I never—Q. Just wait until I ask a question. Then you did tell

Mr. Googin that you had sawed a thousand cords of wood? A. I told him I might have but I had not sawed any on that. He then says that he did not push the wood upon the saw but took it away. But upon re-direct examination he says that he did not tell Mr. Googin that he did not push the wood upon the saw. Q. Did you tell him (Mr. Googin) that you ran a saw, or took away from a saw? A. I did not tell him in what capacity I worked, no sir.

Googin testifies that he had instructed him in regard to running the saw. But whether he had or not if he gave Googin to understand that he had run a saw sufficiently to enable him to comprehend its use and dangers it was not necessary that Googin should give him instructions in regard to a matter upon which, upon his own statement, he was already informed.

Besides, the dangers attending the operation of this saw for the cutting of edgings, with the apparatus provided, was perfectly apparent to a man of ordinary intelligence who had had any experience at all in connection with the operation of this kind of a saw.

It is a fact that the plaintiff in operating this saw lost his hand. But how, or by what cause, not even the plaintiff, himself, seems to know. He describes the accident as follows: "Well, when I put the bundle onto the saw—when I put it into the carriage and went to push it up onto the saw, the bundle jumped in some way, but I can't tell exactly how it was done, it was done so quick. I had my hand about four inches from the saw, like that, and went to push it on, and the bundle came up like that, and my hand being so near the saw you know, to hold the bundle, that I had no way, and leaned forward. I leaned forward like that, pushing the carriage. I had no way to catch myself to keep myself off from the saw."

This description fails to show any negligence on the part of the defendant or to establish the exercise of due care on the part of the plaintiff. So far as this description is concerned the accident may as well be attributed to the contributory negligence of the plaintiff as to the negligence of the defendant. We fail to discover any evidence sufficient to warrant a verdict for the plaintiff. Motion sustained. *McGillicuddy & Morey*, for plaintiff. *Newell & Woodside*, for defendant.

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

Hancock County. Decided November 14, 1917. This case involves an action of trespass, quare clausum, and comes up on motion by the plaintiff. The issue as stated by the defendant is as follows: Did Allen A. Fiske have the right to cross the property of the plaintiff within the limits of the travelled way on March 16, 1915, by rights acquired by him or his grantors by adverse possession, i. e., a private right of way across the homestead farm of the plaintiff?

The report of the evidence contains two hundred and fifty-one pages and involves pure questions of fact. In view of the conclusion to which a careful reading of the report inevitably leads, an analysis of the testimony, upon which the conclusion is based, is unnecessary and beyond the limits of any reasonable rescript.

The elements which enter into proof of a prescription right are too well established to require recital. The defendant's evidence utterly fails to show that continued adverse use which, in twenty years, ripens into a prescriptive title. As it was incumbent for him to show this in order to maintain his verdict, the entry must be: Motion sustained. New trial granted. *Hale & Hamlin*, for plaintiff. *William E. Whiting*, for defendant.

HARRY P. PIERCE *vs.* MORRILL BROS. COMPANY.

Cumberland County. Decided November 14, 1917. This case comes up on exceptions by the plaintiff for the granting of a motion for non-suit. It is an action in which the plaintiff seeks to recover damages received by him while unloading apples from an auto truck upon the alleged ground that, after he had stopped the truck and had unloaded five or six barrels of apples, the emergency brake which was holding the truck, with the assistance of a monkey wrench under one of the wheels, gave way, allowed the truck to start and crush his knee between the hub and a hydrant in the sidewalk.

The evidence shows that he was an experienced chauffeur having driven autos and trucks for six or seven years and that he had driven the Crabowsky truck for the defendants for about nine months. It also appears from his own testimony that he thoroughly understood the mechanism, operation and use of the brakes, including the emergency brake. The Morrill Bros. employed him to run and look after the car and assist in loading and unloading the freight. It is not pretended that they assumed the duty of making any examination of the car to ascertain whether it was or was not in running order. The plaintiff frankly says that he tested the car from time to time when he was using it to see whether the brakes were in running order. The only thing he complains of is that in "said truck by reason of the notches in the brake ratchet being badly worn rendered the brakes useless, defective, wholly unfit and unable to hold said truck still." Admitting this allegation to be true, we think his own testimony conclusively shows that he knew all about it.

The evidence shows that the plaintiff knew all about this car, its condition and just what it was liable to do if he trusted to the emergency brake to hold it. What he said to Mr. Morrill in regard to the slipping of the brake cannot be sufficient to excuse him for using the car. His evidence shows that Mr. Morrill made no response to his statement regarding the car. It does not, therefore, affirmatively appear that Mr. Morrill heard what he said. But assuming that he did, in view of the duties which devolve upon a man who is hired to run a car or truck, we think the defendant not only assumed the risk of holding this car with the emergency brake in the condition in which he knew it to be, *Dempsey* v. *Sawyer*, 95 Maine, 295; but was guilty of contributory negligence in attempting to do so. He had been accustomed to use a block as an extra precaution but on this occasion the block had been left and he used a monkey wrench which appears to have been of little or no avail.

We are of the opinion that the non-suit was rightly ordered. Exceptions overruled. *Augustus F. Moulton*, for plaintiff. *W. W. Jump, and William H. Gulliver*, for defendant.

FLORA VERRILL *vs.* ANDROSCOGGIN ELECTRIC CO.

Cumberland County. Decided November 15, 1917. An action for personal injury received by the plaintiff when about to board one of the defendant's cars. Defendant on general motion seeks to set aside a verdict recovered by the plaintiff.

Defendant operates the Interurban Electric Railway between Portland and Lewiston, running local and express cars. At New Gloucester, Upper Corner, the track crosses a much travelled highway. Practically within the limits of this highway the defendant maintains a small waiting room, having in front of it a platform, level with the top of the rails, and six feet wide and twenty feet long. Defendant's car overhung this platform for about one-third of its width.

The plaintiff, who had not visited this station before crossed the track onto the platform to take a local car then about due and on time. She had partly turned and waved to her husband when she was struck in the back by the approaching car, and thrown twenty-five feet onto the frozen ground. She had seen the car about one thousand feet away, but supposing it made that stop apprehended no danger. Passengers in the road or on the platform could be seen by the train crew for a long distance. The crew testify that they did not intend making this stop as they had noticed no passengers on the platform, and when they saw the plaintiff they locked the brakes but owing to the slippery rails the car slid. The car must have slid more than two hundred feet if this testimony is correct.

A careful examination of the testimony satisfies the court that there is sufficient reliable testimony to justify the jury's conclusion that the defendant was negligent and the plaintiff not guilty of contributory negligence. The plaintiff was entitled to all of the protection that common carriers must afford their passengers. The defendant should have known that passengers might arrive at any moment up to the time it set for its car to make the stop. All of the circumstances that increased the hazard of passengers at this point and on this particular morning the defendant knew and should have borne in mind.

Motion denied. Judgment on the verdict. *William Lyons,* for plaintiff. *Larrabee & Larrabee, and John A. Morrill,* for defendant.

JOSEPH W. PETERSON, Appellant from Decree of Judge of Probate.

Cumberland County. Decided November 17, 1917. This was an appeal from the decree of the Judge of Probate of Cumberland County allowing the last will and testament of Deborah S. Peterson. The Supreme Court of Probate at the close of the appellant's evidence dismissed the appeal, and the appellant thereupon filed exceptions to this ruling.

The exceptions were adjudged by the presiding Justice to be frivolous and intended for delay and were certified as such to the Chief Justice under R. S., Chap. 82, Sec. 55. More than thirty days having expired since the transmission of said exceptions to this court, and neither case nor arguments having been received, *Held;* that the exceptions be overruled for want of prosecution and the decree of the Supreme Court of Probate affirmed. *John T. Fagan, Harry E. Nixon, and Jacob H. Berman,* for appellant.

IDELLA LAWFORD *vs.* BANGOR RAILWAY & ELECTRIC COMPANY.

Penobscot County. Decided November 17, 1917. An action for personal injuries for defendant's negligence in starting street car while plaintiff was alighting therefrom. Jury returned a verdict for plaintiff for $350.00. Case comes to Law Court on general motion, and on exceptions to refusal of presiding Justice to give certain instructions.

The only evidence in support of plaintiff is furnished by her own testimony; which is rebutted by evidence so strong and convincing that we are forced to conclude that sympathy overbalanced the better judgment of the jury. The motion is therefore sustained. It would be without profit to discuss the exceptions. Motion sustained. Verdict set aside. *Terence B. Towle,* for plaintiff. *Ryder & Simpson,* for defendant.

FRANK PERRY *vs.* CHARLES G. RANCOURT, et al.

Kennebec County. Decided November 18, 1917. This is an action for malpractice and comes up on the usual motion by the defendant. The plaintiff alleges that he fell upon the sidewalk in the City of Waterville and suffered a fracture of the lower left leg, was in need of medical and surgical aid and employed the defendants, who were physicians, to diagnose the injury to his leg and properly treat it and care for it until it should become sound; and that the defendants undertook the care and treatment, as requested; but that the defendants did not use proper care and skill in reducing the fracture but bandaged his leg and put on a plaster cast so tightly as to impair and hinder the circulation of blood in his leg and foot, and allowed the cast to remain so long that the foot and leg became gangrenous, and in so diseased a condition that on account of the defendants' negligence his leg had to be amputated at a point nearly up to the body. The plaintiff recovered a verdict of $8,192.40. That the plaintiff's leg had to be amputated on account of the development of gangrene from some cause is conceded by everybody. The plaintiff contends that the evidence is sufficient to show that the gangrene resulted from the negligence and unskillful treatment of the defendants. The defendants combat this contention, not only upon the ground that the treatment was proper, but also upon the theory that the bacillus, called a gas bacillus, which produced the gangrene in this particular case could not have been generated by continued pressure of the cast.

The contention of the defendants that they were not negligent as to the pressure of the cast and the length of time they kept it upon the leg was purely a question of fact for the jury and, without quoting the evidence upon this branch of the case at all, we are of the opinion that the finding of the jury upon this question cannot be disturbed.

But the defendants say even if the cast was kept upon the leg as claimed, it did not produce the gangrene which necessitated the amputation of the leg. They base this contention purely upon the theory that the type of gangrene here found could not be produced by pressure. From the testimony of all the physicians, however, it is fully established that continued pressure sufficient to stop the circula-

tion may produce gangrene. There was, moreover, before the jury a definite, assignable cause for gangrene in the plaintiff's foot below the cast. Against this was presented the theory that the symptoms found in this case, namely, the appearance of gangrene above the cast could not be produced by the pressure of the cast but by a form of bacteria called the gas bacillus. The doctors, as usual in such cases were in conflict in regard to the cause. The jury evidently believed in the facts instead of the bug. We cannot say they were wrong.

The fact that the jury found a verdict against Dr. Rancourt, only, cannot be regarded as an adequate reason for setting aside the verdict. Upon the evidence a finding that Dr. Merrill was acting in the capacity of an assistant could not be disturbed. As to negligence it also appears that Dr. Merrill warned Dr. Rancourt that he "was binding that pretty tight and that probably he would have to remove it the next day."

The verdict is large; but the injury is also very great. We cannot say the finding of the jury is excessive. Motion overruled. *Johnson & Perkins, and Butler & Butler*, for plaintiff. *W. R. Pattangall, Harvey D. Eaton, and Frank O. Bean*, for defendants.

EVERETT L. SPEAR *vs.* EDWARD BRYANT COMPANY.

Knox County. Decided November 20, 1917. This was an action of debt to recover $750. for rent claimed to be due under a lease of a lime kiln located in Rockland in Knox County. The plaintiff recovered a verdict for $650.37, and the case is before the court on the defendant's general motion for a new trial.

The lease in question was dated April 18, 1913. The issues involved depended upon the performance of duties imposed by the following clause in the lease:

"In the case the lessee cannot secure prompt and convenient delivery of rock over the Lime Rock Railroad or in case the railroad and trestle shall be removed from the vicinity of the leased premises so that rock cannot be delivered promptly and conveniently to the lessee, the lessee may at its option cancel this lease upon thirty days'

written notice unless it shall be possible to provide prompt and convenient delivery of rock to the kilns in a manner satisfactory to the lessee. Said premises are leased as they now are, and the lessor shall not be responsible for the present or future condition thereof or for the safety in berth where vessels may lay and the said premises shall only be used by said lessee for conducting the lime business."

It is admitted that the trestle mentioned was still in position at the date of the writ. But two questions were left for the jury,—(1) Could the defendant secure prompt and convenient delivery of rock over the Lime Rock Railroad? (2) Was it possible to provide prompt and convenient delivery of rock to the kilns in a manner satisfactory to the lessee?

The plaintiff contended that two methods were open to the defendants to transport their lime; one by the use of the railroad, the other by the use of teams. The defendants contended that neither course was open to them upon any terms or conditions which would be satisfactory; that the railroad company would not contract with them, and that moving the rock could not be done profitably by team on account of the expense attending the building of certain bridges, if teams were used. Holding that view the defendant, on March 5, 1914, tendered the balance of rent then due, and notified the plaintiff that "we consider our lease with you terminated and cancelled."

There is no dispute as to the law governing the case, and no contention that the instructions to the jury were erroneous or misleading. The defendant, however, by its brief statement claimed that "if the jury should find the lease has not been so terminated, then the defendant is entitled to recoupment for use by the plaintiff of the said premises for storage purposes."

The case was carefully tried, and the documentary evidence introduced must have been helpful to the jury in considering the testimony of the witnesses upon the issues involved. We have examined the record with care and we fail to find that the jury erred, either in the general conclusion or the amount due. The terms of the lease, the time involved, and payments admitted, indicate that in returning a verdict as they did, the jury must have taken into consideration the defendant's claim to recoupment and allowed the same. The entry will be motion overruled. *A. S. Littlefield,* for plaintiff. *Philip G. Clifford, and Henry L. Withee,* for defendant.

HERBERT L. PALMER

vs.

INHABITANTS OF BLAINE, INHABITANTS OF BRIDGEWATER, INHABITANTS OF MARS HILL.

Somerset County. Decided November 22, 1917. In this case the demurrers were not filed until the second term, and no leave to plead anew was then obtained; the demurrers were sustained at nisi prius, but the exceptions to that ruling were sustained by the Law Court; after that decision of the Law Court was received, upon motion, judgment was entered for the plaintiff and the case comes up on exceptions to that ruling.

Held:

1. Where a demurrer is not filed until the second term, and no leave to plead anew is granted, the defendant has no right to plead anew after the demurrer has been overruled. In such case judgment is to be entered for the plaintiff. R. S., 1916, Chap. 87, Sec. 36. *Fryeburg* v. *Brownfield*, 68 Maine, 145. *Roberts* v. *Niles*, 95 Maine, 244.

2. The ruling ordering judgment for the plaintiff in this case was correct, and the exceptions thereto must be overruled. So ordered. *Manson & Coolidge*, for plaintiff. *W. S. Brown*, for defendants.

SARAH A. LATHAM

Appellant from Decree of Judge of Probate.

Androscoggin County. Decided November 22, 1917. This is an appeal from a decree of the Judge of Probate approving and allowing the last will and testament of Cain Latham. In the Supreme Court of Probate the jury found, upon the two issues of fact submitted to them, first, that the testator was not of sound mind at the time he executed the instrument which purports to be his last will and testa-

ment, and, second, that the testator was induced to make and execute said instrument by undue influence. The case comes before us on a motion to set aside the verdict.

The evidence as reported embraces four hundred and sixty pages. No exceptions are presented to any rulings of the presiding Justice as to the admission or exclusion of evidence, or to his instructions to the jury.

The testator at the time of his death, March 29, 1916, was between sixty-five and seventy years of age. He was born in England, and came to this country about 30 years before his death and settled in Lewiston, Maine. His wife and children came soon after. He worked in the cotton mills until about eight years before his death when he retired from that work and thereafter took orders for wall paper from samples.

The petition for the probate of the will in question recites that his estate does not exceed $5450, of which $5000 is real estate, and $450 personal estate. All his children, five in number, are living. The oldest, Mary (Ollerenshaw), forty-four years old at time of trial, was married at the age of nineteen, and has since lived in Lewiston. William, forty-one years old at time of trial, an operative in the cotton mills, is unmarried and has always lived at home with his parents. David, thirty-nine years old, was married at the age of twenty-three and moved to Lowell, Mass., where he now resides. Sarah, thirty-three years old, an operative in the cotton mills, is unmarried and has always lived at home. Ernest, twenty-nine years old, was unmarried at the time of his father's death. He is a painter and lived at home, until recently.

January 31, 1912, Cain Latham made a will, therein giving his wife the use and income of all his estate for the term of her life. Of the remainder of his estate, after his wife's death, he gave to his son David $100, to each of David's two children $100, to his daughter Mary and her only child $100 each, and all the rest of his estate he gave to William, Ernest, and Sarah, equally, saying in the will: "These three children are made the residuary legatees because they have especially aided me in accumulating my property."

The testator's wife died July 2, 1914. Soon after that, on the 21st of the same July, he sailed for England on a visit. He reached Lewiston on his return September 23, 1914. His three children, William, Ernest, and Sarah, went to Massachusetts to meet him on

the arrival of the steamer, but, owing to miscalculation as to the time, they did not meet him, and he arrived home in their absence. His visit was apparently disappointing, and he returned home tired, weak, sick, and dejected in spirit, at least.

It is conceded that before Mr. Latham took the trip to England he was of sound mind, possessing ample testamentary capacity. And we think the evidence justifies the conclusion that after his return home he appeared changed in both body and mind.

After he had been at home three or four weeks he began taking his meals with his daughter, Mary, his daughter Sarah then going to work in the mill, but he slept at his home, as did the three children, Ernest, William and Sarah. He continued to take his meals with Mary, paying her therefor, until a few days before his death.

On the 9th day of November, 1914, the testator executed the instrument in question. It is therein provided that the child of his daughter Mary should receive $200, that each of the two sons of David should receive $100, and that the rest of his estate should be equally divided among his five children, if all should be living at his death, otherwise among those that should then be living. This will he left with his daughter Mary, telling her not to inform the other children, about it. The three contesting children had no knowledge of it until after his death. And when the other will was read before the heirs, after his death, Mary, although present, said nothing about this second will. She says that her father told her to wait and hear the other will read.

In December, 1914, the testator signed a petition asking the Probate Court to appoint a guardian for him, alleging in the petition "that he is unfitted by reason of mental and physical disability to manage his affairs with prudence and understanding," and he petitioned that his son Ernest might be appointed such guardian, and he was so appointed, and so continued until the testator's death. The contestants testified that Mr. Latham after his return from England, failed wholly to attend to his business affairs in connection with his property, and that the guardianship was a necessity, and being proposed to him he not only assented to it but seemed pleased with the idea. The case is almost barren of any business matters that the testator transacted after his return.

The foregoing unquestioned facts and circumstances reveal something of the testator's life before his wife's death, of his family and their relation to him, of the testamentary disposition of his property

as contained in the will of 1912, and of his condition of body and mind after he returned from England on September 23, 1914. The contestants claimed that he was then broken down mentally to such an extent that he no longer possessed testamentary capacity. On the other hand, the proponents of the will contended that, although he was then weakened in body, he was still mentally capable of disposing of his property by will. That was the first issue submitted to the jury.

The evidence bearing on that issue is too voluminous to be analyzed within reasonable limits. On the side of the contestants it includes the testimony of very many witnesses, of many years close personal acquaintance and association with Mr. Latham, who relate that he quite invariably failed to recognize them when they spoke with him after his return, and could not seem to realize who they were after being told, and that he did not appear to possess ability to converse with them when they tried to talk with him. They also relate many instances of strange acts on his part, including quite frequent crying and sobbing, when spoken to by his friends, and statements by him that his wife was with him, or coming soon to see him, and that he himself was dead.

On the other hand, the proponents of the will introduced the testimony of the experienced attorney who drafted the will, that Mr. Latham came to his office alone on Saturday, November 7th, 1914, and gave him the data for drafting the will, and came again on Monday alone when it was read to him, and he expressed his approval of it and signed it. And in the opinion of the attorney the testator was of sound and disposing mind. The proponents also called several witnesses who testified that they saw and talked with Mr. Latham after his return, and that they saw nothing unusual about him mentally.

But the jury saw all the witnesses and heard them testify, and they had a better opportunity to determine the weight of the testimony than this court has with only their printed words to study. The case is not a strong one in support of the contention of the contestants.

But after a careful examination of all the evidence presented, as to the testamentary capacity of Mr. Latham at the time the will in question was executed by him, we are not persuaded that the finding of the jury in favor of the contestants is so clearly erroneous that it should not be permitted to stand.

We feel, however, that there is much less competent evidence to support the finding of the jury in answer to the second question, that the testator was induced by undue influence to make and execute the will. But, even if the finding of the jury in answer to the second question is against the weight of the evidence, and we incline to the opinion that it is, nevertheless, the motion for a new trial must be overruled, because the jury found, and were justified in finding, that the testator was not of sound and disposing mind when the instrument was executed. *Carvill* v. *Carvill*, 73 Maine, 136, 138.

It is to be noted that after the verdict the Supreme Court of Probate made and entered its decree, wherein it sustained the appeal, reversed the decree of the Judge of Probate, disallowed and rejected the instrument in question as the last will and testament of Cain Latham, and remanded the cause to the Probate Court for further proceedings. That decree appears to be in force,. its validity not having been questioned by exceptions or otherwise. The practice in such case should be, we think, for the party filing the motion for a new trial, to move the court not to enter any final decree pending the motion for a new trial on the issues presented to the jury, and, should a decree be made notwithstanding that motion, then to take and prosecute exceptions to the making of such decree under the circumstances.

In the case at bar, however, the motion for a new trial being overruled, no confusion will arise because of the fact that the decree was entered and stands unchallenged. Motion overruled. *J. G. Chabot, and Newell & Woodside*, for proponents. *McGillicuddy & Morey, and L. J. Brann*, for appellant.

PIEDMONT & GEORGES CREEK COAL COMPANY

vs.

M. B. PERRY and C. O. PERRY.

Knox County. Decided December 7, 1917. This case comes up on report. It is an action of assumpsit to recover the sum of one hundred dollars, the balance of the purchase price of a cargo of coal.

The defendants set up as special matters of defense, first, that before the bringing of this action they paid $59.51 on a trustee execution issued on a judgment rendered by the Supreme Judicial Court for Knox County in an action wherein one A. W. Hutchings was the plaintiff and this plaintiff company was the defendant, and these defendants were summoned and charged as trustees; and, second, that before the bringing of this action these defendants were summoned as the trustees of the plaintiff Coal Company in another action brought by the aforesaid A. W. Hutchings against it and now pending in the said Supreme Judicial Court, and wherein the ad damnum is $100.

It is claimed by the plaintiff herein that the judgment, and execution issued thereon, on which said defendants paid the $59.51, were illegal and void, and, therefore, that said payment affords no defense in this action. It is also claimed by the plaintiff that the second trustee process, although served on the defendants herein, has not been served on the principal defendant therein, and that it cannot now be legally served on said principal defendant.

If it should be determined that the judgment rendered, and the execution issued thereon, in the first trustee suit, and on which the defendants paid the $59.51, were illegal and void, still the balance due from the defendants to the Coal Company on the cargo of coal, is covered and attached by the second trustee process, served on the defendants before this action was commenced, and which is still pending.

It is plain, therefore, that the rights of the parties involved in this case now before the Law Court cannot be fully and finally determined until that pending trustee process is disposed of. Whether or not an order for the service of that pending trustee action on the principal defendant therein can and should now be granted, is a matter to be determined in that case, and not in this, for the plaintiff therein is not before us. His right to have these defendants charged as trustees of the Coal Company under his pending suit against it, cannot be adjudicated in this action so as to bind him. And we think this court should not pass upon that question in this action.

It is therefore the opinion of the court that this report should be discharged and that the case should await at nisi prius the disposal of the aforesaid pending trustee action. Report discharged. Case dismissed from law docket. *Rodney I. Thompson*, for plaintiff. *Philip Howard*, for defendant.

ALBERT RUSSELL SAVAGE

IN MEMORIAM

SERVICES AND EXERCISES BEFORE THE LAW COURT, AT PORTLAND, JULY 19, 1917, IN MEMORY OF

HONORABLE ALBERT RUSSELL SAVAGE,

LATE CHIEF JUSTICE OF THE SUPREME JUDICIAL COURT, BORN DECEMBER 8, A. D. 1847, DIED JUNE 14, A. D. 1917.

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

Resolutions of the Androscoggin Bar, and the remarks of Hon. GEORGE C. WING, President of the Androscoggin Bar Association, in presenting them:

It is my melancholy duty to make formal announcement at the Bar of this Court of the death of ALBERT RUSSELL SAVAGE, late Chief Justice, at his home in Auburn, June 14, 1917. Justice SAVAGE was a member of the Androscoggin County Bar Association, and that organization directs my presence here to ask that the court pause in the discharge of its public duty and cause memorial to be kept of one of the state's most distinguished citizens and a member of our common profession.

The Androscoggin County Bar Association at a meeting held on the 11th inst. selected a committee to prepare and present to this court an affectionate tribute to the memory of Judge SAVAGE, one of its most beloved members, and as representing that committee I wish to say in behalf of the Bar Association that our relations with Judge SAVAGE were very close, friendly, confidential and I believe mutually appreciated. Our Bar was proud of him and never failed in expressing its gratification at his advancement and the recognition

that his great learning, ability and industry received by the profession wherever his opinions were read, and where members of the profession and the public were permitted to come closely in contact with the jurist and the man. The Bar Association felt a pride that the eminent public service rendered by Chief Justice SAVAGE had received deserved recognition, not only in Maine but in the wider field wherever his painstaking opinions were appreciated by the profession.

Previous to his service to the State on the bench of this court he presided over the Probate Court for the County of Androscoggin and his administration of that office was featured by rare patience, impartiality and courtesy, not only to the members of the Bar who practiced before him, but to every other person that was privileged to know him and to none of which did he ever turn an unwilling ear or in their sorrow or need manifest any haste or impatience. His eminent services as a member of this court to the performance of which he carried his genuine kindliness and courtesy, his industry, diligence and fidelity and his broad and deep knowledge of the common law made him an ideal judge. Neither his courage nor his integrity was ever questioned and when death suddenly overtook him he was in full possession of his brilliant mental faculties and that ripeness of thought and reason which can only come from continued study. Judge SAVAGE was a man of great mental resource which was constantly illuminated by his tireless study and careful investigation.

I cannot allow the occasion to pass without reference to the very close personal relations which existed between Chief Justice SAVAGE and myself. I had known him ever since he came to the Bar and my relations with him were very close and very intimate. I know he was my friend and I feel that I am a better man for having had these close relations with him.

The Committee named by the Bar have formulated the following resolutions—

Resolved: That the members of the Androscoggin Bar Association wish to express their great appreciation of the character and service of ALBERT RUSSELL SAVAGE, for many years a member of its Association and of this Court, and to offer this loving tribute to his memory to the end that the same may be placed upon its records, and made permanent.

Resolved: That during his entire career as a member of the Bar in every place to which he was called for public service he showed himself trustworthy and deserving of the great honors which he enjoyed. He was kind. He was patient. He was learned, and best of all he was loyal to his friends. He believed in fair dealing and that every suitor should have a fair hearing and his contention properly considered. He was painstaking and impartial and approached every question with an open mind. He earned and deserved his reputation for courage, justice, learning and fairness, and wherever and whenever he rendered service a sense of security prevailed. He died in his full intellectual strength. We sit in the shadow and mourn his loss, for we loved him and he is no longer with us.

Resolved: That these resolutions be presented to the court with the request that they be entered upon its records and that a copy thereof be transmitted to his widow, who survives him.

GEORGE C. WING,
JESSE M. LIBBY,
HARRY MANSER,
DANA S. WILLIAMS,
HARRIE L. WEBBER,
Committee on Resolutions.

Remarks of Hon. HENRY W. OAKES, of Auburn, Judge of Superior Court, Androscoggin County.

MAY IT PLEASE THE COURT:

When the death of Chief Justice SAVAGE occurred, the tidings came to the lawyers of the State as a shock which gave the impression of a calamity.

Notwithstanding a serious illness in the latter part of 1914, he soon resumed his duties, and as time went on was performing with ease and regularity the vast amount of work which for many years he had taken upon himself.

His appearance improved. Those who knew him well knew that he was looking forward to the time when he should lay aside the

burdens of his office, and round out his life in the enjoyment of his home and the companionship of his wife to whom he was devoted.

Upon us of the Androscoggin Bar the blow came with especial force. He had not only our respect but our affection. We admired his learning. We trusted his wisdom and his integrity. But above and beyond that, he was our friend and our brother.

From the dignity which was an essential part of the man, and in no sense an accessory, many who came in contact with him in court or elsewhere were likely to judge him cold and austere.

But I believe it to be the universal judgment of his associates at our Bar that actual acquaintance but emphasized the satisfaction they experienced in the certainty that this was not a cold and austere man, but one on whose careful and kindly attention to all matters they brought before him they might rely without hesitation.

In the twenty years of his service on the Bench he held twenty-one terms of court in Androscoggin County. Besides this, a great number of causes in equity and other cases were heard out of term time, and there were also many actions referred to him by agreement of counsel.

I speak of these things as showing conclusively that lawyers of his home County, men who knew him best, gave constant unmistakable testimony by their acts of their confidence and esteem. There was never any tendency to continue cases in Androscoggin County when Judge SAVAGE was to preside at a term of court.

In the public eye, the picture which will endure is of Chief Justice SAVAGE sitting in court, arrayed in his official robe, presiding at the trial of causes; a picture showing the ideal characteristics of the great Judge, fully equal to his task, holding even the scales of Justice between party and party.

To his brothers at the Bar, fully recognizing him in this aspect, I think the remarks of one of the younger members of the Bar, after his death, give a picture of Judge SAVAGE in a manner more likely to remain impressed upon our recollection as time passes.

Speaking of his death, this lawyer said that now, as he went to the Court House, he could not help thinking that in the Judge's chambers he must still find that familiar form, wearing no robe of office, always occupied, never in haste, patient, courteous, and kindly, meeting all who came with the full attention which their business required, and dispatching it with the ease and certainty of one whose strength and

wisdom was adequate to any call, and whose best was fully given to all matters.

It seems to me that some such recollection as this of him will be cherished by us all in the future with the greatest satisfaction.

I like to think of Chief Justice SAVAGE as in no sense accidentally great, and to illustrate my thought, I venture to speak of some of the features of his life before he left the practice of law to take his place on the Bench.

When I first became acquainted with him, he was a member of the firm of Hutchinson and Savage in Lewiston, with his home in Auburn. He was then a powerful, well-equipped lawyer.

In 1884 I became his partner, and the relation continued until he became Judge in 1897. During this period, performing the tasks and bearing the responsibilities which belong to the life of a busy and successful lawyer, he was County Attorney in 1881 and 1882, Judge of Probate in 1885, 1886, 1887 and 1888, Mayor of Auburn in 1889, 1890 and 1891, Representative to the Legislature from Auburn in 1891 and 1893, being the Speaker in 1893, and Senator from Androscoggin County in 1895 and 1897, and, during this period, he had been at the head of what was then the greatest fraternal beneficiary order in the country, besides being active in several business enterprises.

But in addition to this, which would seem to be sufficient to fully occupy and give scope to the energies of the ordinary man, he entered upon a work which made him known to every lawyer in the State, and supplemented his previous knowledge and ability with a minute knowledge of the principles embodied in the decisions of our courts. I refer to his Index Digest covering the first eighty-eight volumes of the Maine Reports, afterwards brought up by him to cover the remaining volumes to and including volume 103.

This was a vastly greater task than that involved in the preparation of any of the previous digests in this State. His work was not merely quotation and arrangement of selected language from opinions in convenient alphabetical order. It included a careful analysis of each case, condensing, stating and grouping the precise points, and was essentially a continuous mental task of the most exacting nature.

This would necessarily be a legal training of the greatest value. It was with this legal training as his object that he started on his task. The idea of publication came later as the value of his work to the profession, as well as to himself, became apparent. To this he gave

such time as was not required for his ordinary work which was never neglected. He took an hour, a half hour, a few minutes, when there was an interval during the day, and long hours at night. It was a vast labor thoroughly performed.

While these activities were going on, he not only bore the burden of these tasks, but he had trials of a most serious nature.

During this time he lost his only son, a young man of great promise, who died not long after the completion of his college course, the pride and hope of his parents, who were profoundly affected by his death.

His wife and daughter were invalids through long years, and upon them he lavished the tenderest love and care.

In his political life he was at one time subjected to the most bitter attack and misrepresentation in his own home city, his acts and motives being assailed by men who had been counted among his best friends. They were mistaken, and their views changed, but only after the lapse of time had given them knowledge of facts which entitled him to their gratitude instead of their hostility. It was a bitter period for one of the most sensitive of men, and the iron entered deeply into his soul.

With all these things, under the burden of which a smaller man might have become selfish, narrow, or cynical, he pursued the even tenor of his way, and perhaps because of these trials and sorrows his qualities of head and heart alike became broader and deeper and stronger. He laid up no animosities against those who attacked him and the affliction of sickness and death in his home life left him not only the patient, kind and affectionate husband and father, but a kind man who, having borne troubles himself, could sympathize with the troubles and perplexities of others.

He never wore his heart upon his sleeve. To the outer world he was at all times the serene strong man, not calling upon others, but one upon whom others could depend for wisdom, patience, and a willing response to all worthy calls upon his sympathy.

And so when he was called to the Bench he entered upon his duties fully equipped in legal knowledge and in the qualities of heart and mind which make up the ideal great Judge. And as he entered upon and fulfilled his new duties with new relations toward men, and especially toward his brothers at the Bar, he still progressed. He grew greater and broader from the standpoint of one who was directing affairs with the single purpose of promoting justice according to

law, recognizing the higher justice which is tempered by mercy, and the higher law often wisely applied to interpret the written law.

I have not attempted to speak of many things of which the distinguished men who have been his associates on the Bench may well speak. They have had close relations with their honored Chief. I am sure that with all else they have found these same characteristics which we of his own Bar have recognized.

I am thinking of him today, not as the Chief Justice and the great lawyer, but as my friend whom I have known and lost, and the friend of the men who make up the Androscoggin Bar, men who have taken pride in his success, have given him their loyal respect, and affection, and who are affected profoundly by the sense of their irreparable loss. In their behalf, and with a full heart, I offer these few words of tribute to his memory which we shall long cherish.

Remarks of CHARLES J. DUNN, Esq., of the Penobscot Bar.

WITH THE PERMISSION OF THE COURT:

When Chief Justice SAVAGE, in the full possession of his faculties, and in full command of his sterling integrity, was suddenly summoned to appear before the court of God, he obeyed the warning with a smile, but the messenger of Death by the service of that summons caused heartfelt sorrow in the homes of the people of the State of Maine.

Eulogy's diction is so likely to be either mechanical and indifferent, or inordinate and extravagant, that I hesitantly am attracted to its use. On the other hand, the deep affection borne by me for the good Justice while he was living, and the honor and the reverence in which I hold him in remembrance now that he is dead, alike strongly impel me to speak commemorative words of one who possessed the high ideals that have been maintained in this court throughout its history, who stretched out his hand and was kind and helpful to many a young lawyer beginning to toil up the rugged ascent of the path of his career, and to mingle my regrets with the regrets of those who knew him best, liked him best, and admired him most.

I never knew him personally until, soon following his appointment as an Associate Justice, some twenty years ago, when my license to practise was comparatively new, he came to a Penobscot session to

interpret and expound the laws, and to award judgments. That he was laden with profound and varied knowledge of the science he was to administer, and that, while at the Bar, although he loved peace and counseled the termination of contentions, he was ever ready to battle loyally for a client's cause, we had already heard; but otherwise, speaking generally, the members of the Penobscot Bar then knew not of the new judge. They came to know him passing well, to regard him affectionately, and to look eagerly for his coming on the circuit.

He did not live in vain. He did not drift down the stream of life a mere atom upon its surface. No man lives in vain, and no man fails to be known from the mass of humanity who, by reason of his personal traits and habitual conduct, attaches a great host of friends to himself with the golden chains of love, to each of whom his death is a well-defined personal loss.

Of Chief Justice SAVAGE the State will always be proud. Brave, upright, genial, tender and wise, with honesty of language, of purpose, of thought, and of mind, his fame will grow brighter with the efflux of time, and history will write him down as one of the great citizens New England has produced, a character unique in its symmetry, glorious in its beauty, magnificent in its strength, and stainless in its purity.

By faithful service he won and retained the confidence of his fellows in public places, even unto the lofty summit of a lawyer's ambition. Wherever stationed he was a person of natural and simple manners, untouched with arrogance, cordial, sympathetic, approachable, magnetic, efficient, and with unrelaxed sincerity of principle. From first to last of his life his stature leveled up to all the points of Blackstone's aphorism for he "lived honestly, hurt nobody, and rendered unto every man his due."

A wholehearted American he loved his country next his Maker; held his head high on a vertical neck; raised his eyes toward Heaven in search of signals of the truth, and never turned his ear aside to listen for the fickle murmurs of popular approval. He inherently adored right, hated wrong, revered and was subordinate to the law.

Much was expected of him! How splendidly he measured up four square to the highest expectations! With what exceptional ability, with what untiring industry, with what becoming dignity, with what impartiality and justness he managed the affairs of his high office, fraught with good or ill as he might discharge public duty! Than who no man in Maine was more familiar with "the

codeless myraid of precedent," that "wilderness of single instances," those crystallizations of common sense, the reports of judicial decisions written into the books to endure as long as the English language shall live, if, indeed, that language shall ever die.

Tenaciously he adhered to well considered precedent, though its source be in the record of a Saxon sullenly defending his rights against a Norman baron, and still perceiving, as he did, that the common law never retrogrades, but with forward, upward outlook on life moves on, and ever on, keeping abreast of the van in the procession of safe and sane progress, he took the world as he saw it, and human nature as he knew it, and construed that law in the light of the case before him. He hesitated not, when he discerned error in an ancient rule, to revise his opinion, and to blaze a new pathway out, and it mark unerringly for the walk of the goddess who guards and protects the rights of persons and of property. But he did not, as has well been said, confuse change with progress, nor lose sight of the substance in the darkness of the shadow.

Very correct was his conception of the province of this tribunal, of its purposes, and of the indefinable power of judicial discretion. He was guided by a true sense of right, stood in awe of his official oath, and was sustained and soothed by an approving conscience. Human frailty he recognized and pitied. He knew men, and knowing them realized, as Shakespeare said:

> "Best men are moulded out of faults,
> And, for the most, become much more the better,
> For being a little bad,"

and he never forgot, that

> "No ceremony that to great ones 'longs
> Not the king's crown, nor the deputed sword,
> The marshal's truncheon, nor the judge's robe,
> Become them with one half so good a grace
> As mercy does."

There are no words intense enough to express the esteem and respect of society for a learned Judge, an upright Judge exercising with cold neutrality as a fundamental function of government an attribute of the Creator. Many a plain man of the State, to slightly

paraphrase and apply the words of Mr. Phelps, has never seen the court of the judge, nor ever expects to see it. He cannot discriminate its jurisdiction nor understand its procedure. But he reposes with a more confident security under the roof his industry has raised, and enjoys with a better assurance the liberty that has made him free, because he knows that there is a limit which oppression cannot transgress; that no agency of power can go upon him or send upon him but by the judgment of his peers and the law of the land; and he believes that if the worst should come to the worst, and wrong and outrage should be found intolerable and without other redress, that there is still laid up for him a remedy, to be based in some way or other, in the Supreme Judicial Court of Maine.

Public confidence, and faith, and pride in the court grew even stronger as a result of the service of Judge SAVAGE. Peace to his memory! He lived an earnest and a useful life with nothing unpleasant to remember.

Remarks of Ex-Chief Justice LUCILIUS A. EMERY.

MAY IT PLEASE YOUR HONORS:

Twenty years ago, Mr. Justice WALTON, clarum et venerabile nomen, retired from the Bench of this high court after thirty-five years of faithful service. Who should be the successor of that eminent Justice was naturally regarded by all as a question of great public importance, but there was no suggestion of any other than the distinguished member of the Androscoggin Bar, whose life and service we commemorate this day.

I had then been for fourteen years a member of the court and I clearly recall that, while regretting the loss of the one, we welcomed the other in the confident belief that he would be a worthy successor and would do his full part in the work of the court,—would maintain and even increase its efficiency, influence and authority. To-day, after fourteen years of close personal and official association with him on the Bench and six years of interested observation since my retirement, I desire to bear personal witness to what his recorded judgments show, that the court and the law have been advanced by his judicial labors.

What the late Chief Justice was in society, at the Bar and in the legislature, I leave to others to describe. I would however mention one instance showing his faithful service to the law before coming to the Bench. He had been appointed auditor or master in an intricate, much entangled case requiring patient investigation and orderly statement of results in order to make clear the right. The case then fell to me and I was so impressed by the merit of his report I wrote him my grateful thanks for the service, and expressed the hope he would in due time accept a place on the court itself.

With the above exception, I will confine myself to a brief statement of my own estimate of some of his judicial characteristics and labors.

He possessed in large degree that valuable quality in a judge, openness of mind and patience to hear before deciding. This patience however did not, as it should not, extend to the immaterial or to the irrelevant. He ruled his mind as well as his spirit. He would not let his mind run ahead of the evidence or the argument. He thus avoided what Lord Bacon centuries ago said was a grave and too common fault in a judge. Even when the evidence and the arguments were concluded he paused to make sure they were rightly understood before forming his judgment.

I think his written opinions justify what I have said. They are not mere bald assertions, ex-cathedra. They show the reasons for the judgment whether it be based on statutes, precedents or general principles. They also show diligent research and much thought when such were necessary. He was rarely content with merely citing precedents, unless indeed they had clearly become fixed rules of law to be changed only by legislative action. In any event he made it clear to the parties and the readers that the case had been fully considered.

With such mental traits and habits, combined with his intellectual power, he was a valued and helpful associate in the work of the court. In the consultations he listened to his associates with a mind still open. In his turn he modestly stated his opinion as only his then opinion, to be modified or reversed by further investigation and reflection. He was not a mere doubter however. When the time came for decision he could be as decided as any, and could hold to his matured opinions against any majority. When he thought the occasion justified it he did not hesitate to publish his own opinion

against the unanimous opinion of his associates. Shortly after his appointment there came before the court the case of *Reynolds* v. *Waterville*, 92 Maine, 292, involving a new constitutional question. In that case he published his sole dissent from the strong opinion of the majority prepared by the late Chief Justice PETERS. I cite one other and much later instance, that published in 103 Maine, 506, where he declined to give his opinion on certain questions of law submitted to the Justices by the Senate under the constitutional provision therefor. Although the other Justices deemed it their constitutional duty under the circumstances to give their opinions, he nevertheless held that those circumstances forbade the Justices doing so.

On the other hand this confidence did not degenerate into pride of opinion. He still ruled his mind. He still kept it open to the influence of wider knowledge. I cite one instance, not appearing in the reports but still clear in my memory and in that of my esteemed friend and then associate, former Chief Justice WHITEHOUSE. There came before the court the question whether, in view of the rigid division of powers in our Constitution, a Justice of the court could constitutionally act as a member of a statutory committee to review the action of County Commissioners and the Railroad Commissioners in matters within their jurisdiction. It chanced that Justice SAVAGE shortly after he came upon the Bench had acted as a member of such committee. In the case presented, however, he held that the constitution clearly forbade such action. When his former action was cited against him by those Justices entertaining the opposite view, he replied, "True, but I know more now and I can and do over-rule myself." The ability and willingness to over-rule himself on just occasion are not undesirable qualities in a Judge.

I have said he did not regard precedents as sufficient guides. He did not ignore them however. He rightly considered that the precedent might contain a principle; that our law is largely a collection of such principles and so broadens down from precedent to precedent, as "The thoughts of men are widened by the process of the suns."

He was well read in the history of nations and institutions as well as in the books of the law. He thought as well as read. Indeed he was more a thinker than orator or advocate. Had he lived in the classical period of the Roman Law, he would have been more akin to Gaius and Ulpian than to Cicero or Hortensius.

He was loyal to the law. He would not tolerate any evasion of it. He regarded it, however, not as something sacrosanct not to be touched, but as an institution, an instrumentality, for the furtherance of its great end, justice, the greatest earthly good. As such he could see its imperfections in substance and procedure, its need of improvement to realize the ideal of equal and exact justice to all men. As lawyer, legislator and judge he sought such improvement. To that end he was progressive but conservatively so. While he looked to the future earnestly, he also looked to the past thoughtfully, that the desired progress might not be endangered by misdirection or reaction. To my mind he exemplified that two visaged figure in Raphael's Mural painting of Juris-prudence in the Vatican, the one visage youthful and courageous, looking hopefully to the future, the other visage older, more thoughtful, looking carefully at the past.

Chief Justice SAVAGE lived laborious days and our State is the better for that life and labor. He has died, but "being dead he yet speaketh." He speaks to this and future generations through his labors for law and justice.

Tribute of Former Chief Justice WHITEHOUSE to the Memory of Chief Justice ALBERT R. SAVAGE.

Since the adjournment of the last term of this court at Bangor, the dark shadow of death has again fallen upon us and we have been called upon to mourn the passing of the eleventh Chief Justice of the Supreme Judicial Court of Maine. His sudden death on the morning of the 14th of last month was an event for which the members of the court and of the bar and the people of the state were wholly unprepared, and the announcement of it was universally received with feelings of deep sorrow and sincere expressions of regret. The state mourned the loss of a distinguished citizen, and an able, learned and upright judge, and his associates on the bench deeply feel the departure from them of their honored and beloved Chief. He merited and received the implicit confidence of the people and of all suitors that came before him, was honored and admired by members of the bar, and held in the highest esteem and warmest affection by all the members of the court who were associated with him during the twenty years of his judicial service.

Although Judge SAVAGE had for forty-three years rendered constant and devoted service to his chosen profession and within a few short months would have reached the allotted age of man, and although he had been admonished that he had symptoms of organic disease, he yet retained such an appearance of health and strength unimpaired, and was performing his customary duties with such cheerfulness and apparent facility, that his friends and associates had no premonition that he could possibly be so near the verge of the dark valley.

His sudden death was therefore a great shock to them all. In conversation with him a few years ago reference was made to the two sudden deaths among the members of our court in recent years, and I remarked that among the supplications of the Litany is a prayer to be delivered from sudden death, and that I had never been able to appreciate the reason for it. He said, "No; it is certainly to be preferred to years of languishing in misery and distress from some incurable disease."

A philosopher says, "blessed is he who has found his work; let him ask no other blessedness." Judge SAVAGE early found his work, and nobly performed it; and the "wages of all noble work," says our philosopher, "do yet lie in Heaven or else nowhere." His death was indeed sudden, but it was merciful in its freedom from pain and suffering. It was the peaceful crowning of a good, kindly and sweet-tempered life of great usefulness and unsullied integrity and honor, and not the unprepared death contemplated in the Litany. He died as he doubtless would have chosen to die, in the full tide and stress of the judicial labor he loved so well and so faithfully performed. He fulfilled the "solemn trusts of life," committed to him, and was gently

> "gathered to the quiet West
> The Sundown splendid and serene.

Judge SAVAGE had the advantage of a liberal education; and in the study and practice of the law, as in every other field of intellectual service, he recognized the absolute necessity and "perennial nobleness" of work; and after his admission to the bar in Auburn in 1875, he at once impressed himself upon the community in which he lived as a young man of superior natural endowments and fearless integrity, and was promptly recognized as a lawyer of excellent abilities and great promise. In his subsequent career at a bar com-

prising lawyers who were eminent for their learning and the strength of their service, he continually added to the public estimate of the fullness of his own learning and his own strength as a lawyer.

He served as County Attorney, and also as Judge of the Probate Court of Androscoggin County, and subsequently as a member of both branches of the State Legislature, and as speaker of the House of Representatives. In all of these positions he performed his duties with conspicuous fidelity and ability, reflecting credit upon himself and honor upon the state. As a legislator he achieved distinction in both the house and the Senate. He had been a diligent reader of general history and a thoughtful student of the history and philosophy of the law and political science. He was thus well prepared for legislative service and made notable contributions to the work of improvement and reform in several branches of substantive law and methods of procedure. He had thus become identified with the public life of his county and state, and he came to the Bench of the Supreme Court in 1897 with a broad and enlightened conception of the onerous and responsible duties of that office, and in all respects admirably equipped and qualified to perform them. He brought with him not only high ideals of the honor of the legal profession and the dignity of the law, and a full appreciation of the judicial character and functions, but also an exceptional capacity and disposition for prolonged and arduous labor in the solution of complex and difficult legal problems, and the analytical study of great masses of testimony. He had positive convictions upon public questions and policies and clear conceptions of civic righteousness and duty.

The impress which he made upon our jurisprudence, and the public and professional life of the state during the sixteen years of his service as Associate Justice of the Supreme Court constituted a tribute of confidence and respect more potent than the most eloquent voice of eulogy. And with his superior executive and administrative ability superadded to his great intellectual gifts and accurate knowledge of the law, it is but the language of truth and soberness to assert that he brought to the position of Chief Justice of the Supreme Court of Maine qualifications for the office unsurpassed perhaps by any of his predecessors since the organization of our State.

In the discharge of the duties of this great office he exemplified the same love of Justice for its own sake, the same tireless industry and conscientious endeavor to discover the truth, the same gentle, kindly

consideration and gracious demeanor that had characterized his entire judicial service prior to that time. As a well known writer once said of another, "the kindness of his heart never weakened his intellect and the strength of his intellect and high sense of duty never hardened his heart," but he was tender and thoughtful of the rights of all suitors whatever their condition in life, and he loved the flexible principles of equity more than the rigid rules of law. But the gentleness of his disposition never signified the absence of strength of character and personality, for he possessed to an exceptional degree the moral courage which gave him the power to act fearlessly according to his convictions of right and duty.

Although Judge SAVAGE never aspired to fame as a raconteur, or appeared to take special pride in the brilliancy of his wit in repartee, he recognized the fact that humor is a quality of the imagination indispensable to a correct view of proportion, and was himself possessed of a keen but always gentle and kindly sense of humor. I recall an instance of it in the Supreme Court at Auburn a short time before his appointment to the Bench. Mr. H. called up a bill for the dissolution of a partnership in which Counsellor SAVAGE was for the defense. Several grounds for the dissolution were stated in such general terms that it was difficult to discern the one relied upon. But the plaintiff's principal grievance appeared to be that he had not received the large profits from the business that he had anticipated. It soon appeared from evidence that the plaintiff had never contributed anything to the capital, or any service to the business of the company.

The presiding Justice had just finished the hearing of a libel for divorce for "desertion and cruel and abusive treatment," and with a twinkle in his eye said to Mr. H.: "Upon what ground do you claim a "divorce" in this business partnership; is it desertion or cruel and abusive treatment?" Before Mr. H. could explain, Counsellor SAVAGE promptly responded: "As I understand it, your Honor, it is simply a case of "failure to support" the plaintiff. Hazlitt somewhere says that "Ridicule is the test of truth, and that false gods are laughed off their pedestals." Of course the wit in this case did not influence the result, and it was only a coincidence that a "false god fell off his pedestal."

The style of Judge SAVAGE's published opinions, speaking for the Law Court, is not colorless and impersonal, but to a considerable

extent a reflection of the personality and intellectual character of the man and the Judge. He had manifestly acquired in early life correct habits of observation and consecutive thought, and possessed in a marked degree that clearness of apprehension which underlies all useful knowledge and that facility of accurate expression and methodical statement which give knowledge exceptional power. His general reading had been extensive and intelligent, his memory well stored and responsive and his writing graceful, lucid and effective. His legal opinions are accordingly notable alike for their faultless legal reasoning and elegant literary style. Many of them are conspicuous illustrations of the flexibility and creative power of the common law, and its adaptability, when invoked by a strong and progressive legal mind, to new enterprises, new developments and new conditions in social life. In many of these opinions "we see how he would stalk across the labyrinths of confusing details in a voluminous record, and take the main avenue, to the "very truth and right of the question." As a beam of light comes through a crystal prism broken into its component colors, every subject seemed to emerge from his judicial mind in full analysis with all its component parts clearly distinguished.

These opinions recognize what the profession of each new generation must more and more observe, and that is the distinction between reason and authority; that while cases decided under conditions like our own have great value in the practical administration of justice, representing, as they do, the principles of law applied to actual life, it must never be forgotten that behind and underneath all decisions, deeper and more real than all authority are to be found the true sources of the law in the enlightened reason, the natural justice and moral sense of mankind.

The natural trend of Judge SAVAGE'S thought and opinion was essentially progressive, in the proper and legitimate sense of that term. He recognized the fact that in a progressive society neither substantive law nor legal procedure can long remain fixed and stationary; but he believed that the process of reform should not be revolutionary and sweeping, but so gradual that neither the practice of the law nor the interests of business should be unsettled or embarrassed; and that while reformers might be iconoclasts, in the words of Dr. Holmes, "they should take down the idols so gently, that it will seem but an act of worship."

Judge SAVAGE had a profound belief in the genius of our governmental institutions, and cherished with reverence the historic grandeur of the great principles of "liberty under law" consecrated by the fathers as the foundation of a new republic; but he believed, with the first Federal Chief Justice that "civil liberty consists not in the right of every man to do just what he pleases, but it consists of an equal right to all citizens to have and enjoy and do in peace and security whatever the equal and constitutional laws of the country admit to be consistent with the public good." He realized that while a written constitution should be a declaration of principles as a basis of government rather than a code of laws, yet when it fails in important respects to meet the necessities of the changed industries and social conditions of society, it should be amended, but only after careful and deliberate consideration and study, in response to a general demand of the people therefor. At the same time he had seen that amendments to constitutions and statutes enacted and adopted at a time when a tidal wave of popular excitement is at its height are liable to be revolutionary and destructive of the safeguards of civil liberty.

No eulogy upon the life of Chief SAVAGE is required. He passed away in the fullness of labor and fame, having erected by his beneficent life, a monument more lasting than bronze. Such a life and such service cannot fail to transmit to generations beyond our own the unimpeachable fame of an exemplary citizen and Christian gentleman, and a distinguished magistrate who will ever hold a conspicuous place in the front rank of the great judges and jurists in the juridical history of Maine.

Response for the Court by Chief Justice LESLIE C. CORNISH.

GENTLEMEN OF THE BAR:—

For the second time in the judicial history of this State a Chief Justice of our highest court has died in office. The only other instance is that of the late Chief Justice WISWELL, who passed away on December 4, 1906. Of the eleven jurists who have filled this office since the organization of our State, nine have died after their retirement.

Chief Justice SAVAGE, in whose loved memory we are met today, stepped so suddenly from the chamber we call life into the chamber we call death, which we believe is but another room in the house of the good Father, that he almost seems not to have left us, and it is with difficulty that we can realize his departure. He had returned to his home in Auburn on Monday, June 11th, from the Law Court in Bangor, where he had seemed as well as at any time during the past three years, and had presided over the sessions of that court with his accustomed grace and dignity. On Tuesday and Wednesday he was busy with his judicial work, hearing causes in chambers and preparing an extended note in a case pending in the Law Court, where there had been a divergence of views. On the day before he passed away he wrote out in his own clear and beautiful hand a decision in a matter that he had recently heard, dated it the following day, Thursday, June 14, and left it on his desk awaiting his return next morning. But next morning, instead of returning to the Court House and to his chambers, which by long association had become so dear to him, without warning, without pain, his spirit took its flight from the burdening body, and after many years of honorable and honored labor he was at rest.

Chief Justice SAVAGE was truly a product of Northern New England. Born in Vermont, educated in New Hampshire, his life work developed and completed in Maine, he was the very embodiment of the characteristics of our northern country. Towering and majestic like its mountains, placid and equable like its lakes, with a depth of reserved power like its noble rivers, his nature could and did drink in the joys and the pleasures of a verdured June or submit in silent strength and resignation to the sorrows and disappointments of a drear November.

His birthplace was Ryegate, Vermont, which was also the birthplace of Governor Harris M. Plaisted. There may have been a touch of sentiment as well as a high regard for public duty when the latter's son, Governor Frederick W. Plaisted, reappointed Judge SAVAGE Associate Justice of this court in May, 1911. Judge SAVAGE was born on December 8, 1847. His father was a farmer and there in that remote rural community the boy grew up amid all those typical surroundings which may then have seemed to him like privations but which in reality were rich blessings. Industry, prudence, thrift, rational ambition and patience, these constituted the environ-

ment. He was fond of recounting his early days upon the farm and looked back upon them with an appreciation of their formative value. His college was Dartmouth, an institution which has given three Chief Justices to Maine, NATHAN WESTON, our second, who graduated in 1803, and served from 1834 to 1841; ETHER SHEPLEY our fourth, who graduated in 1811 and served from 1848 to 1855, and ALBERT R. SAVAGE who graduated in 1871. During his college course and after graduation he taught in northern New Hampshire and northern Vermont, and as we journeyed together from Montreal to Portland a few years ago he pointed out to me in a reminiscent mood, one of the districts in which he had taught while in college. He then studied law, was admitted to the bar of Androscoggin County at the April term, 1875, and for more than forty-two years he upheld the best traditions of that bar and of the profession. As a practicing attorney from 1875 to 1897, a period of twenty-two years, his rise from rather small beginnings was constant until he was recognized as one of the leaders of the bar in the State. Those present here today who were his associates or his adversaries in many a hard fought battle know full well the skill and the strength of his honorable warfare. Amid his many professional cares however, he found time to serve in varied positions of public trust, in all of which he proved his capacity for administrative and judicial labor, while at the same time his own experience was broadening and his intellectual equipment was developing.

During this period too he prepared and, on January 1, 1897, he published the first volume of his Index Digest of the Maine Reports, a task that consumed the hours which others were devoting to rest or recreation, and thereby he made the profession his acknowledged debtor. It was a work which proved the analytical qualities of his mind and greatly enhanced his legal reputation.

Thus equipped, he came to the Bench on May 15, 1897, as the successor of one of Maine's famous judges, CHARLES W. WALTON, and here for a little more than twenty years he has wrought the best that was in him into the jurisprudence of his adopted State. Together, their terms of office span fifty-five continuous years.

The exercises of this afternoon are most fitting. They follow an old and unbroken custom. They prove that worthy judicial service wins recognition and approbation from a grateful State. They not only permit loving associates to pay a tribute to the memory of one

whose name stands high up on the scroll, but they serve to delineate, for the future members of our profession, to whom, as the years glide by, Chief Justice SAVAGE will be a name rather than a living memory, a picture of the man and of the magistrate as he was. When I recall with what a masterly touch, from this very Bench, three years ago, he recreated for us the person and personality of the unique and rugged Justice FOSTER, and again two years ago he delineated, with well nigh a filial devotion, the courtly and benign Justice STROUT, whose portrait as it looks down upon the proceedings of this court from yonder wall is a daily benediction, we would crave for a brief period the use of that facile pen in eulogy of him who wielded it with such delicacy and such accuracy.

The dominant element in Judge SAVAGE'S character was untiring industry. Voltaire's motto, "Always at work," was his. He had the capacity for unremitting mental labor, and he exercised that capacity to the full. "Nulla dies sine linea." Physically he was inclined to be indolent, mentally he was ever active, and herein lay the source of his strength. Each year brought growth in legal knowledge and intellectual power, as the giant oak acquires each twelve months its circle of added fibre. In his chambers he was always busy and when the days work was finished and his books and his pen laid aside, he would devote hours to the solution of an intricate picture puzzle or commit to memory a page of his favorite Shakespeare. During the last years of his life he mastered several of the plays of the great dramatist, and could recite them verbatim, a task of magnitude. On his desk, right at hand, he always kept the well thumbed volume. In 1909 he brought out his supplemental Index Digest, finding time therefor amid his exacting judicial labors.

To this talent for work, which is but another name for genius, we must add an open mind and an innate love of justice. If he had prejudices, he concealed them. I doubt if he possessed any. His single thought was to discover the way the light of legal truth leadeth. And so with this legal mind constantly in training, his strength waxed with the years and he advanced by steady strides into the ranks of Maine's great judges.

At nisi prius he was welcome in every county. He was popular in the only true and desirable sense, in that popularity with him was a result and not a motive. He presided over the trial of a cause before a jury with ease and grace and dignity. He spoke infrequently. His

words had therefore the greater weight. With his full mind he was able to rule promptly and squarely, thus expediting the cause, while always giving the aggrieved party his right of exception. He never feared exceptions. I have often heard him say that he was glad when exceptions were taken to a doubtful ruling because, if it was wrong, he wished it to be made right. His charges to the jury were simple, clear, informing, not essays on abstract law but plain talks to plain men on the issues before them. He was master of the situation. He looked the part and he acted the part. He was free from all exhibitions of temper. He never seemed to be irritated himself, and he never irritated others. I never in my life, saw any signs of anger in him. He was patient, kindly, courteous; yet there was an underlying firmness which, though not obtrusive, was silently manifest. It was felt rather than seen. In his personal relations the same was true. There was a feeling of friendship, but somehow, except to a chosen few, it stopped just short of familiarity.

But however important the work of the Judge at nisi prius may be, in meeting the people at first hand and determining wisely their controversies, his reputation in the trial court is, at best, written in the sand. It survives only in tradition and gradually fades as those who knew him pass from active scenes. The permanent in judicial effort rests upon the opinions to be found in the published reports. There, what is written is written. It can neither be added to nor taken from. It stands for good or ill. Tried by this test, the breadth and depth and clearness of Judge SAVAGE'S judicial mind, its grasp and its vision are apparent, and they manifest themselves in opinions which will ever stand as models in the literature of the law.

He sat with nineteen different Judges in the Law Court, beginning as a junior with Chief Justice PETERS. His first published opinion was *Rhoades* v. *Cotton*, announced only one month after his appointment and appearing in the 90th Maine Report. His last, was *State* v. *Jenness*, announced only a week before his death. This will appear in the 116th Maine, 196. Twenty-seven volumes therefore contain the result of his appellate work. They aggregate 434 full opinions in addition to 63 per Curiam rescripts, a total of nearly 500 decisions, representing his contribution to the jurisprudence of our State.

With his customary regard for detail, he kept from the very beginning a small record book in which he entered in succession the title of every law case assigned to him, the initials of the Justice to

whom he sent his opinion when completed, the date when the opinion was announced, and the volume and page in which it was published. As proof of his diligence it should be added, that the only unfinished law cases in his hands when he passed away, were the two that he had received a few days before at the Bangor Law Term, and these had been carefully entered in the book.

During the twenty years of Judge SAVAGE'S service upon the Bench our social fabric has been passing through marvelous changes and the very structure of our government has been modified from the plan adopted by the fathers. Necessarily the echoes of these changes have reached the court and new problems have arisen for solution. In the great variety of litigation involving the application of the principles of the common law to the ever changing needs of the times, as well as along the more smoothly trodden paths, Judge SAVAGE has borne well his part. In none did he display his splendid talents to better advantage than in his series of decisions governing the formation of municipal water districts and the rules to be adopted in the appraisal of property and franchises taken from water companies by right of eminent domain. His grasp of the problems and his power of clear, accurate and illuminating expression made these opinions landmarks. They gave him a reputation far beyond the borders of our State and have been quoted extensively by courts in other jurisdictions and by text writers. It is unnecessary to mention others. They are familiar to the profession, and have added honor to the court of Maine.

Judge SAVAGE had a singularly happy style. He developed his opinions so logically and so lucidly that they marched straight on to the conclusion, and they were easy reading even for a layman. His pen ran smoothly. He sought no display of learning but the learning was disguised in terms of every day understanding. He was fond of short sentences. He often made his points in sharp succession. He hit the nail with every blow and the wood was left unscarred. This was especially true of his later opinions in some of which the use of conjunctions is almost dispensed with, and no predicate is far separated from its nominative. He did not seek the startling expression and yet sometimes he bordered on the epigrammatic. In one of his last opinions, *Bixler* v. *Wright*, 116 Maine, 133, a case involving fraud in the sale of goods, we find these words which are characteristic not only of his literary style but of the man himself: "The law dislikes

negligence. It seeks properly to make the enforcement of men's rights depend in very considerable degree upon whether they have been negligent in conserving and protecting their rights. But the law abhors fraud. And when it comes to an issue whether fraud shall prevail or negligence, it would seem that a court of justice is quite as much bound to stamp out fraud as it is to foster reasonable care." This State is the richer for having had upon its highest Court of Justice for a score of years a magistrate to whom this doctrine was a creed and who, day by day, was a giver of light and truth.

I cannot close without a brief reference to the personal appearance of Judge SAVAGE, so familiar to us but unknown to those who may read these words in after years. Of commanding height, with a fully developed and well rounded figure, and an upright carriage, he was indeed a king among men. Whenever and wherever he represented the court we were proud of him. His figure was imposing and his countenance strong and fine. He was moderate in movement, moderate too in speech. His voice once heard could never be forgotten. It was deep and rich as a cathedral bell, with a peculiarly sympathetic quality that was most charming. It attracted and held attention. Usually reserved and dignified yet when that kindly smile illumined his face you were made an instant friend. He loved companionship and the society of congenial associates. He was a welcome visitor at the fireside and after an evening's talk before the open fire one was impressed with the sweetness as well as the strength of his character. He was singularly modest. Publicity he disliked and avoided. He met with personal bereavements in the loss of family, far beyond the lot of any man within my acquaintance, but no one ever heard him utter a single word of complaint. With him tribulation indeed worked patience. It softened him and made him tender.

With us, his associates on the bench, he was as an elder brother and our affection for the man was as deep as was our admiration for the Judge. That affection and that admiration will abide with us as long as life shall last.

The court joins with the Bar in its tribute to the memory of a great Chief Justice. It notes with pleasure the presence here today of so many members of the Androscoggin Bar. The resolutions which have been presented will be entered upon the records of this court in perpetual memory of our good friend and brother, and as a further mark of respect this court will now adjourn.

QUESTIONS AND ANSWERS

QUESTIONS SUBMITTED BY THE GOVERNOR OF MAINE TO THE JUSTICES OF THE SUPREME JUDICIAL COURT OF MAINE, JULY 16, 1917, WITH THE ANSWERS OF THE JUSTICES THEREON.

STATE OF MAINE

EXECUTIVE DEPARTMENT

Augusta, Maine, July 16, 1917.

TO THE HONORABLE JUSTICES OF THE SUPREME JUDICIAL COURT:

Under and by virtue of the authority conferred upon the Governor by the Constitution of Maine, Article Six, Section Three, and being advised and believing that the questions of law are important and that it is upon a solemn occasion, I, Carl E. Milliken, Governor of Maine, respectfully submit the following statement of facts and questions and ask the opinion of the Justices of the Supreme Judicial Court thereon.

STATEMENT

The Legislature of 1917 passed an Act entitled "AN ACT TO CREATE THE OFFICE OF COMMISSIONER OF INLAND FISHERIES AND GAME AND TO ABOLISH THE OFFICE OF COMMISSIONERS OF INLAND FISHERIES AND GAME," which Act appears in the Acts and Resolves of 1917 as Chapter 244 of the Public Laws of Maine. This Act was approved by the Governor on the seventh day of April, 1917.

The Legislature of 1917 also passed an Act entitled "AN ACT TO PROVIDE A POLICE COMMISSION FOR THE CITY OF LEWISTON AND TO PROMOTE THE EFFICIENCY OF THE POLICE DEPARTMENT THEREOF,"

which Act appears in the Acts and Resolves of 1917 as Chapter 37 of the Private and Special Laws of Maine. This Act was approved by the Governor on the eighth day of March, 1917.

The Legislature of 1917 also passed an Act entitled "AN ACT PROVIDING FOR A STATE PAPER," which Act appears in the Acts and Resolves of 1917 as Chapter 1 of the Public Laws of Maine. This Act was approved by the Governor on the sixteenth day of February, 1917.

The Legislature of 1917 also passed an Act entitled "AN ACT TO CREATE A COMMISSION OF SEA AND SHORE FISHERIES," which Act appears in the Acts and Resolves of 1917 as Chapter 293 of the Public Laws of Maine. This Act was approved by the Governor on the seventh day of April, 1917.

The Legislature adjourned on April 7, 1917. On and prior to July 5th, certain petitions intended to come within the provisions of Article Four of the Constitution of Maine as amended by the amendment adopted September 14, 1908, known as the Initiative and Referendum amendment, were filed in the office of the Secretary of State addressed to the Governor requesting that the Acts hereinbefore referred to be referred to the people of Maine to be voted on. Certain other petitions of similar import were thus filed with a similar request in the office of the Secretary of State on the 6th day of July prior to twelve o'clock midnight of that day.

The petitions requesting that the Act, entitled "AN ACT TO CREATE THE OFFICE OF COMMISSIONER OF INLAND FISHERIES AND GAME AND TO ABOLISH THE OFFICE OF COMMISSIONERS OF INLAND FISHERIES AND GAME," be referred, apparently bore the names of eleven thousand six hundred sixty petitioners.

The petitions requesting that the Act, entitled "AN ACT TO PROVIDE A POLICE COMMISSION FOR THE CITY OF LEWISTON AND TO PROMOTE THE EFFICIENCY OF THE POLICE DEPARTMENT THEREOF," be referred, apparently bore the names of thirteen thousand two hundred twenty petitioners.

The petitions requesting that the Act, entitled "AN ACT PROVIDING FOR A STATE PAPER," be referred, apparently bore the names of eleven thousand four hundred eighty-four petitioners.

The petitions requesting that the Act, entitled "AN ACT TO CREATE A COMMISSION OF SEA AND SHORE FISHERIES," be referred, apparently bore the names of twelve thousand, three hundred petitioners.

Samples of blank forms used by petitioners in requesting that the foregoing Acts be referred to the people are hereto annexed and made a part hereof but are hereinafter identified and annexed as Exhibits under questions affecting the same. All petitions filed were upon printed forms in every way similar to such Exhibits.

The questions submitted affect all of these Acts and your opinions upon such questions will determine whether said Acts are in effect or should be referred by me as Governor to the people.

Certain objections have been made to the sufficiency of certain of the petitions and in order that I may determine whether or not to count certain of said signatures to said petitions, so filed in the Secretary of State's office and to refer to the people of Maine, to be voted on, the several Acts in question, I desire your opinion as to the sufficiency of certain of said petitions and whether or not the names thereon should be counted in determining that ten thousand electors have petitioned in accordance with the Constitution.

QUESTION 1.

Certain petitions signed by various alleged petitioners were presented to the City Clerk of the City of Lewiston for certification at various times prior to July 5th, 1917, and the forms of certificate printed upon such petition were filled out and signed by said Clerk and bear dates prior to said July 5th. Such certificates purport to certify that all names, without exception, upon such petitions are on the voting list of said City of Lewiston and entitled to vote for Governor therein. On July 6, 1917, by letter dated July 5th, 1917, and mailed in Lewiston, according to the postmark on the envelope, at 12-30 P. M. on said July 6th, which letter was received in the office of the Secretary of State at or about five o'clock on said July 6th, the said Clerk notified the Secretary of State that prior to the date of such letter he had signed various petitions without examining the names on the petitions and without ascertaining whether or not their names appeared on the voting list as specified in the certificates, and further stated that he felt it was his duty to make this statement in order that the Secretary of State might act in the matter with full knowledge. The certificates on the petitions were not changed by amendment or cancellation but remain as originally written upon the

petitions. With said letter of the City Clerk of Lewiston attached, the several petitions so certified by said Clerk are presented to the Governor by the Secretary of State as a part of the petitions requesting a reference of each of said Acts under consideration. Shall the names on such petitions be counted?

A copy of this letter is attached hereto and made a part hereof and marked Question 1, Exhibit A.

B. In addition to the facts set out in the foregoing paragraph of Question Number 1, since the expiration of the ninety days in which petitions may be filed the City Clerk of said City of Lewiston has stated to the Governor that on said July 5th, 1917, he personally made written request upon Charles P. Lemaire, the person who presented such petitions for certification, by delivering such request in hand to the said Lemaire, in which written request he informed said Lemaire that such certificates had been signed without examining the names of the petitioners and without ascertaining whether or not their names appeared on the voting list as specified in the certificate and with a request that the said Lemaire should return all of said petitions before filing the same with the Secretary of State, in order that he, the clerk, might make a proper examination of the names and a proper comparison with the voting lists. Said clerk further states that said Lemaire did not comply with such written request. Said Clerk has also filed with the Governor a certified copy of such written request and a copy thereof is attached hereto and made a part hereof and marked Question 1, Exhibit B. In view of the facts stated in the preceding paragraph in this Question Number 1, and said statement of the City Clerk of Lewiston relative to his request to Charles P. Lemaire, should the names on the petitions certified to by said Clerk prior to July 5th, at the request of Charles P. Lemaire, returned to said Lemaire and filed by him in the office of the Secretary of State, be counted?

C. In determining whether or not the names on such petitions should be counted may the Governor, after the expiration of the ninety days in which the petitions are to be filed, hear testimony and determine whether or not as a fact, said alleged written request was served upon said Charles P. Lemaire and such request refused and regardless thereof said petitions filed in the office of the Secretary of State, and such facts being proved to the satisfaction of the Governor shall the names on such petitions be counted?

QUESTION 2.

If the Clerk who certifies to the petition is also one of the petitioners and also acts as verifying petitioner, should the names on such petition be counted?

QUESTION 3.

In case a petitioner signs two or more petitions requesting a reference of the same act and also acts as verifying petitioner on each and all of the several petitions which he has signed, such petitions bearing different dates, should the names on any of such petitions be counted, and if so, on which petition or petitions?

QUESTION 4.

In certain cases the verifying petitioner filled out and signed the verification form attached to the petition and according to the jurat subscribed and made oath to the same on a date prior to the date when, according to his certificate, the clerk of that town or city in fact certified that the petitioners appeared on the voting list of said town. The city clerk not having certified that the verifying petitioner was on the voting list at the time the verification was made and sworn to and the statement of the verifying petitioner that the names thereon had been certified by the clerk when, according to the dates given in the jurat and clerk's certificate, such was not a fact, being apparently false, should the names on such petitions be counted?

A copy of a petition of this class so verified on a date prior to the date of certificate by the clerk is made a part hereof and attached hereto and marked Question 4, Exhibit A.

QUESTION 5.

In case the verifying petitioner is named in the jurat by Christian and surname as Ralph Richards but no petitioner by the name of Ralph Richards appears as a signer of the petition, but there is a petitioner named R. W. Richards, should the names on this petition be counted?

B. If the verifying petitioner is named in the jurat with full surname preceded by initials of Christian and middle names, to wit, as W. W. Farrar, but in the petition itself there is no name of W. W. Farrar but the name of Walter W. Farrar appears, should the names on this petition be counted?

C. Should the Governor receive evidence, after the expiration of the ninety days within which the petitions are to be filed, to the effect that the person who signed the petition and the verifying petitioner named in the jurat are or are not the same person, and if satisfied as to the identity, should the names on such petitions be counted?

A copy of a petition exemplifying such discrepancy between name of signer and verifying petitioner described in this question is attached hereto and made a part hereof and marked Question 5, Exhibit A.

QUESTION 6.

In view of R. S., Chap. 5, Sec. 14, should signatures upon petitions, giving only initials for Christian and middle names, although certified by the clerk and verified by a petitioner be counted?

B. Can the Governor after the expiration of the ninety days within which petitions are to be filed receive evidence to prove that the signature by initials and surname is or is not the signature of an elector whose name appears on the voting list of said town as qualified to vote for Governor and who is registered by full Christian name and surname.

QUESTION 7.

In certain cases the alleged certificate by the town clerk was apparently signed by such clerk on a typewriter and not by hand. Should the names on such petitions be counted?

B. After the expiration of the ninety days within which the petitions are to be filed, can the Governor receive evidence as to whether the clerk in fact himself subscribed his name by means of a typewriter or whether it was written by a third person?

QUESTION 8.

After the ninety days within which petitions are to be filed have expired can the Governor receive evidence outside of the petitions

themselves as to whether the signatures appearing upon the petitions are true signatures or forgeries and refuse to count any signatures found to be forged?

QUESTION 9.

Can the Governor after the ninety days within which the petitions are to be filed have expired compare the names appearing on the petitions, although certified by the town clerk and verified by a petitioner, with the actual voting lists of the towns and refuse to count such names as do not appear on such lists?

QUESTION 10.

In certain cases signatures are subscribed upon petitions on each and all of the lines in the two columns numbered 1 to 100, but signatures on two of the regular printed lines numerically designated, are crossed out with ink and two names are signed after the signature on line number 100 in the second column, without numerical designation. The city clerk certifies that the names of the foregoing petitioners numbered from 1 to 100, excepting none, appear on the voting list, etc. The name of the verifying petitioner does not appear on any of the lines in either column numbered 1 to 100, nor is his name one of the two added at the foot of the second column without numerical designation, but the name of the verifying petitioner is written into said petition at the foot of the first column below line number 50 and has no numerical designation. Is the name of the verifying petitioner within the certificate of the clerk and should the names on such petition be counted?

A copy of a petition of this class, showing name of verifying petitioner inserted as set forth in this question, is attached hereto and made a part hereof and marked Question 10, Exhibit A.

QUESTION 11.

In certain cases, petitioners signed by affixing their mark accompanied by signature of a witness thereto. Shall such names by mark be counted?

QUESTION 12.

In case of petition in usual form signatures appear on printed lines numbered 1 to 47 in the first column with no signature on line 48, but with the signature of the verifying petitioner on line 49, if the clerk certifies that the foregoing petitioners numbered from 1 to 48 are on the voting list, is the verifying petitioner's signature appearing on line 49 within the certificate of the clerk and should the names on the petition be counted?

QUESTION 13.

In case a petition in usual form contains signatures upon lines in the two columns numbered from 1 to 100 except on lines 25 and 91 which are left blank and the name of the verifying petitioner is added at the foot of the first column, without numerical designation, after the signature on the printed line number 50, and the clerk in his certificate states that all of the foregoing petitioners numbered from 1 to 100, excepting none, appear on the voting list, is the name of the verifying petitioner within the certificate of the clerk and should the names on such petitions be counted?

A copy of petition of this class showing addition of name of verifying petitioner as set forth in this question is attached hereto and made a part hereof and marked Question 13, Exhibit A.

QUESTION 14.

On petition in usual form the name of the verifying petitioner is inserted without numerical designation before the first name on printed line No. 1 of the first column. One hundred other names appear on the petition of printed lines designated 1 to 100 and the clerk certifies that the petitioners numbered from 1 to 101 appear on the voting list. The verifying petitioner's name is not designated No. 1 but precedes the name so designated. Is the verifying petitioner's name included within the certificate of the clerk and should the names on this petition be counted?

QUESTION 15.

In case the certificate of the town clerk specifies the month and year upon which the certificate is made but fails to give the day of the month is such certificate sufficient and should the names on such petition be counted?

B. In case the jurat of the officer taking the oath of the verifying petitioner bears no date or in case the month and year are specified but the day of the month is omitted, is the jurat sufficient and should the names on such petition be counted?

QUESTION 16.

In case a petitioner signs two different petitions on different dates should his name be counted on either of the petitions and if so, on which?

QUESTION 17.

In case a petition is verified by the person who circulated the petition and who is not one of the signers of the petition itself, should the names on such petition be counted?

QUESTION 18.

In case the verifying petitioner makes oath before a Notary Public and such Notary in making his jurat affixes his signature and described his office but fails to seal the same with his official seal, is such a verification sufficient and should the names on such petition be counted?

QUESTION 19.

The Legislature adjourned according to the records on April 7, 1917. Should names on petitions received in the office of the Secretary of State between midnight July 5, 1917 and midnight July 6, 1917 be counted?

Very respectfully,

CARL E. MILLIKEN,
Governor.

To the Honorable Carl E. Milliken, Governor of Maine:

The undersigned, Justices of the Supreme Judicial Court, having considered the questions propounded by you under date of July 16, 1917, respectfully submit the following answers.

The request for our opinion is accompanied by the following statement:

"Statement.

The Legislature of 1917 passed an Act entitled "An Act to Create the Office of Commissioner of Inland Fisheries and Game and to Abolish the Office of Commissioners of Inland Fisheries and Game," which Act appears in the Acts and Resolves of 1917 as Chapter 244 of the Public Laws of Maine. This Act was approved by the Governor on the seventh day of April, 1917.

The Legislature of 1917 also passed an Act entitled "An Act to Provide a Police Commission for the City of Lewiston and to Promote the Efficiency of the Police Department thereof," which Act appears in the Acts and Resolves of 1917 as Chapter 37 of the Private and Special Laws of Maine. This Act was approved by the Governor on the eighth day of March, 1917.

The Legislature of 1917 also passed an Act entitled "An Act Providing for a State Paper," which Act appears in the Acts and Resolves of 1917 as Chapter 1 of the Public Laws of Maine. This Act was approved by the Governor on the sixteenth day of February, 1917.

The Legislature of 1917 also passed an Act entitled "An Act to Create a Commissioner of Sea and Shore Fisheries," which Act appears in the Acts and Resolves of 1917 as Chapter 293 of the Public Laws of Maine. This Act was approved by the Governor on the seventh day of April, 1917.

The Legislature adjourned on April 7, 1917. On and prior to July 5th, certain petitions intended to come within the provisions of Article Four of the Constitution of Maine as amended by the amendment adopted September 14, 1908, known as the Initiative and Referendum amendment, were filed in the office of the Secretary of State addressed to the Governor, requesting that the Acts herein-

before referred to, be referred to the people of Maine to be voted on. Certain other petitions of similar import were thus filed, with a similar request, in the office of the Secretary of State on the 6th day of July prior to twelve o'clock midnight of that day.

The petitions requesting that the Act entitled "AN ACT TO CREATE THE OFFICE OF COMMISSIONER OF INLAND FISHERIES AND GAME AND TO ABOLISH THE OFFICE OF COMMISSIONERS OF INLAND FISHERIES AND GAME" be referred, apparently bore the names of eleven thousand six hundred sixty petitioners.

The petitions requesting that the Act entitled "AN ACT TO PROVIDE A POLICE COMMISSION FOR THE CITY OF LEWISTON AND TO PROMOTE THE EFFICIENCY OF THE POLICE DEPARTMFNT THEREOF," be referred, apparently bore the names of thirteen thousand two hundred twenty petitioners.

The petitions requesting that the Act entitled "AN ACT PROVIDING FOR A STATE PAPER," be referred, apparently bore the names of eleven thousand four hundred and eighty-four petitioners.

The petitions requesting that the Act entitled "AN ACT TO CREATE A COMMISSION OF SEA AND SHORE FISHERIES," be referred, apparently bore the names of twelve thousand three hundred petitioners.

Samples of blank forms used by petitioners in requesting that the foregoing Acts be referred to the people are hereto annexed, and made a part hereof, but are hereinafter identified and annexed as Exhibits under questions affecting the same. All petitions filed were upon printed forms in every way similar to such Exhibits.

The questions submitted affect all of these Acts and your opinions upon such questions will determine whether said Acts are in effect or should be referred by me as Governor to the people.

Certain objections have been made to the sufficiency of certain of the petitions, and in order that I may determine whether or not to count certain of said signatures to said petitions, so filed in the Secretary of State's office, and to refer to the people of Maine, to be voted on, the several Acts in question, I desire your opinion as to the sufficiency of certain of said petitions and whether or not the names thereon should be counted in determining that ten thousand electors have petitioned in accordance with the Constitution."

Before stating the questions and our answers thereto it may be well to quote the constitutional provision under which these questions arise, and to refer to the principles already laid down as to the con-

struction thereof in the answers given by the Justices to a former Governor, to be found in 114 Maine, page 557.

The Amendment (Art. XXXI) of the Constitution of this State adopted by the people in 1908, and entitled "The Direct Initiative of Legislation and Optional Referendum" contains this provision:

"SECT. 17. Upon written petition of not less than ten thousand electors, addressed to the governor and filed in the office of the secretary of state within ninety days after the recess of the legislature, requesting that one or more acts, bills, resolves or resolutions, or part or parts thereof, passed by the legislature, but not then in effect by reason of the provisions of the preceding section, be referred to the people, such acts, bills, resolves, or resolutions or part or parts thereof as are specified in such petition, shall not take effect until thirty days after the governor shall have announced by public proclamation that the same have been ratified by a majority of the electors voting thereon at a general or special election. As soon as it appears that the effect of any act, bill, resolve, or resolution or part or parts thereof has been suspended by petition in manner aforesaid, the governor by public proclamation shall give notice thereof and of the time when such measure is to be voted on by the people, which shall be at the next general election not less than sixty days after such proclamation, or in case of no general election within six months thereafter, the governor may, and if so requested in said written petition therefor, shall order such measure submitted to the people at a special election not less than four nor more than six months after his proclamation thereof."

Sec. 20 defines what shall be regarded as a petition in these words: " 'Written petition' means one or more petitions written or printed or partly written and partly printed, with the original signatures of the petitioners attached, verified as to the authenticity of the signatures by the oath of one of the petitioners certified thereon, and accompanied by the certificate of the Clerk of the City, town or plantation in which the petitioners reside that their names appear on the voting list of his city, town or plantation as qualified to vote for Governor."

It is clear, as held in the former answers, that in order to warrant the counting of the names on a petition, the petition itself must be filed within ninety days after the recess of the legislature and in form must contain two prerequisites, first a verification as to the genuine-

ness of the signatures by a certified petitioner on said petition, and second, an accompanying certificate of the city, town or plantation clerk that the names of the petitioners appear on the voting list as qualified to vote for Governor. The former must be under oath, the latter need not be. The constitution itself prescribes these two indispensable accompaniments of a valid petition, and a petition which lacks either or both of these requirements is invalid and cannot be counted. Nor can a paper purporting to be a petition, which is invalid at the expiration of the prescribed time be rendered valid thereafter by the addition or correction of either the verification by the co-petitioner or the certification by the municipal clerk. These rules are settled by the former answers. They simply give effect to the explicit and mandatory provisions of the constitutional amendment, prescribing the form.

The questions now propounded raise points in some respects analogous to the former ones, in other respects, modifications of the same, and in others, points entirely new. We will answer them in their order.

QUESTION 1A.

"Certain petitions signed by various alleged petitioners were presented to the city clerk of the city of Lewiston for certification at various times prior to July 5th, 1917, and the forms of certificate printed upon such petitions were filled out and signed by said clerk and bear dates prior to said July 5th. Such certificates purport to certify that all names, without exception, upon such petitions are on the voting list of said city of Lewiston and entitled to vote for Governor therein. On July 6, 1917, by letter dated July 5th, 1917, and mailed in Lewiston, according to the postmark on the envelope, at 12-30 P. M. on said July 6th, which letter was received in the office of the Secretary of State at or about five o'clock on said July 6th, the said clerk notified the Secretary of State that prior to the date of such letter he had signed various petitions, without examining the names on the petitions and without ascertaining whether or not their names appeared on the voting list, as specified in the certificates, and further stated that he felt it was his duty to make this statement in order that the Secretary of State might act in the matter with full knowledge. The certificates on the petitions were not changed by

amendment or cancellation but remain as originally written upon the petitions. With said letter of the city clerk of Lewiston attached, the several petitions, so certified by said clerk, are presented to the Governor by the Secretary of State as a part of the petitions requesting a reference of each of said Acts under consideration. Shall the names on such petitions be counted?

A copy of this letter is attached hereto and made a part hereof and marked Question 1, Exhibit A."

Answer.

It is admitted that the petitions, as filed, complied with the constitutional requirements as to form in all respects. The precise question raised therefore, is whether the letter of the city clerk, received by the Secretary of State, after these petitions had been filed and before the expiration of the ninety days, nullified these certificates and thereby rendered the petitions themselves invalid. In his official certificates the clerk states "that the names of all the foregoing petitioners," giving their numerical designation, "appear on the voting lists of said city as qualified to vote for Governor therein." In his letter he says "I have up to this date signed certificates accompanying several of these petitions, the certificates being to the effect that I am the clerk of the city of Lewiston duly elected and qualified, and that the names of all of the foregoing petitioners numbered, etc., appear on the voting list of said city as qualified to vote for Governor. In each case I have signed the certificate without examining the names of the petitioners, and without ascertaining whether their names appear on the voting list as specified in the certificate, and without a proper appreciation of the meaning of the certificate. On and after this date I shall examine all petitions carefully, and compare the names of the petitioners with the voting list before signing the certificate. I feel it my duty to make this statement to you that you may act in the matter with full knowledge."

The Governor therefore has before him two statements signed by the city clerk, the first in compliance with the constitutional requirement and under the form of an official certificate attached to each of a group of petitions; the second in the form of a letter attempting to qualify or annul his former certificates.

The constitution does not require that the certificate shall state that the clerk has compared the names on the petitions with the names on the voting list. He must certify that the names do appear on that list.

In his official certificate here the clerk does state that the names appear on the voting list. That is prima facie evidence of the fact. In his letter he does not state whether the names appear on the voting list or not. He does not deny that they do. He does not directly contradict the facts contained in his prior certificate. He simply alleges that he did not examine the names of the petitioners and he did not ascertain whether their names appear on the list or not. They may in fact appear there for all that his letter states. He says he has not taken the pains to ascertain. As the propounded question recites: "The certificates on the petitions were not changed by amendment or cancellation but remain as originally written upon the petition."

Under these circumstances we do not think that this indefinite statement contained in the letter should be held to nullify and render invalid the unamended and uncancelled certificates in constitutional form. Their prima facie evidence is not overborne. We do not mean that a clerk's certificate might not be amended within the prescribed time in order to accord with the facts. But such amendment should be made by the clerk in the proper manner upon the petitions themselves. Here no amendment as such was attempted. If anything, it was an attempt at annulment.

The return of an officer on a writ is taken in court as proof of the facts therein stated. It may subsequently be amended or corrected by the officer in order to accord with the facts, but such amendment must be made before the proper tribunal and upon the writ itself. One would hardly regard an officer's return as amended, much less annulled, when he simply wrote a letter to the clerk of court like that under consideration. Official certificates should not be so lightly set aside. We therefore answer that the names on these petitions should be counted.

QUESTION 1B.

"B. In addition to the facts set out in the foregoing paragraph of Question number 1, since the expiration of the ninety days in which

petitions may be filed, the city clerk of said city of Lewiston has stated to the Governor that on said July 5th, 1917, he personally made written request upon Charles P. Lemaire, the person who presented such petitions for certification, by delivering such request in hand to the said Lemaire, in which written request he informed said Lemaire that such certificates had been signed without examining the names of the petitioners, and without ascertaining whether or not their names appeared on the voting lists as specified in the certificate, and with a request that the said Lemaire should return all of said petitions before filing the same with the Secretary of State, in order that he, the clerk, might make a proper examination of the names and a proper comparison with the voting lists. Said clerk further states that said Lemaire did not comply with such written request. Said clerk has also filed with the Governor a certified copy of such written request and a copy thereof is attached hereto, and made a part hereof, and marked Question 1, Exhibit B. In view of the facts stated in the preceding paragraph in this Question number 1, and said statement of the city clerk of Lewiston relative to his request to Charles P. Lemaire should the names on the petitions certified to by said clerk prior to July 5th, at the request of Charles P. Lemaire, returned to said Lemaire and filed by him in the office of the Secretary of State, be counted?"

Answer.

We answer in the affirmative.

The letter from the city clerk to Mr. Lemaire is simply a restatement of the facts contained in his letter to the Secretary of State, and has no legal effect upon the question involved. In no sense was Mr. Lemaire the agent of the petitioners, and what he did or failed to do in consequence of this letter received by him from the city clerk did not affect their constitutional rights as petitioners.

Question 1C

"C. In determining whether or not the names on such petitions should be counted, may the Governor, after the expiration of the ninety days in which the petitions are to be filed, hear testimony and determine whether or not as a fact, said alleged written request was

served upon said Charles P. Lemaire, and such request refused, and regardless thereof said petitions filed in the office of the Secretary of State, and such facts being proved to the satisfaction of the Governor, shall the names on such petitions be counted?"

Answer.

This question comprises two, and our answers to the two preceding questions sufficiently cover these. We answer the first in the negative, the Governor may not receive evidence on this point after the expiration of the ninety days; and the second in the affirmative, the names on these petitions should be counted.

QUESTION 2.

"If the clerk who certifies to the petition is also one of the petitioners and also acts as verifying petitioner, should the names on such petition be counted?"

Answer.

We answer in the affirmative. The constitution requires that the verifying petitioner be himself a certified co-petitioner, and the fact that he happens to be the municipal clerk does not disqualify him. As such clerk he can officially certify that his own name appears on the voting list. No one else can do this, and to deny him that right would, in effect, disfranchise him from exercising his constitutional right of petition, and disfranchise every other municipal clerk in the State.

QUESTION 3.

"In case a petitioner signs two or more petitions requesting a reference of the same Act and also acts as verifying petitioner on each and all of the several petitions which he has signed, such petitions bearing different dates, should the names on any of such petitions be counted, and if so, on which petition or petitions?"

Answer.

We think only the names on the petition, bearing the earliest date, should be counted, because that petition alone has been verified as

required by the constitution "by the oath of one of the petitioners certified thereon." The other petitions have not been legally verified because by a person purporting to be a petitioner but not one within the contemplation of the constitution, although his certified signature appears thereon.

It takes more than a mere signature to constitute a petitioner. The person, whose signature it is, must have the right to sign and to have his name counted as one of the ten thousand electors necessary to suspend the operation of a statute. It must be the signature of a person who has a right to act as a petitioner in that particular proceeding and on that particular petition. A person has that right on the first petition. There his right ceases. Suppose he signs one hundred different petitions. His name can be counted only on the first, and he is a petitioner only when his name can be counted. The other ninety-nine signatures are nullities and of no more efficacy than blank spaces. His name appeared rightfully on the first petition and wrongfully on all the others.

If a non-countable signature does not represent a constitutional petitioner then it follows that such a person cannot verify the petition. One must be a legal petitioner before he can be a verifying petitioner. If the first fails the last fails also.

In principle this question was decided on the former occasion. It was there held that a person was incompetent as a verifying petitioner, although his name appeared upon the petition verified, if it had been specifically excepted by the clerk's certificate as not being upon the voting list. Question 8. 114 Maine, 571-2. The signer was disqualified in that case by the clerk's certificate, in the present case by his reduplication of signature. In neither was he competent to verify because in neither was he a legal petitioner.

It is the person to whom the name belongs who makes the verification and takes the oath, and that person can verify only once because he can be a petitioner only once.

QUESTION 4.

"In certain cases the verifying petitioner filled out and signed the verification form attached to the petition and according to the jurat subscribed and made oath to the same on a date prior to the date

when, according to his certificate, the clerk of that town or city in fact certified that the petitioners appeared on the voting list of said town. The city clerk not having certified that the verifying petitioner was on the voting list at the time the verification was made and sworn to, and the statement of the verifying petitioner that the names thereon had been certified by the clerk when, according to the dates given in the jurat and clerk's certificate, such was not a fact, being apparently false, should the names on such petitions be counted?

A copy of a petition of this class so verified on a date prior to the date of certificate by the clerk is made a part hereof and attached hereto and marked Question 4, Exhibit A."

Answer.

The blanks for verification and certification, as printed on the Exhibit accompanying the question, are not strictly in conformity with the provisions of the constitution. In the constitution the verification is evidently supposed to come first and it applies merely to the authenticity of the signatures on the petition. It has no connection with the clerk's certificate. It is a simple declaration under oath of the genuineness of the signatures, and whether the names appear or do not appear on the voting list is a matter for the clerk's certificate alone. Here, however, the clerk's certificate is printed first and then follows the verification, which is not confined to the constitutional requirements but comprises what is not found in the constitution, namely, "that the signatures of all the petitioners upon the foregoing petition are the original and authentic signatures of the same persons, whose names the clerk has certified therein appear on the voting lists" etc. This last clause as to certification is surplusage. The vital fact is that the signatures are genuine and we think this sufficiently appears from the verification. The fact that the clerk's certificate is dated June 4, 1917, while the verifying petitioner signed and made oath on June 2, 1917, does not vitiate the petition. As the petition comes to the Governor the constitutional requirements as to form are complied with. It is verified by a certified co-petitioner and it is duly certified by the city clerk.

We think the names on petitions of this class should be counted.

QUESTION 5A.

"In case the verifying petitioner is named in the jurat by Christian and surname as Ralph Richards but no petitioner by the name of Ralph Richards appears as a signer on the petition, but there is a petitioner named R. W. Richards, should the names on this petition be counted?"

Answer.

We answer in the affirmative. We think it sufficiently appears that Ralph Richards and R. W. Richards are one and the same person. The verification blank recites: "I, Ralph Richards, one of the foregoing petitioners, hereby make oath" etc., and there is no signer by the name of Richards, except R. W. Richards, whose name does appear on the petition. The identity is adequately established. Even an indictment is not vitiated where the foreman signs by initials. *State* v. *Taggart*, 38 Maine, 300.

QUESTION 5B.

"If the verifying petitioner is named in the jurat with full surname preceded by initials of Christian and middle names, to wit, as W. W. Farrar, but in the petition itself there is no name of W. W. Farrar but the name of Walter W. Farrar appears, should the names on this petition be counted?"

Answer.

We answer in the affirmative. The reasons given in the preceding answer apply with even greater force here, where the initials of both the Christian and the middle names appear.

QUESTION 5C.

"Should the Governor receive evidence, after the expiration of the ninety days within which the petitions are to be filed, to the effect that the person who signed the petition and the verifying petitioner

named in the jurat are or are not the same person, and if satisfied as to the identity, should the names on such petitions be counted?

A copy of a petition exemplifying such discrepancy between name of signer and verifying petitioner described in this question is attached hereto and made a part hereof and marked Question 5, Exhibit A."

Answer.

The answers to the two preceding questions render an answer to this unnecessary. The identity is adequately established by the petitions and indorsements.

QUESTION 6A.

"In view of Revised Statutes, Chapter 5, Section 14, should signatures upon petitions, giving only initials for Christian and middle names, although certified by the clerk and verified by a petitioner be counted?"

Answer.

We answer in the affirmative. Sec. 14 of Chap. 5 of the R. S. provides rules merely for the registration of voters by Boards of Registration and has no bearing upon the counting of referendum petitions by the Governor. In fact, Boards of Registration exist only in the cities, while these petitions may come from every town and plantation in the State, and names properly verified and certified should not be rejected simply because initials are used in place of full Christian or middle names.

QUESTION 6B.

"Can the Governor after the expiration of the ninety days within which petitions are to be filed receive evidence to prove that the signature by initials and surname is or is not the signature of an elector, whose name appears on the voting list of said town as qualified to vote for Governor, and who is registered by full Christian name and surname?"

Answer.

The preceding answer covers this. Signatures by initials instead of by full Christian name are sufficient. The vital questions are the genuineness of the signatures and the existence of the names upon the voting lists.

QUESTION 7A.

"In certain cases the alleged certificate by the town clerk was apparently signed by such clerk on a typewriter and not by hand. Should the names on such petitions be counted?"

Answer.

We answer in the negative. Official signatures must be made by the officers themselves. An official certificate not signed by the officer himself in his own hand is not a certificate. It is the signature which authenticates it and gives it its official character. This is settled law. R. S., Chap. 1, Sec. 6, paragraph XX; *Chapman* v. *Inhabitants of Limerick*, 56 Maine, 390; *Opinion of Justices*, 68 Maine, 587; *Bass* v. *Dumas*, 114 Maine, 50; *Opinion of Justices*, 114 Maine, 574.

QUESTION 7B.

"After the expiration of the ninety days within which the petitions are to be filed, can the Governor receive evidence as to whether the clerk in fact himself subscribed his name by means of a typewriter or whether it was written by a third person?"

Answer.

We answer in the negative. The petitions must be complete in form before the expiration of the ninety days. These lack one prerequisite.

QUESTION 8.

"After the ninety days, within which petitions are to be filed have expired, can the Governor receive evidence outside of the petitions

themselves as to whether the signatures appearing upon the petitions are true signatures or forgeries and refuse to count any signatures found to be forged?"

Answer.

We answer in the affirmative. We think under this constitutional amendment the implied power to receive such evidence exists in the Governor, to whom it must "appear" that not less than ten thousand electors have addressed him by petition, to inquire into and ascertain whether that number have addressed him and whether forgeries have been practiced upon him. If he finds after due notice to the interested parties and especially to the verifying petitioner, the truth of whose verification is at stake, that forged signatures have been filed with him, it is his duty to reject them. A forged signature is no signature, and to hold otherwise is to make the verification on the petition conclusive upon the Governor, however firmly he may believe that fraud exists. "The law abhors fraud" and stamps upon it whenever it appears. If the Governor is helpless to protect himself from fraud and forgery when it exists then the rights of the people in having a law passed by the legislature take effect, may be thwarted by having the referendum invoked by less than ten thousand actual electors.

There is no power to pass upon this question except that conferred upon the Governor. In case of the election of Senators and Representatives to the Legislature the votes are counted in the first instance by the election officers in the various cities and towns, the returns are then canvassed by the Governor and Council and certificates are issued to those who appear to be elected. But in those cases there is a tribunal beyond the Governor and Council, namely the Senate and the House of Representatives which are the judges of the election of their own members.

In like manner the votes for county officers are counted by the election officers, and then the returns are canvassed by the Governor and Council, and certificates of election issued, but the candidates for these offices are not bound thereby. They may petition a Justice of the Supreme Judicial Court and a hearing may be had, and, on appeal, all the Justices are required to pass upon the legal rights of the parties.

In the case of the referendum however, there is no intermediate board and no appellate board. There is the Governor alone before whom are brought not returns or certificates or records of the petitions but the original petitions themselves with all the original signatures upon them, and if he has not the power to reject forged signatures then no relief exists anywhere, a situation repugnant to the fundamental conception of our government and of the rights of the people.

Section 20 requires that the "original signatures of the petitioners" be attached. That must be read in connection with R. S., Chap. 1, Sec. 6, paragraph XX, viz: "When the signature of a person is required he must write it or make his mark." These two taken together must be interpreted as meaning that each petitioner must attach his original signature or mark to the petition. He cannot authorize or delegate another to do it. One man may circulate a petition among a hundred electors but he cannot affix their signatures, he cannot write their names for them. He can only write his own. This explicit provision of the constitution is evidently designed to prevent fraud and forgery and it must be obeyed. Of course in private transactions one man may authorize another to sign his name for him, even to a note or a deed, and if he adopts that signature as his he is bound by it. That principle however has no application here.

Section 20 further requires that the authenticity, that is the genuineness of the signatures, be verified under oath by a co-petitioner. True, a petition properly verified and certified is prima facie evidence of its validity, but it is not conclusive. Suppose the Governor on inspection perceives that many names are evidently written by one and the same hand, or learns from reliable sources that fraud and forgery have been practiced upon him, is he bound to count these names without ascertaining the facts after due notice and hearing to the interested parties? We think not. This is a matter within his discretion. In the *Opinion of Justices*, 64 Maine, 588, 591, it was held that if election returns appear to be signed by the proper officers they must control, regardless of irregularities and illegalities in the proceedings connected with the town meeting. But in that case the only original record that came before the Governor and Council was the signatures to their returns made by the proper officers, and the Justices said: "If the names signed be forgeries the fact may be shown, for forged returns are not those contemplated by the statute."

Here not only do the jurat of the verifying petitioner and the certificate of the clerk bear the original signature, but all the names on the petition are brought in their original form to the Governor, and by parity of reasoning it may be said "if the names of the petitioners, as well as of the magistrate and clerk, be forgeries, the fact may be shown, for forged signatures are not those contemplated by the constitution." In a sense, the signatures on referendum petitions take the place of votes at an election. No one can act as proxy for a voter. Each must express his individual choice by casting his own ballot. In like manner no one can act as proxy for a referendum petitioner. Each must express his individual wish by signing his own name or making his own mark. It was not intended that a non-emergency measure should be suspended beyond the ninety day limit unless ten thousand bona fide electors should so express their individual wish and ask for a referendum to the people. The Governor alone is clothed with the power to determine and declare whether in a given instance it appears that the required number of bona fide electors have so expressed themselves.

QUESTION 9.

"Can the Governor after the ninety days within which the petitions are to be filed have expired, compare the names appearing on the petitions, although certified by the town clerk and verified by a petitioner, with the actual voting lists of the towns and refuse to count such names as do not appear on such lists?"

Answer.

We answer in the affirmative. In the former question the truth or falsity of the verification of a co-petitioner was involved; in this question it is the truth or falsity of the clerk's certificate. The same principle applies to both. Fraud opens all doors and if the Governor has good reason to believe that an attempt has been made to defraud the people of their rights by a false certificate we think he has the power in his own discretion to ascertain the truth, giving of course due notice and hearing to the parties interested and especially to the clerk whose certificate is attacked. The reasons given in the preceding answer apply here. The knowledge of the existence of this

power in the Governor to reject forged names and names falsely certified may tend to prevent fraud and to protect the referendum from disrepute.

QUESTION 10.

"In certain cases signatures are subscribed upon petitions on each and all of the lines in the two columns numbered 1 to 100, but signatures on two of the regular printed lines numerically designated, are crossed out with ink and two names are signed after the signature on line number 100 in the second column, without numerical designation. The city clerk certifies that the names of the foregoing petitioners numbered from 1 to 100, excepting none, appear on the voting list, etc. The name of the verifying petitioner does not appear on any of the lines in either column numbered 1 to 100, nor is his name one of the two added at the foot of the second column without numerical designation, but the name of the verifying petitioner is written into said petition at the foot of the first column below line Number 50 and has no numerical designation. Is the name of the verifying petitioner within the certificate of the clerk and should the names on such petition be counted?

A copy of a petition of this class showing name of verifying petitioner, inserted as set forth in this question, is attached hereto and made a part hereof and marked Question 10, Exhibit A."

Answer.

We answer in the negative. In order to make the certificates more exact the petitioners are given numerical designations, although it is not required by the constitution. On this petition there are one hundred names opposite the figures from 1 to 100 inclusive, two other names without numbers are added to the second column and one without number to the first, making 103 names in all. Two are erased, leaving 101. The clerk certifies to those names which bear designating numbers from 1 to 100 inclusive, and he certifies to only one hundred names in all. The name of the petitioner who attempts to verify is below the last number on the first column. It has no number of its own and is not within the total. We do not think his

name has been certified by the clerk as appearing on the voting list and therefore he is not competent to verify the petition. The names on these petitions should not be counted.

QUESTION 11.

"In certain cases, petitioners signed by affixing their mark accompanied by signature of a witness thereto. Shall such names by mark be counted?"

Answer.

We answer in the affirmative. As before stated, the signatures must be original, but that may be by mark, duly witnessed, as well as by handwriting. R. S., Chap. 1, Sec. 6, paragraph XX.

QUESTION 12.

"In case of petition in usual form signatures appear on printed lines number 1 to 47 in the first column with no signature on line 48, but with the signature of the verifying petitioner on line 49, if the clerk certifies that the foregoing petitioners numbered from 1 to 48 are on the voting list, is the verifying petitioner's signature appearing on line 49 within the certificate of the clerk and should the names on the petition be counted?"

Answer.

We answer in the affirmative. Here is evidently a clerical error which corrects itself. The clerk certifies forty-eight names, and only forty-eight names appear on the petition. There is no name on line forty-eight. The last signer placed his name on line forty-nine, instead of on line forty-eight, evidently by mistake, and the clerk did not notice the discrepancy. But his intended certification of this name as opposite 48 on the petition is obvious. These names should be counted.

QUESTION 13.

"In case a petition in usual form contains signatures upon lines in the two columns numbered from 1 to 100 except on lines 25 and 91,

which are left blank, and the name of the verifying petitioner is added at the foot of the first column, without numerical designation, after the signature on the printed line number 50, and the clerk in his certificate states that all of the foregoing petitioners numbered from 1 to 100, excepting none, appear on the voting list, is the name of the verifying petitioner within the certificate of the clerk and should the names on such petitions be counted?

A copy of petition of this class showing addition of name of verifying petitioner as set forth in this question is attached hereto and made a part hereof and marked Question 13, Exhibit A."

Answer.

We answer in the negative. No clerical error seems to exist here. There are names opposite all the numbers from 1 to 100 inclusive, with two exceptions, where there are blanks, and all these names are expressly verified. The name of the verifying petitioner is below the line which separates the two columns of verified names from the appended certificate, is separate and apart from the others and is not marked by any number whatever. It is virtually excluded by the verification. Expressio unius, exclusio alterius. It is not within the certificate, and the names on this class of petitions should not be counted.

QUESTION 14.

"On petition in usual form the name of the verifying petitioner is inserted without numerical designation before the first name on printed line No. 1 of the first column. One hundred other names appear on the petition on printed lines designated 1 to 100 and the clerk certifies that the petitioners, numbered from 1 to 101, appear on the voting list. The verifying petitioner's name is not designated No. 1 but precedes the name so designated. Is the verifying petitioner's name included within the certificate of the clerk and should the names on this petition be counted?"

Answer.

We answer in the affirmative. We think this also was a self-correcting clerical error. The clerk certified 101 names, and only 101

appeared on the petition. All the others are numbered except the one that was placed first. This was evidently regarded as No. 101, but was not so marked. No other name is marked 101. That number must have been intended for this name. The petitioner is verified we think, although not by number, and the constitution does not require that it be by number. These names should be counted.

QUESTION 15A.

"In case the certificate of the town clerk specifies the month and year upon which the certificate is made but fails to give the day of the month is such certificate sufficient and should the names on such petition be counted?"

Answer.

We answer in the affirmative. The certificate of the town clerk was filed within the required time. It must have been made prior thereto. Its precise date is immaterial.

QUESTION 15B.

"In case the jurat of the officer taking the oath of the verifying petitioner bears no date, or in case the month and year are specified but the day of the month is omitted, is the jurat sufficient and should the names on such petition be counted?"

Answer.

We answer in the affirmative, for the same reasons given in the preceding answer. The important fact is that the oath was taken; its precise date, prior to the time of filing, is immaterial.

QUESTION 16.

"In case a petitioner signs two different petitions on different dates should his name be counted on either of the petitions and if so, on which?"

Answer.

His name should be counted on the one appearing to be signed by him first.

QUESTION 17.

"In case a petition is verified by the person who circulated the petition and who is not one of the signers of the petition itself, should the names on such petition be counted?"

Answer.

We answer in the negative. A person cannot be a verifying petitioner who is not himself a signer of the petition purporting to be verified.

QUESTION 18.

"In case the verifying petitioner makes oath before a Notary Public and such Notary, in making his jurat affixes his signature and described his office but fails to seal the same with his official seal, is such a verification sufficient and should the names on such petition be counted?"

Answer.

We answer in the affirmative. At common law a Notary Public had no legal right to administer oaths, *Holbrook* v. *Libby*, 113 Maine, 389. Under R. S., Chap. 40, Sec. 26, he was given authority to "do all acts that Justices of the Peace are or may be authorized to do." While doing these acts, such as the administering of oaths, he is acting as a Justice of the Peace and the affixing of his official seal is unnecessary. It forms no part of his official act. A seal is required in connection with the protest of commercial paper, R. S., Chap. 40, Sec. 28, but not in the taking of oaths.

QUESTION 19.

"The Legislature adjourned according to the records on April 7, 1917. Should names on petitions received in the office of the Secretary of State between midnight July 5, 1917 and midnight July 6, 1917 be counted?"

Answer.

We answer in the affirmative. The words of the constitution suspending the effect of a legislative act are these: "No act. . . . shall take effect until ninety days after the recess of the legislature passing it" etc. The recess of the legislature is defined to be "the adjournment without date of a session of the legislature." The Legislature of 1917 adjourned April 7. Therefore the period of suspension ends at the expiration of ninety days after April 7th. A full period of ninety days is provided for. If it was a period of ten days it would expire on midnight April 17. As it is ninety days, it expired by the same method of computation at midnight on July 6, 1917.

We have the honor to remain,

Very respectfully,

LESLIE C. CORNISH,
ARNO W. KING,
GEORGE E. BIRD,
GEORGE F. HALEY,
GEORGE M. HANSON,
WARREN C. PHILBROOK,
JOHN B. MADIGAN.

To the Honorable Carl E. Milliken, Governor of Maine:

Answer of Associate Justice Albert M. Spear to Questions 1 and 2 of the questions propounded by you under date of July 16, 1917.

I concur in all the answers except these two questions numbered 1 and 2. These questions vary in form only and may be considered together.

The issue involved in these questions is sufficiently stated, for the purpose of my answer, in the letter attached to Question 1 and marked Exhibit A.

The letter is as follows:

(Seal of City of Lewiston)

Arthur B. Landry,
City Clerk,
Lewiston, Maine.
Tel. 308-W. July 5, 1917.

Petitions for referendum have been circulated since the last adjournment of legislature including those asking for a referendum of the Act to Provide a Police Commission for the City of Lewiston and to Promote the Efficiency of the Police Department thereof. I have up to this date signed certificates accompanying several of these petitions, the certificates being to the effect that I am the clerk of the City of Lewiston duly elected and qualified and that the names of all the foregoing petitioners numbered from.....to.....except the following.....appear on the voting list of said city as qualified to vote for governor. In each case I have signed the certificates without examining the names of the petitioners and without ascertaining whether their names appear on the voting list as specified in the certificate, and without a proper appreciation of the meaning of the certificate. On and after this date I shall examine all petitions carefully and compare the names of the petitioners with the voting list before signing the certificate.

I feel it my duty to make this statement to you, that you may act in the matter with full knowledge.

Very respectfully,

Arthur B. Landry.

The question is, should the petitions thus certified be counted.

The opinion of the Chief Justice answers this question in the affirmative. I regret to say that I cannot concur. Amendment Art. XXXI, of the constitution, requires a petition of 10,000 electors before the Governor is called upon to issue his proclamation for the suspension of the Act sought to be referred to the people. It then specifies precisely what official acts are necessary to make a petition legal.

First; (a) The signatures of the signers must be original; (b) one of the signers must know that every signature is original and verify every one by his oath. If he verifies only the first page of several sheets of names, all the other pages, although attached to the first page, become no part of a constitutional petition. If he is not certified as appearing on the voting list the verified page is not a legal petition. If he is certified as on the list, but is not a signer, the petition is invalid.

Both the *Opinion of the Justices*, 114 Maine, 557, and the present opinion hold to this strict rule as necessary to insure an absolute compliance with constitutional requirements, when invoked to overturn a solemn act of the legislature.

Second; The signatures verified by one of the signers must be "accompanied by the certificate of the clerk of the city or town or plantation in which the petitioners reside that their names *appear* on the voting list of this city, town or plantation as qualified to vote for Governor.

From this it is evident that verified signatures, to make a valid petition, must be certified by the municipal clerk.

Hence arises the question, what is certification?

What must the clerk do to make such list a legal petition; a petition which should be counted by the governor? In my opinion a petition which is not certified in truth is not certified at all under the constitution. Certification in strict accord with the constitution is as imperative as strict observance of verification. The acknowledgment of a deed in the absence of the signer would be no acknowledgment in law. It would be false. A bill in equity could be asked to cancel and restrain its record. The certificate of a corporation, approved by the attorney general but containing false statements would be invalid and could be enjoined and cancelled. So could any other certificate

falsely stating the facts which the law required the certificate to contain. It must be a compliance in fact as well as a compliance in form. To determine whether there is a compliance in fact it becomes necessary to consider two questions; First, the power of the governor to go behind the returns to ascertain the facts; second, his duty, if a failure to comply is disclosed.

A bill in equity cannot be brought to restrain these falsely certified petitions. It will be observed that the amendment contains no provision for any appeal from the action of the officers, charged with the duty of verifying and certifying the petitions therein required and defined.

Accordingly, by necessary implication, the governor either upon his own initiative or upon information, must be vested with power to determine whether the requirements of the constitution have been complied with in the execution of the petitions, otherwise, however fraudulent in verification or certification, a petition regular in form would be final and the constitution evaded and nullified. Nor can it be of any concern from what source information of defective action may come, providing it bears the impress of truth. When information of this kind comes to the governor, his duty would seem plain.

It is, however, conceded in the opinion that the governor has the power to investigate the validity of any petition upon the question of forgery or fraud. A false certificate whether intentional or otherwise is a fraud. Therefore, the question is, is the certificate in question false within the intent and meaning of the constitution?

The following statement if true, clearly discloses a false certificate.

"On July 5, 1917, the papers purporting to be the petition in question were filed. On July 6, 1917, by letter dated July 5, 1917, and mailed in Lewiston according to the postmark on the envelope at 12.30 P. M. on July 6, which letter was received in the office of secretary of state at about 5 o'clock on said July 6, the said clerk notified the said secretary of state, that prior to the date of such letter he had signed various petitions without examining the names on the petitions and without ascertaining whether or not their names appeared on the voting list as specified in the certificate." This quotation is a correct statement of the contents of the letter.

The constitution says:

The verified petitions shall be "accompanied by the certificate of the clerk of the city.....in which the petitioners reside that their names appear on the voting list of the city." This provision of the constitution is clear and unambiguous.

The letter says:

"I have signed the certificates without examining the names of the petitioners and without ascertaining whether their names appear on the voting list."

The language of the letter is equally explicit in its disregard of the provision.

If the letter is true, the clerk completely ignored the constitutional provisions. He did not look at a name on the petition and never saw the voting list at all. His confessed non-action was in defiance and negation of the constitutional requirements. All he did was to perfunctorily sign the form of certificate already prepared and attached in printed form to the petitions.

In answer to question 1 in the opinion it is said;

"The governor has before him two statements signed by the city clerk, the first in exact compliance with the constitutional requirement and under the form of the official certificate attached to each group of petitions; the second is in the form of a letter, attempting to qualify or modify his former certificate. The certificates on the petition were not changed by amendment or cancellation but remain as originally written upon the petition."

The opinion then goes on: "Under these circumstances we do not think this indefinite statement should be held to nullify and render invalid the unamended and uncancelled certificate in constitutional form. The prima facie evidence is not overborne. We do not mean that the clerk's certificate could not be amended within the prescribed time to accord with the facts. But such amendment should be made in the proper manner upon the petitions themselves and not by merely writing a letter to the secretary of state."

I concede the correctness of this statement as far as it goes, but it does not go far enough. The letter, itself, does not and should not control the certificate. It is not even evidence of the facts which it purports to rehearse. It is not an amendment of the certificate. It does not purport to be. It is the process by which the matter is presented to the governor. True, an officer's return on a writ is taken as proof of the fact therein stated but it is open to attack by any

person who may be injured by a false statement. The return is not final against the interests of an aggrieved party. It can be opened before the proper tribunal. In the same way the falsity of these petitions may be tested by the governor. My contention is, that there is no legal process, like a bill in equity, by which a charge of a false verification or a false certificate can be brought before the governor. He must act upon information presented from any source which he may deem worthy of consideration.

This letter from the clerk, himself, stating explicitly his failure to comply with the constitution, is therefore the most reliable source of information concerning the defects of his certification that can possibly be presented. As before suggested, it does not in itself contradict or amend the certificate of the clerk. It simply gives the information upon which the governor may act. It is the process, so to speak, by which the matter is brought before the governor. It opens the case for hearing and proof before the only tribunal that has any power of review in the premises, to determine the truth or falsity of the material allegation contained in this letter.

If the people of the state as well as the petitioners for the referendum are to have their interests determined in accordance with the plain requirements of the constitution, the action of the governor by ordering a hearing and giving notice to all parties interested would seem the only method by which these important rights may be determined.

Important questions of fact are certainly presented by the contents of this letter. Is the certificate a matter of form only or is it a matter of substance? If the former, and all inquiry ends with formality, then the certificate is prima facie evidence of the facts which it purports to state, although not one of them may be true. If the latter, and substance instead of form is to control, the certificate is untrue and a nullity, and should be so declared.

For the purpose of emphasizing the strict requirement of the constitution in regard to the clerk's duty, I wish to call attention to its wording. The petition shall be "accompanied by the certificate of the clerk.....that their names *appear* on the voting list....." Webster defines "appear": to come or be in sight; to be in view; to be visible.

In the opinion it is said; "This letter does not state whether the names appear on the voting list or not." It does, however, state that

he does not know that they there appear. If this is true, it defeats the petition for it is the command of the constitution that he positively certify that the petitioners' names do *appear* on the voting list. An omission to state, that they do not appear, is far short of a statement, that they do appear. Positive action is required of the clerk to give his certificate life. But the clerk explicitly says that neither names nor voting list appeared unto him.

Finally, I submit that the language of the constitution must be construed in a reasonable way. But, it would be trifling with the purpose and intent of this fundamental law to say that it authorizes the clerk of the city of Lewiston to certify, without comparison, that the names of the thousands of men in that city "appear on the voting list."

It accordingly follows that, even if he had examined the names on the petitions and undertook to say that those names appeared on the voting list, it would present an absurdity unworthy of consideration. But he did neither.

My conclusion therefore is that the governor before he counts the petitions involved in question 1 and question 2 should order a hearing, giving notice to all interested parties and determine whether the statements in the clerk's letter are true or false. If the proof shows that they are true, then in my opinion the papers filed with the secretary of state, involved in this question, purporting to be petitions are not petitions at all and should not be counted.

A. M. SPEAR.

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ACCOUNT ANNEXED.

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See *Hight* v. *York Manufacturing Co., et al.*, 81.

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BANKRUPTCY.

Clause (e) of Section 70 of the bankruptcy act of 1898 creates no new right of the trustee to avoid transfers of property made by the bankrupt, but gives to the trustee authority to avoid any fraudulent transfers of his property by the bankrupt "which any creditor" might have avoided; accordingly the question whether a particular transfer was or was not fraudulent as to creditors does not depend upon the bankruptcy act, but upon the laws of the State where the alleged transfers were made. *Woodman, Tr.*, v. *Butterfield*, 242.

In deciding whether the corporation was solvent at the time of the alleged payments and transfers we must accord to the term insolvent the meaning ascribed to it by the courts of Illinois, the State where the payments and transfers were made, which meaning makes the test whether the corporation was unable to pay its debts and obligations as they fell due in the usual and ordinary course of business. *Woodman, Tr.*, v. *Butterfield*, 242.

See *Carville* v. *Lane*, 332.

BASTARDY COMPLAINT.

When a person has been arrested, tried, convicted and imprisoned under the provisions of the Bastardy Act, and released from jail by giving bond as provided in said Act, he is under no other Act liable to prosecution and arrest for or on account of non-support of the illegitimate child in question. The duty to support such child is imposed by Statute, and the same Act provides for its enforcement. *State of Maine* v. *McCurdy*, 359.

The support of illegitimate children is provided for under the Bastardy Act, which makes adequate and exclusive provision for the enforcement of that duty. *State of Maine* v. *McCurdy*, 359.

CHARITABLE BEQUESTS.

A charitable bequest, in the legal sense, is a gift to be applied consistently with existing laws for the benefit of the persons or classes specified, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life or by erecting or maintaining public buildings or works, or otherwise lessening the burden of government.

Bills, et als., v. *Pease, et als.*, 98.

The fact that a bequest is made as a private memorial to a relative does not impair its public character or affect its legal validity.

Bills, et als., v. *Pease, et als.*, 98.

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See *Gilman* v. *Burnett*, 382.

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See *State of Maine* v. *McCurdy*, 359.
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CITIES AND TOWNS.

Where one member of a board of selectmen wrote a letter, it was not admissible in evidence to bind the town without showing that the act of the single member was subsequently ratified either by the town or by a majority of the board of selectmen. *Prest* v. *Inh. of Farmington*, 8.

It is well established that without subsequent ratification, either by the town or by a majority of the board of selectmen, the act of one member of the board cannot bind the town. *Prest* v. *Inh. of Farmington*, 11.

Where a defendant is a public municipal corporation, its powers, duties and liabilities must be measured by the same standards used in determining the powers, duties and liabilities of other municipal corporations when exercising the same functions, under the same circumstances.

Woodward v. *Livermore Falls Water District*, 86.

COMMON CARRIERS.

A carrier's contract and right to recover compensation for his services arise from the circumstances of his employment. He has the right to look for his compensation to the party who required him to perform the service. And his right to receive his freight from the shipper or consignor cannot be made to depend upon what may prove to be the legal effect of the negotiations between consignor and consignee upon the title to the property which is the subject of transportation.
No. Pac. Ry. Co. v. *Pleasant River Granite Co., et al.*, 497.

The statement printed on the back of the bill of lading that the "owner or consignee shall pay the freight and all other lawful charges accruing on said property and, if required, shall pay the same before delivery," in no way relieves the consignor or shipper of his liability to pay the freight if the carrier sees fit to look to him for his compensation. The contract of the consignor and that of the consignee are not considered to be inconsistent with each other.
No. Pac. Ry. Co. v. *Pleasant River Granite Co., et al.*, 497.

The last of the connecting carriers over whose lines a through shipment of goods is made may pay the preceding carriers their lawful freight charges against the goods and recover the same, together with its own freight and other lawful charges incident to the shipment, of the party liable for the freight.
No. Pac. Ry. Co. v. *Pleasant River Granite Co., et al.*, 497.

A railroad company has the right to keep possession of the shipment until its lawful charges should be paid. But in keeping possession of it after its arrival at its place of destination the railroad company is required to act with reasonable prudence and discretion. It could not incur unnecessary and unreasonable expenses in keeping possession of the property and hold the defendant liable therefor. *No. Pac. Ry. Co.* v. *Pleasant River Granite Co., et als.*, 497.

CONSIDERATION.

Action of assumpsit on a contract signed by two sons of the plaintiff. The plaintiff is the widow of Amos Garnsey, whose will was proved and allowed April 5, 1898, in the Probate Court for York County. Frederic A. Garnsey and Almon E. Garnsey, two sons of the testator, were appointed as executors without bonds, as requested in the will. Julia A. Garnsey, the present plaintiff and the widow by Amos Garnsey, waived her rights as widow and in lieu thereof accepted the agreement signed by the two sons, upon which this action is brought.

Held:

1. That the agreement between the plaintiff and the two executors and trustees, by which the plaintiff waived the right to have her share in the estate of her

husband, was sufficient consideration for the execution by the executors and trustees of the agreement to pay the widow according to the terms of the agreement declared upon.

2. A mere statement by the widow that she intended to release, or did release, the signers of the agreement without any consideration moving from any one for the promise did not discharge the debt and obligation incurred by the agreement. The debt was created by contract for a sufficient consideration. It can be discharged by contract for a sufficient consideration, but a naked promise to release without consideration is not a discharge.

3. That if the plaintiff did not know that suit had been brought upon the agreement, she had power to ratify the act of bringing the suit, even if she did not give authority in the beginning. *Garnsey* v. *Garnsey, Admrx.*, 295.

A promise to forbear and give time for the payment of a debt followed by actual forbearance for the time specified, or for a reasonable time when no time is named, is a sufficient consideration for a promise to pay the debt.
Hay v. *Fortier*, 455.

The payment, or promise of payment, of money which is then due and payable by virtue of an existing valid contract of the promisor is not in contemplation of law a sufficient consideration for any new contract. *Hay* v. *Fortier*, 455.

The creditor's promise to forbear action on the bond was, therefore, without a legal consideration and not binding on him, and he could not have been compelled to forbear as he agreed to do. *Hay* v. *Fortier*, 455.

When a contract, not originally binding for want of mutuality, is executed by the party not bound to perform his part, so that the other party has actually received the benefit contracted for, the latter will be estopped from refusing performance on his part on the ground that the contract was not originally binding on the other, who has, nevertheless, performed it.
Hay v. *Fortier*, 455.

Having enjoyed the forbearance of the plaintiff from bringing action against her on the bond for the full period agreed upon, the defendant is now estopped from refusing performance on her part on the ground that the contract was not originally binding on the plaintiff, who did in fact perform it and she has received the benefit thereof. *Hay* v. *Fortier*, 455.

See *Merithew* v. *Ellis*, 468.

CONSIGNOR AND CONSIGNEE.

See *No. Pac. Ry. Co.* v. *Pleasant River Granite Co., et al.*, 497.

CONSTITUTIONAL LAW.

CONTRACTS.

The words "would not consider less than half" are equivalent to saying that the party using them will consider, think or reflect upon an offer of one-half, if made. The words are appropriate to the invitation rather than to the proposal of an offer. *Sellers* v. *Warren*, 350.

Where a valid contract was entered into between a mother and her daughter and husband, whereby the daughter and her husband were to care for the mother during her life and to have the homestead at her decease, it was

Held:

1. That an equitable interest was thereby created in favor of the plaintiffs.
2. That the court in equity is given special statutory jurisdiction to grant relief in cases of trusts, and the plaintiffs are entitled to the remedy sought.

Brackenbury, et al., v. *Hodgkin, et al.*, 399.

COUNTY COMMISSIONERS.

See *Sawyer, Petr.*, v. *County Commissioners of Androscoggin County*, 48.

COURTS.

Under Chap. 305, Public Laws, 1915 (R. S., 1916, Chap. 87, Sec. 37), providing that a Justice of the Supreme Judicial Court or Superior Court may in vacation render judgment heard by him in term time, such Justice obtains no power to render judgment in such a case at the term occurring subsequent to the expiration of the vacation. *Robinson, Applt.*, 125.

In an action of assumpsit returnable in the Lewiston Municipal Court after the Superior Court act had taken effect in which the ad damnum was fifty dollars, it is

Held:

1. That the action not being exclusively cognizable by the Lewiston Municipal Court because the ad damnum exceeded twenty dollars became solely cognizable by the Superior Court.
2. That the two acts in so far as they apply to the jurisdiction over cases where the ad damnum exceeds twenty dollars and the specific demand in the writ does not exceed three hundred dollars are repugnant to each other and cannot stand together.
3. That the earlier statute must be regarded as amended by the latter so as to become conformable thereto, and all those actions over which the Lewiston Municipal Court had previously taken concurrent jurisdiction with the Supreme Judicial Court, that is between twenty dollars and three hundred dollars, fell into the exclusive jurisdiction of the newly established Superior Court and the concurrent jurisdiction of the Municipal Court ceased.

CORPORATIONS.

CY PRES DOCTRINE.

DAMAGES.

Damages are to be assessed on the footing of what the plaintiff's profits would have been if the contract had not been broken by defendants; and the plaintiff is to be made whole for what he has lost by their breach.

Simpson v. *Emmons*, 15.

In actions to recover damages on account of the sale of stock, the measure of damages is the difference between the actual value of the stock at the time of the purchase and its value if it had been what it was represented to be.

Chellis v. *Cole, et al.*, 288.

DECEIT.

See *Chellis* v. *Cole, et al.*, 283.

DEEDS.

The alleged infirmity in the title to certain lots conveyed by the Commonwealth of Massachusetts in 1792 cannot prevail. That deed contained merely a condition subsequent, and in the case of a grant from the State with a condition subsequent, the title remains valid in the grantee until the State by some legislative act avails itself of a forfeiture. There has been no attempted re-entry for breach of condition. *Abbott, et al.*, v. *Fellows*, 173.

In the absence of evidence to the contrary, the presumption of payment of a debt, although secured by a mortgage, arises after the lapse of twenty years, and in view of the fact that the defendant and his predecessors in title have occupied the premises without interruption for more than forty years, the record of an undischarged mortgage given more than thirty years ago creates no substantial defect in the title. *Abbott, et al.*, v. *Fellows*, 173.

That even if the title in the vendor as to a portion of Lot 4 was imperfect at the time the contract was made, if he perfects it before he is called upon to convey, the plaintiffs cannot complain. The language of the contract refers to the title which is to pass by the deed and not to the conditions existing when the contract was made. *Abbott, et al.*, v. *Fellows*, 173.

Writ of entry brought to determine whether a deed under which the defendant claims was duly delivered,—

Held:

The circumstances attending the execution and delivery of the deed, being uncontrolled by contradictory evidence of strong probative force, conclusively

proved that the deed was duly delivered with the intention of passing the title to the premises therein described. *Coombs, et al.*, v. *Fessenden, et al.*, 304.

When the grantor gives physical possession and control of the document to the grantee, either actually or constructively, or directly states that he delivers the instrument wherever it may be, and so puts it in the power of the grantee to take it, or does both of these things and there is no proof of an intent not to transfer the title, a delivery complete in the first instance is made.
Coombs, et al., v. *Fessenden, et al.*, 304.

Where a deed, with the regular evidence of its execution upon the face of it is found in the hands of the grantee, the presumption is that it has been duly delivered. *Coombs, et al.*, v. *Fessenden, et al.*, 304.

If an unrecorded deed of land is found at the death of the grantee, in his pocket book in his possession, the presumption is that it was duly delivered to him.
Coombs, et al., v. *Fessenden, et al.*, 304.

It is indispensable to the delivery of a deed that it shall pass beyond the control or dominion of the grantor. Otherwise it cannot come rightfully within the power and control of the grantee. Their interests are adverse and both cannot lawfully have control over the deed at the same time. The grantee does not necessarily acquire the right the moment it leaves the possession and control of grantor, but he cannot have it before. Neither can the grantor transfer his property after his decease by deed. The statute of wills or of descent then govern all property not disposed of during the life of the owner.
Coombs, et al., v. *Fessenden, et al.*, 308.

So far as the grantor is concerned any acts or words, whereby he in his lifetime parts with all right of possession and dominion over the instrument, with the intent that it shall take effect as his deed and pass to the grantee, constitute a delivery of a deed of conveyance; and nothing else will suffice.
Coombs, et al., v. *Fessenden, et al.*, 308.

To make a delivery good and effective, the power of dominion over the deed must be parted with. *Coombs, et al.*, v. *Fessenden, et al.*, 308.

DEMURRER.

Where a demurrer is not filed until the second term, and no leave to plead anew is granted, the defendant has no right to plead anew after the demurrer has been overruled. In such case judgment is to be entered for the plaintiff.
Palmer v. *Inh. of Blaine, et als.*, 524.

DEPENDENTS.

See *Supreme Lodge, N. E. O. P.*, v. *Sylvester, et al.*, 1.

DIRECTORS.

See *Woodman, Tr.*, v. *Butterfield*, 241.

DIVORCE.

A devise by which A and B, husband and wife, were each given a life estate in certain real estate was not affected by a subsequent divorce. After divorce, each of the parties had the right to remarry and such remarriage did not deprive them of their rights as life tenants. *Doherty, et al.*, v. *Russell*, 269.

DOWER.

When the right of dower was abolished and the widow given a right by descent in the estate of her husband, the same statutory provision for waiving the provisions of the will and accepting the rights given to her by law were retained as they had previously existed. *Clark* v. *Boston Safe Deposit & Trust Co.*, 450.

The privilege of a widow waiving her rights under the will of her husband is a purely personal right and its exercise rests in her personal discretion alone. If she is non compos her guardian cannot make the election for her.
Clark v. *Boston Safe Deposit & Trust Co.*, 450.

DUE PROCESS OF LAW.

See *Thompson, Applt.*, 473.

ELECTRIC CAR TRACKS.

Driving On.

In the darkness of night, when the driver of a team upon a railway track knows that a car is but a short distance behind him upon the same track and must be continually approaching him, he has a duty other than driving onwards with no effort of some of his senses to ascertain the whereabouts of the car.
Foster v. *Cumberland County P. & L. Co.*, 184.

EMERGENCY CLAUSE OF CONSTITUTION.

EMINENT DOMAIN.

EQUITY.

A court of equity will not permit one party to take advantage and enjoy the benefit of an ignorance or mistake of law by the other, which he knew of and did not correct. While equity interposes under such circumstances, it follows, a fortiori, that when the mistake of law by one party is induced, aided, or accompanied by conduct of the other more positively inequitable, and containing elements of wrongful intent, such as misrepresentation, imposition, concealment, undue influence, breach of confidence reposed, mental weakness, of surprise, a court of equity will lend its aid and relieve from the consequences or the error. *Fenderson* v. *Fenderson*, 362.

Where a valid contract was entered into between a mother and her daughter and husband, whereby the daughter and her husband were to care for the mother during her life and to have the homestead at her decease, it was,

Held:

1. That an equitable interest was thereby created in favor of the plaintiffs.
2. That the court in equity is given special statutory jurisdiction to grant relief in cases of trusts, and the plaintiffs are entitled to the remedy sought.

Brackenbury, et al., v. *Hodgkin, et al.*, 399.

EQUITY OF REDEMPTION.

Where a bill in equity is brought to redeem from an execution sale of the debtor's rights in real estate, it is held,—the plaintiff must prove a prior tender or payment or such facts as show that the defendant upon demand has unreasonably refused or neglected to render in writing a true account of the sum due upon the mortgage, or has in some other way by his default prevented the plaintiff from performing or tendering performance of the condition of the mortgage.

Stevens Mills Paper Co. v. *Myers, Jr.*, 73.

It is undoubtedly the law that an agreement between mortgagee and mortgagor or those holding their respective interests, to extend the time of redemption, although not in writing nor supported by any other consideration than the promise of the redemptioner when such an agreement has been acted upon so far that the parties cannot be placed "in statu quo" is not within the statute of frauds and is binding upon the parties. If within the period the mortgage debt is paid or tendered it has the same effect as though done prior to the time the equity would have otherwise expired. *Thomas* v. *Hall*, 143.

The right to redeem mortgaged real estate may be kept open by express agreement of the parties, or by circumstances from which an agreement may be inferred.

Fenderson v. *Fenderson*, 363.

ESTATE TAIL.

See *Skolfield, et als.*, v. *Litchfield*, 440.

EVIDENCE.

Where one member of a Board of Selectmen wrote a letter, it was not admissible in evidence to bind the town without showing that the act of the single member was subsequently ratified either by the town or by a majority of the Board of Selectmen. *Prest* v. *Inh. of Farmington*, 8.

When, in an action to recover the price of commercial fertilizer sold, the defense set up is a breach of the guaranty as to percentages of nitrogen, potash and phosphoric acid stated in the printed statement affixed to the package as required by R. S., 1916, Chap. 36, evidence of crop failure following the use of the fertilizer is not admissible for the purpose of showing that the percentages were less than those stated in the guaranty.
Armour Fertilizer Works v. *Logan*, 33.

The rule excluding parol evidence to contradict a written instrument is not infringed by the admission of evidence to show that the instrument was not delivered as a completed contract. *Rivard* v. *Continental Casualty Co.*, 46.

In the case of a domestic judgment the absence of authority of an attorney at law to appear for a defendant cannot be shown by parol and the judgment attacked collaterally. *Rose* v. *Parker*, 52.

Any evidence, admissible according to the rules of evidence, is admissible in disputed election case to show the truth. *Racine, Petr.*, v. *Hunt*, 188.

Where a defendant objected to questions to a witness, and he did not set forth the ground of his objections that the contract between the parties in writing was the best evidence, the court's ruling permitting the questions was not erroneous.
Moulton v. *Perkins*, 218.

Where, without motion to strike out testimony objected to on the ground that the contract between the parties was in writing and the best evidence, the defendant offered the contract, he was not aggrieved by the testimony.
Moulton v. *Perkins*, 218.

Subject to the defendant's exception, evidence was admitted that other engines of the defendant had set fires in this vicinity about the time of the fire in question. The defendant contends that such evidence was inadmissible unless it was previously shown that the engines setting such fires were of the same type,

Where the plaintiff calls the parties to the transactions and makes them his own witnesses, he will not be permitted to discredit them, either directly by showing that they are unworthy of credit or indirectly by showing by other witnesses that they have made contradictory statements.

Jones, Tr., v. *Shiro, et als.*, 513.

See *Rowe* v. *Green*, 94.

EXCEPTIONS.

Bills of exceptions must set out with particularity the rulings by which the party presenting such bills claims to have been aggrieved. Otherwise, they cannot be considered. *Rose* v. *Parker*, 52.

It is well settled that a question not raised at the trial will not be considered on exceptions. *Bixler* v. *Wright*, 134.

An exception to an instruction given to the jury will not be sustained when from the bill itself it is impossible to determine whether the instruction was prejudicial or not. *Bixler* v. *Wright*, 134.

A bill of exceptions must present each issue of law in the clear, distinct and summary manner required by statute and where an issue is not so presented by the bill of exceptions it cannot be considered, even though the transcript of the evidence be made part of the bill and shows the irregularity or error complained of. *State of Maine* v. *Davis*, 260.

When the evidence in support of a criminal prosecution is so defective or so weak that a verdict of guilty based upon it cannot be sustained, the jury should be instructed to return a verdict of not guilty. A refusal to so instruct is a valid ground of exception. *State of Maine* v. *Davis*, 262.

No exception lies to the admission in evidence of an auditor's report, objected to for the first time at the trial before the jury, upon the ground that his conclusions were based on incompetent evidence. *King* v. *Thompson*, 316.

Exceptions in jury waived cases are limited to rulings upon questions of law and the only question of law is whether there be any evidence to support the finding. If there be, the decision of the court must stand even if there was a large preponderance of the evidence the other way. *Viele, et al.*, v. *Curtis*, 328.

A petition for leave to enter and prosecute an appeal from the decree of the Judge of Probate when heard by the presiding Justice of the Supreme Court is addressed to his discretion and his decision whether or not the petition should be granted is final and not subject to exception, at least so far as all questions of fact involved are concerned. *Ellis, Petr.*, 463.

Action to recover damages for alleged malpractice in setting and treating the plaintiff's left arm. *Held;* on exceptions.

Assuming that it was error for the plaintiff to testify that the defendant said to him in the conversation between them that he, the plaintiff, could do him no harm as "he was protected by a liability insurance," we think such error is not a sufficient ground for a new trial, in view of the fact that the presiding Justice, upon his own motion, and before the case was argued to the jury, ordered the statement struck from the record and instructed the jury to pay no attention to it in their consideration of the case. *McCann* v. *Twitchell*, 490.

In jury waived cases exceptions are limited to questions of law.
Shapiro v. *Sampson*, 514.

EXECUTORS AND ADMINISTRATORS.

An appeal from the decree of the Judge of Probate of Washington County, removing one of the appellants from the office of administrator of the estate of Charles T. McCluskey, deceased.

Held:

1. The purpose of administration being the complete settlement of the estate of a decedent, a petition for the removal of an administrator is in the nature of an interlocutory proceeding. Such a petition is but a motion in writing.
2. To motions the doctrine of res adjudicata does not in strictness apply and motions may be renewed even upon the same state of facts by leave of court, and a hearing by the court of such a motion is equivalent to leave of court.
3. Upon appeal from a decree of the Probate Court removing an administrator upon the ground that the administrator upon request of an offer of indemnity by a creditor of the estate refused to commence proceedings for the recovery of property alleged to have been conveyed by decedent in fraud of creditors, it is not necessary to determine that the conveyance was made without consideration or with fraudulent intent. It is sufficient that upon the evidence there was reasonable ground so to believe.
4. Where it appears the estate of deceased has been represented insolvent and it appears that a conveyance of land was made by him in his lifetime which there is reasonable ground to believe was fraudulent, the creditors have the right to insist that an administrator shall try the question.
5. An executor or administrator is deemed unsuitable when he has any conflicting personal interest which prevents him from doing his official duty.
6. On an appeal from the decree of the Judge of Probate removing an administrator of an estate for failure at the request of a creditor to commence proceedings for the recovery of property of his intestate alleged to have been fraudulently conveyed, the question of no assets is not involved, and arises only when the new administrator has in his hands the proceeds of the real estate alleged to have been fraudulently conveyed. *McCluskey, et als., Applts.*, 212.

FEDERAL EMPLOYERS' LIABILITY ACT.

FOOT PASSENGER.

FORECLOSURE OF MORTGAGES.

FRAUD.

FRAUDULENT SALE OF STOCK.

FRAUDULENT TRANSFERS.

See *Woodman, Tr.*, v. *Butterfield*, 241.

GOODS BARGAINED AND SOLD.

To maintain an action for the price of goods bargained and sold actual acceptance of the same must be shown. Where the vendee refuses to accept the goods, the seller's remedy is not a suit for the price, but a special action for breach of the implied contract to receive and accept the goods. *Bixler* v. *Wright*, 134.

GUARANTY.

See *Armour Fertilizer Works* v. *Logan*, 33.

HOME RULE DOCTRINE.

See *Lemaire* v. *Crockett, et als.*, 263.

INDICTMENT.

The object of an indictment is to apprise the accused of the definite offense with which he is charged, set forth with such necessary allegations as to time and place that he may be enabled to prepare and present his defense.
State of Maine v. *LaFlamme*, 41.

An indictment must be so drawn that in case any other proceedings should be brought against the respondent for the same offense he could plead the former acquittal or conviction in bar. *State of Maine* v. *LaFlamme*, 41.

But if the meaning of an indictment is clear so that the accused is thereby informed of the precise charge which he is called upon to meet, verbal inaccuracies, grammatical, clerical, typographical or othographical errors which are explained and corrected by necessary intendment from other parts of the indictment are not fatal. *State of Maine* v. *LaFlamme*, 41.

Before an objection, because of false grammar, incorrect spelling or mere clerical errors, is established, the court should be satisfied of the tendency of the error

INSTRUCTIONS TO JURY.

INSURANCE.

JAIL PHYSICIAN.

Mandamus to compel the County Commissioners of Androscoggin to "fix the pay" of the petitioner for services as jail physician.

Held:

1. That the various statutes relating to the subject all point the same way and are consistent with the expressed intention of the legislature, that the sheriff or his deputy, as jailer, shall have absolute and exclusive custody and charge of all prisoners confined in the jail.
2. That these provisions impose so great a responsibility upon the sheriff or jailer for the safe keeping of all prisoners that their interpretation is inconsistent with any other theory than that which vests in the sheriff complete control of the key that unlocks the door that stands between the confinement of prisoners and access to escape.
3. That nowhere is found any authority, express or implied, conferred upon the County Commissioners, in conflict with the authority vested by the statutes, in the sheriff or his deputy, as jailer.
4. That the interpretation of the statutes herein reviewed by express language not only give, but impose upon the sheriff or his deputy, as jailer, the sole responsibility for the care, custody and safe keeping of the prisoners; and by necessary implication authorize him, alone, when necessary, to employ a physician to administer to the prisoners.

Sawyer v. *County Commissioners*, 408.

JUDGE OF PROBATE.

See *Thompson, Applt.*, 473.

JUDGMENT.

The record of judgment of another State is prima facie evidence only of matters recited therein and may be attacked collaterally while that of a domestic judgment is conclusive evidence of all matters recited or shown and is subject to direct attack only. *Rose* v. *Parker*, 52.

In the case of a domestic judgment the absence of authority of an attorney at law to appear for a defendant cannot be shown by parol and the judgment attacked collaterally. *Rose* v. *Parker*, 52.

Conceding jurisdiction, absence of fraud, and regularity in proceedings, we think it will not be challenged as a general rule, that a judgment between the same parties, or their privies, is a final bar to any other suit for the same cause of

JURISDICTION.

JURY WAIVED CASES.

JUSTICES.

If the presiding Justice in his charge to the jury incorrectly states the claim or contention of a party, or if he states without warrant that a particular fact is admitted, it is the duty of counsel at the time to call his attention to his error specifically, that he may correct it. If this is not done the error is waived.
Skene v. *Graham, et al.*, 202.

A petition for leave to enter and prosecute an appeal from the decree of the Judge of Probate when heard by the presiding Justice of the Supreme Court is addressed to his discretion and his decision whether or not the petition should be granted is final and not subject to exception, at least so far as all questions of fact involved are concerned. *Ellis, Petr.*, 463.

The findings of facts by a Justice presiding in the Supreme Court of Probate are conclusive and not to be reviewed by the Law Court if the record shows any evidence to support them. It is the finding of facts without eivdence that can be challenged by exceptions. *Thompson, Applt.*, 473.

A finding of a sitting Justice has the force of a verdict of a jury and is not to be reversed unless it is manifestly contrary to the weight of the evidence.
Rankin v. *Farrand*, 507.

LANDLORD AND TENANT.

It is familiar law that the owner of a building, not in a defective or dangerous condition, is not liable to a tenant or occupant of the building, or to any one else, for injuries or damages caused by the unauthorized, and not reasonably to be anticipated act of any other tenant or occupant, or of any third person, unless his relation to the doer of the act is such that the doctrine respondeat superior applies. *Leavitt* v. *Williams, et al.*, 347.

LAST CLEAR CHANCE.

See *Welch, Admr.*, v. *L. A. & W. St. Ry.*, 191.

LIENS.

One who buys lumber of a dealer for the use of a contractor, who receives it and uses it in the repair of a building, furnishes it within the meaning of R. S., 1903, Chap. 93, Sec. 29, (R. S., 1916, Chap. 96, Sec. 29) and has a lien on the building for the same. *Rounds* v. *Basham, et als.*, 199.

LIMITATIONS OR CONDITIONS IN DEEDS OR WILLS.

LINEAL DESCENDANTS.

LOGS AND LUMBER.

MALPRACTICE.

MANDAMUS.

MARRIAGE CONTRACTS.

See *McAlpine, et al.*, v. *McAlpine*, 321.

MITTIMUS.

See *State* v. *Jenness*, 196.

MORTGAGES.

Where A has given assurance to B that he had until May the thirteenth to pay a mortgage which was then under process of foreclosure, it amounted to an extension of the period of redemption to that date, although the proper date was the eighth day of May; that under the facts of the case the attorney had authority so to do and that A was bound by his action.

Thomas v. *Hall*, 141.

Where A has paid a mortgage for B on the assurance from the present holder of the mortgage that A should have the rights of the mortgagee under the note and mortgage, A was entitled to receive and hold the same under the principles of subrogation. *Thomas* v. *Hall*, 141.

It is well settled that the mortgagee may waive the foreclosure altogether or extend the time within which it would expire. The right to redeem mortgaged real estate may be kept open by the express agreement of the parties or by facts and circumstances from which an agreement may be satisfactorily inferred when it would be foreclosed were it not for such agreement.

Thomas v. *Hall*, 143.

In the absence of evidence to the contrary, the presumption of payment of a debt, although secured by a mortgage, arises after the lapse of twenty years, and in view of the fact that the defendant and his predecessors in title have occupied the premises without interruption for more than forty years, the record of an undischarged mortgage given more than thirty years ago creates no substantial defect in the title. *Abbott, et al.*, v. *Fellows*, 173.

A mortgagee by consenting to repairs on the mortgaged property does not lose any priority he has under his mortgage. *Rounds* v. *Basham, et als.*, 201.

The right to redeem mortgaged real estate may be kept open by express agreement of the parties, or by circumstances from which an agreement may be inferred. *Fenderson* v. *Fenderson*, 363.

In this State the legal title and right of possession of mortgaged real estate, unless otherwise agreed, is in the mortgagee and so continue in him until a full and complete performance of the condition of the mortgage, or a tender equivalent thereto. *American Agr. Chem. Co.* v. *Walton*, 459.

In the absence of a stipulation to the contrary, either express or implied, the mortgagee is entitled to take possession of the mortgaged property at any time either before or after breach of condition. But in such case if the mortgage is afterwards redeemed the mortgagee must account for the clear rents and profits. *American Agr. Chem. Co.* v. *Walton*, 459.

The right of the first mortgagee to take possession of the mortgaged premises was not affected in any way by the fact that the plaintiff as the second mortgagee took possession of the premises in 1915. The second mortgagee had no more right to hold possession of the premises against the first mortgagee than the mortgagor would have had if the second mortgage had not been given. *American Agr. Chem. Co.* v. *Walton*, 459.

The first mortgagee having the legal title and right to the possession of the mortgaged premises could lease it, subject, of course, to its being redeemed. *American Agr. Chem. Co.* v. *Walton*, 459.

See *Stevens Mills Paper Co.* v. *Myers, Jr.*, 73.

MORTGAGES OF PERSONAL PROPERTY.

The defendant sold the plaintiff many horses during the seasons of 1913 and 1914, in each instance taking back a note secured by a mortgage upon the horses, the instrument being in the nature of a Holmes note which was duly recorded.

Held:

1. That evidence was inadmissible to show that there was an oral understanding between defendant and plaintiff that the plaintiff could sell and dispose of the horses described in the mortgages in any way he saw fit, and that the security was given simply to prevent attachment of the property by other parties with whom the present plaintiff might be dealing.
2. A mortgage of personal property duly recorded is constructive notice of its existence to all would-be purchasers of the property included and covered by the mortgage. *Rowe* v. *Green*, 49.

MOTION IN ARREST OF JUDGMENT.

MOTION TO DISMISS.

MUNICIPAL OFFICERS.

MUNICIPAL CORPORATIONS.

MUNICIPAL COURTS.

NEGLIGENCE.

As defendant's automobile was going down on the right hand side of Lisbon Street in Lewiston, on the fifth day of November, at about five o'clock in the afternoon, it had occasion to pass between a team standing by the curb and a large covered wagon coming up street on the car tracks. The injured boy, in response to a call from a playmate started to cross from the left to the right hand sidewalk. Street lights and the machine lights were lighted and the automobile was going about eight miles per hour. When the front of the automobile was nearly abreast of the rear of the covered wagon the boy appeared suddenly about four feet ahead of the automobile, coming from behind the covered wagon. Despite the efforts of the driver of the machine, the boy was struck by the car.

Held:

At the time of the accident the plaintiff's intestate was not in the exercise of such care as ordinarily prudent boys of his age and intelligence are accustomed to exercise under like circumstances and by reason of such negligence the plaintiff is not entitled to recover, there being no opportunity for the driver of the car to avoid the accident after the deceased came in sight.

Levesque v. *Dumont, et al.*, 25.

While the fact of open gates at a railroad crossing is a circumstance which a traveller may properly take into consideration and upon which he may place some reliance, he is not thus relieved of all care.

Blanchard, Admr., v. *M. C. R. R. Co.*, 179.

The extent to which the traveller may rely upon the invitation given by open gates is a question of fact for the jury, unless it appears that he relied exclusively thereon. *Blanchard, Admr.*, v. *M. C. R. R. Co.*, 179.

The fact that the traveller is not the driver of the vehicle in which he is riding does not relieve him of all care. *Blanchard, Admr.*, v. *M. C. R. R. Co.*, 179.

Ordinarily when the view of the traveller of the railroad track is obstructed greater care is required in looking and listening, even to the extent, if driving, of alighting. *Blanchard, Admr.*, v. *M. C. R. R. Co.*, 179.

In the darkness of night, when the driver of a team upon a railway track knows that a car is but a short distance behind him upon the same track and must be continually approaching him, he has a duty other than driving onwards with no effort of some of his senses to ascertain the whereabouts of the car.

Foster v. *Cumberland County P. & L. Co.*, 184.

It is the duty of drivers of teams upon the tracks of street railways to leave them when they are aware, or ought to be aware, of the approach of cars.

Foster v. *Cumberland County P. & L. Co.*, 184.

One driving a team or wagon at night upon the track of a surface railway may not rely wholly upon the supposition that the servants of the railway will see him in time to give warning but he must be on the alert to discover in some manner and by some exercise of his senses the approach of a car from the rear.
Foster v. *Cumberland County P. & L. Co.*, 184.

If his sense of hearing be impaired, he is not excused from the exercise of his other senses but is called upon to exercise those unimpaired with a higher degree of alertness than will be the case if all his senses be normal.
Foster v. *Cumberland County P. & L. Co.*, 184.

In a statutory action to recover damages for the instantaneous death of the plaintiff's intestate while she was attempting to cross the railroad track in front of a closely approaching car,

Held:

1. Foot passengers in crossing a street should carefully observe the movements of street cars. They should make such use of their senses as the situation demands. They cannot move blindly on, oblivious to everything about them and then seek to throw upon others the blame that attaches only to themselves.
2. The intestate, a woman seventy-one years of age and of defective hearing, left the sidewalk and proceeded to cross the street, with her head bent down, wholly inattentive to her surroundings. She had a clear and unobstructed view of the track for a distance of three hundred feet. The car was in plain sight, was approaching at a reasonable rate of speed, and was giving the customary signals. At a point four feet from the track, she looked up and discovered the car, paused, then gave a scream and started to cross in front of it, when she was struck and killed.
3. Far from exercising the care of an ordinary prudent woman under the same conditions, she seems to have exercised no care whatever. Her own conduct precludes recovery.
4. The so-called last clear chance doctrine does not apply. Had the intestate remained at the point outside the track when she discovered the approaching car she would have been safe. Her dash across the rails was clearly negligent on her part and her contributory negligence continued to the very moment of collision. After she made the last fatal plunge the motorman was powerless to save her. *Welch* v. *L. A. & W. St. Ry.*, 191.

In actions brought under R. S., 1916, Chap. 57, Sec. 53, to recover for fires caused by locomotives, it is held that these actions are not based on negligence, but should be based on the statute making the defendant company liable, regardless of negligence. *Libby* v. *M. C. R. R. Co.*, 235.

Where the bottom of an elevator well had been left unlighted and unguarded, it amounted to a dangerous trap for a servant of the defendant company, and defendant was held liable for injuries received by an employee who entered said opening or well. *Zobes* v. *International Paper Co.*, 237.

In an action on the case to recover damages for injuries received by the plaintiff, as he alleges, through the negligence of the defendant, it is

Held:

1. The plaintiff, in order to recover, was bound to show not only defendant's negligence but affirmatively that no want of due care on his part contributed to the injury.
2. In actions of this kind, it is true that every negligent act upon the part of the plaintiff will not necessarily bar him from the recovery of damages. The rule has been stated many times, "that he who last has an opportunity to avoid the accident, notwithstanding the negligence of the other, is solely responsible. If due care on the part of either at the time of the injury would prevent it, the antecedent negligence of one or both parties is immaterial, except as it may be as one of the circumstances by which the requisite measure of care is to be determined."
3. Notwithstanding the negligence of the plaintiff in falling upon the fender of the defendant's car, the plaintiff was powerless to help himself; from that time a new relation existed between the parties, and it was the duty of the defendant, if it's servants having charge of the car knew of his position, or by the exercise of due care would have known the dangerous position the plaintiff was in, to use the same degree of care which a reasonable, careful and prudent man ought to use under the same circumstances; and if, with the exercise of reasonable care, they could have prevented the injury, it was their duty to do so, and failure on their part to so act would be negligence which would entitle the plaintiff to recover.
4. Where the negligent acts of the parties are distinct and independent of each other, the act of the plaintiff preceding that of the defendant, it is considered that the plaintiff's conduct does not contribute to produce the injury if, notwithstanding his negligence, the injury could have been avoided by the use of ordinary care at the time by the defendant.

McKinnon v. *B. R. & E. Co.*, 289.

A jury may return a verdict based upon inferences properly drawn, but such inferences must be drawn from facts proved in the case, and not merely upon conjecture or guess work. *Coolidge* v. *Worumbo Manufacturing Co.*, 445.

See *Hamilton* v. *Madison Water Company*, 157.

NEGOTIABLE INSTRUMENTS.

In case of a declaration charging the defendant as maker of a promissory note which he had not signed as maker, an amendment charging him as guarantor of the note upon a guaranty written on the back of the note and signed by him is not allowable. *Limerick National Bank* v. *Jenness, et als.*, 28.

NEW TRIAL.

Action to recover damages for alleged malpractice in setting and treating the plaintiff's left arm.

Held:

THE EXCEPTIONS.

Assuming that it was error for the plaintiff to testify that the defendant said to him in the conversation between them that he, the plaintiff, could do him no harm as "he was protected by a liability insurance," we think such error is not a sufficient ground for a new trial, in view of the fact that the presiding Justice, upon his own motion, and before the case was argued to the jury, ordered the statement struck from the record and instructed the jury to pay no attention to it in their consideration of the case. *McCann* v. *Twitchell*, 490.

The burden of showing the verdict to be wrong rests upon the movent.
Clark v. *Dillingham*, 509.

Even though the evidence preponderates against the verdict and even though the court might have arrived at a conclusion different from that reached by the jury, if there be evidence upon which the verdict may rest, the motion should be overruled, unless the conclusion is warranted that the jury reached its verdict improperly or was, in finding it, improperly influenced.
Clark v. *Dillingham*, 509.

OPTIONS.

See *Sellers* v. *Warren*, 350.

OVERSEERS OF THE POOR.

It is settled law in this State that "when the overseers act in good faith and with reasonable judgment touching the necessity of relief of persons found in need their conclusions will be respected in law.
Inh. of Machias v. *Inh. of E. Machias*, 426.

PARENT AND CHILD.

See *Farnham* v. *Clifford*, 299.

PAUPERS.

Under R. S., Chap. 29, Sec. 33, overseers of the poor are bound to relieve persons destitute found in their towns and having no settlement therein.
Inh. of Machias v. *Inh. of E. Machias*, 423.

PLEADING AND PRACTICE.

4. That a plea in abatement must be filed to reach the defect complained of.

On the motion of C. Doherty to amend by striking out the name of A. D. Bird as a co-partner and as a plaintiff on the ground that there was no partnership.

Held:

1. That the proposed amendment did not introduce a new cause of action.
2. That the parties in the case could be rightfully understood, and the amendment came within the purview of the statute.

Doherty, et al., v. *Bird, et al.*, 416.

PROBATE APPEALS.

The remedial provisions of Sec. 33, Chap. 67, R. S., are not limited to cases where the appellant has omitted "to claim" an appeal, but they also include cases where an appellant has omitted to "prosecute his appeal" which he had duly claimed. *Ellis, Petr.*, 462.

The petitioner's appeal was never entered in court within the meaning of the statute, because it had not been served as required by statute.

Ellis, Petr., 462.

Until the reasons of appeal are served, as the statute provides they shall be, the Appellate Court has no jurisdiction to act upon the appeal, and can do nothing more than dismiss it. *Ellis, Petr.*, 462.

The reasons of appeal not having been served, as the statute requires that they must be, the Appellate Court had no jurisdiction of the matter and no authority to order service of the reasons of appeal. *Ellis, Petr.*, 462.

The phrase "defect of notice" as used in Sec. 33, Chap. 67, R. S., includes cases where there is an omission to give any notice of the reasons of appeal, as well as cases where the notice given is defective. *Ellis, Petr.*, 462.

A petition for leave to enter and prosecute an appeal, under the provisions of Sec. 33, Chap. 67, R. S., in which the petitioner alleges that he seasonably claimed an appeal, "but that through accident, mistake, defect of notice, or otherwise without any fault on his part, said appeal papers were not properly served upon the adverse party who appeared before the Judge of Probate, as required by law," and "that justice requires a revision of the decree" appealed from, contains sufficient allegations of the jurisdictional facts which are prerequisites to the maintenance of such a petition. *Ellis, Petr.*, 463.

A petition for leave to enter and prosecute an appeal from the decree of the Judge of Probate when heard by the presiding Justice of the Supreme Court is

addressed to his discretion and his decision whether or not the petition should be granted is final and not subject to exception, at least so far as all questions of fact involved are concerned. *Ellis, Petr.*, 463.

The finding of facts by a Justice presiding in the Supreme Court of Probate are conclusive and not to be reviewed by the Law Court if the record shows any evidence to support them. It is the finding of facts without evidence that can be challenged by exceptions. *Thompson, Appl.*, 473.

The Probate Court had full jurisdiction of the parties and of the cause, and the weight and sufficiency of the evidence in sustaining the will in question were matters to be determined by that court. The weakness or the strength of that evidence did not affect the jurisdiction and the Supreme Court of Probate properly excluded that evidence on this petition to vacate the decree. It would be admissible in a hearing on appeal from the decree but not on a petition to revoke the decree itself for lack of jurisdiction. *Thompson, Applt.*, 473.

Appeal from the decree of the Judge of Probate, Androscoggin County, approving and allowing the last will and testament of Cain Latham. At the Supreme Court verdict was rendered by jury upon two issues of fact; first, that the testator was not of sound mind at the time he executed the instrument which purported to be his last will and testament, and second, that the testator was induced to make and execute said instrument by undue influence. After this verdict, the Supreme Court of Probate made and entered its decree, wherein it sustained the appeal, reversed the decree of the Judge of Probate disallowed and rejected the instrument in question as the last will and testament of Cain Latham, and remanded the cause to the Probate Court for further proceedings;

Held:

The practice in such case should be for the party filing the motion for a new trial to move the court not to enter any final decree pending the motion for a new trial on the issues presented to the jury, and, should a decree be made notwithstanding that motion, then to take and prosecute exceptions to the making of such decree under the circumstances. *Latham, Applt.*, 528.

See *McCluskey, et als., Applts.*, 212.

PROBATION.

See *State* v. *Jenness*, 196.

PROMISE TO FORBEAR.

See *Hay* v. *Fortier*, 455.

QUANTUM MERUIT.

RAILROAD CROSSING.

RATIFICATION.

REAL ACTION.

REPLEVIN.

RES JUDICATA.

RESULTING AND CONSTRUCTIVE TRUSTS.

REVOCATION OF WILLS.

SALES.

The printed statement required by statute, R. S., 1916, Chap. 36, to be affixed before sale to lots or packages of commercial fertilizer, giving a chemical analysis stating the minimum percentage of nitrogen or its equivalent of ammonia in available form, of potash soluble in water, of phosphoric acid in available form, soluble and reverted and of total phosphoric acid, is a guaranty of the percentages of those ingredients as printed in the statement, but it is not a guaranty of suitableness, nor of results. *Armour Fertilizer Works* v. *Logan*, 33.

When, in an action to recover the price of commercial fertilizer, sold, the defense set up is a breach of the guaranty as to percentages of nitrogen, potash and phosphoric acid stated in the printed statement affixed to the packages as required by R. S., 1916, Chap. 36, evidence of crop failure following the use of the fertilizer is not admissible for the purpose of showing that the percentages were less than those stated in the guaranty.
Armour Fertilizer Works v. *Logan*, 33.

Where, at the time of the execution of an executory contract of sale of personal property, the possession of the property is delivered to the vendee, the question whether the title to the property then passed to the vendee depends upon whether it was the intention of the parties that the title should pass at that time. *Diamond Cork Co.* v. *Maine Jobbing Co.*, 67.

SEIZIN.

A seizin once acquired is presumed to continue until it is shown that there has been an ouster or disseizin, or an abandonment.
Doherty, et al., v. *Russell*, 273.

SELECTMEN.

See *Prest* v. *Inh. of Farmington*, 8.

SENTENCE.

The respondent was sentenced to fine and imprisonment, and was then placed upon probation by virtue of R. S., Chap. 137, Sec. 15. At a later term, the court after hearing ordered that the order of probation be revoked, and that mittimus issue at the expiration of another sentence, which the respondent was then serving in jail.

SHERIFF AND JAILER.

SPECIAL WRIT.

STATUTE.

SUBROGATION.

SUPERIOR COURTS.

TAXES.

TENDER.

TOWN MEETINGS.

See *Van Buren L. & P. Co.* v. *Inh. of Van Buren*, 119.
See *Racine, Petr.*, v. *Hunt*, 188.

TRUSTEE PROCESS.

A trustee process, though in form an action at law, is in substance an equitable proceeding to determine the ownership of a fund in dispute, especially where a claimant has appeared and become a party to the suit. And as between the plaintiff in such an action and the claimant of the fund equitable considerations must prevail as far as the nature of the process will permit.

Diamond Cork Co. v. *Maine Jobbing Co.*, 68.

Where successive trustee attachments are made, the amount so attached cannot be added to avoid the exemption allowed the principal debtor but shall be treated separately and the exemptions allowed the debtor shall apply to each amount so trusted. *Howard Coal Co.* v. *Savage, et al.*, 115.

TRUSTS.

A charitable bequest, in the legal sense, is a gift to be applied consistently with existing laws for the benefit of the persons or classes specified, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life or by erecting or maintaining public buildings or works, or otherwise lessening the burden of government.

Bills, et als., v. *Pease, et als.*, 98.

The fact that a bequest is made as a private memorial to a relative does not impair its public character or affect its legal validity.

Bills, et als., v. *Pease, et als.*, 98.

Item four of a testator's will contained these words; "And the residue of my personal estate I leave in trust to said Hall J. Staples to be by him distributed and disposed of as he pleases." In a bill in equity brought to obtain the construction of this clause it is

Held:

1. That the testator did not intend to give the absolute ownership of the residue to Staples, but to create a trust therein.
2. That this trust cannot be upheld as a charitable trust, because the fund is not limited to any use that falls within the scope of a public charity as known to the courts.

UNDUE INFLUENCE.

VERDICT.

WAGES.

Where successive trustee attachments are made, the amount so attached cannot be added to avoid the exemption allowed the principal debtor but shall be treated separately and the exemptions allowed the debtor shall apply to each amount so trusteed. *Howard Coal Co.* v. *Savage, et al.*, 115.

WAIVER.

See *Bilodeau* v. *Fire Insurance Company*, 355.
See *Clark* v. *Boston Safe Deposit and Trust Company*, 450.
See *Grand Lodge, A. O. U. W.*, v. *Conner, et als.*, 224.

WATER COMPANIES.

In an action on the case to recover damages sustained by the plaintiff by reason of the defendant's alleged negligence in furnishing him with water from which he contracted typhoid fever,

Held:

1. That it was the duty of the defendant to exercise ordinary care and vigilance in furnishing and distributing at all times an adequate supply of wholesome water for domestic use.
2. That the degree of care and vigilance necessary to constitute ordinary prudence has relation to the importance of the subject matter and is commensurate with the duty to be performed.
3. When a corporation assumes what is practically an exclusive right to provide a community with such a prime necessity of life as water, sound public policy requires that it be held to a high degree of faithfulness in furnishing a supply adequate in quantity and wholesome in quality. This is but the exercise of ordinary care applied to the circumstances of the particular case.
4. Actual notice or knowledge of the unwholesomeness of the water on the part of the defendant is not an essential element to be proven in order to establish the defendant's liability. It is sufficient if there was credible testimony showing that the defendant in the exercise of reasonable care might have discovered its unwholesome and dangerous condition.
5. Nor is the plaintiff legally required to prove by positive testimony and with absolute certainty that the drinking of the water was the cause of his typhoid fever. It is sufficient if he proves facts and circumstances from which it is made to reasonably appear that the drinking of the water was the probable efficient cause of his illness.

6. The facts and circumstances in this case lead to the reasonable conclusion that the typhoid fever from which the plaintiff suffered was contracted from the use of the water furnished by the defendant, and that the defendant was not in the exercise of due care in supplying him with such contaminated water.
7. While the doctrine of contributory negligence on the part of the plaintiff obtains in this class of cases, as in all others of actionable negligence, its enforcement depends upon the peculiar facts and circumstances of each case, and those facts and circumstances must be weighed in the light of the relations between the parties.
8. This case is barren of any substantial evidence tending to prove want of due care on the part of the plaintiff. He did what the ordinarily prudent water taker would have done under the same circumstances and therefore fulfilled the measure of duty resting upon him. *Hamilton* v. *Madison Water Co.*, 157.

Such a corporation is not a guarantor of the purity of its water or of its freedom from infection; but it is bound to use reasonable care in ascertaining whether there is a reasonable probability that its water supply may be infected with a communicable disease from causes which are known to exist, or which could have been known or foreseen by the exercise of such care; and if the exercise of such care would have disclosed a reasonable probability of such infection, then it becomes the duty of a water company to adopt whatever approved precautionary measures are, under the circumstances of the case, reasonably proper and necessary to protect the community which it serves from the risk of infection.
Hamilton v. *Madison Water Co.*, 166.

Actual notice or knowledge of the unwholesomeness of the water of the defendant company is not an essential element to be proven in order to establish the defendant's liability. It is sufficient if there is testimony tending to show that the defendant in the exercise of reasonable care might discover the unwholesomeness and dangerous condition of the water.
Hamilton v. *Madison Water Co.*, 166.

See *Woodward* v. *Livermore Falls Water District*, 86.

WAYS.

Independent of statute there is no liability on the part of municipalities for injuries caused by defective highways. *McCarthy* v. *Inh. of Leeds*, 276.

The remedy being purely statutory the rights of the traveling public and the liability of the municipality are limited by the scope of the statute.
McCarthy v. *Inh. of Leeds*, 276.

WILLS.

The privilege of a widow waiving her rights under the will of her husband is a purely personal right and its exercise rests in her personal discretion alone. If she is non compos her guardian cannot make the election for her.

Clark, Petr., v. *Boston Safe Deposit & Trust Co.*, 450.

When the act of destruction is connected with the making of another will so as fairly to raise the inference that the testator meant the revocation of the old to depend upon the efficacy of the new disposition intended to be substituted, such will be the legal effect of the transaction; and therefore if the will intended to be substituted is inoperative from defect of attestation or any other cause, the revocation fails also and the original will remains in force.

Thompson, Applt., 480.

A will may continue to exist, though the paper it was written upon is destroyed.

Thompson, Applt., 481.

See *Bills, et als.*, v. *Pease, Exr., et als.*, 98.

WITNESSES.

Where the plaintiff calls the parties to the transactions and makes them his own witnesses, he will not be permitted to discredit them, either directly by showing that they are unworthy of credit or indirectly by showing by other witnesses that they have made contradictory statements. *Jones, Tr.*, v. *Shiro, et als.*, 513.

WORDS AND PHRASES.

WORKMEN'S COMPENSATION.

A deceased employee, for whose death compensation was claimed, had been engaged in the same employment for the York Manufacturing Company for more than a year preceding the injury. He had received fourteen dollars and fifty cents per week for his labor. Fifty-eight hours constituted a week's work and the time was so arranged that the employees worked ten and one-half hours a day for five days in the week and five and one-half or practically one-half day on Saturday.

Held:

1. That the varying hours in no way affected the earning capacity or the actual earnings of the employee. He received the same amount as if the hours were equally divided among the six days, and his average daily wages are unaffected thereby.

2 That to ascertain the average daily wages the total amount earned for the week, or fourteen dollars and fifty cents, must be divided by six, the number of working days, which gives $2.416 as the average daily wages, instead of dividing by five and one-half which gives $2.636 as the average daily wages.

3 The weekly number of hours being limited to fifty-eight, the division must be made by six however the hours may be divided among the days. The legislature did not intend that the average weekly wages should be reckoned as more than the highest weekly wages the employee ever earned in his employment.

Hight v. *York Manufacturing Co., et al.*, 81.

WRIT OF ENTRY.

See *Stairs* v. *Bangor Power Company*, 255.

WRIT OF REVIEW.

An indemnitor who has neither appeared and defended nor has been requested to defend an action against his indemnitee is not such a party in interest as to entitle him to petition for a review of the action under R. S., Chap. 94, Sec. 1, Paragraph 3. *Glovsky* v. *Maine Realty Bureau, et al.*, 378.

If one is bound by a judgment in the original suit, it is just that he should be given the right to bring a petition for its review. Hence, it has been held that a warrantor who has been vouched in to defend a real action brought against his warrantee can bring a petition for review as a party in interest, because after such voucher the warrantor was bound by the judgment rendered therein even though she did not appear and defend the suit.

Glovsky v. *Maine Realty Bureau, et al.*, 378.

APPENDIX

STATUTES AND CONSTITUTIONS CITED, EXPOUNDED, ETC.

CONSTITUTION OF MAINE.

STATUTES OF UNITED STATES.

STATUTES OF MASSACHUSETTS.

LAWS OF ENGLAND.

SPECIAL LAWS OF MAINE.

STATUTES OF MAINE.

REVISED STATUTES OF MAINE.

ERRATA.

Rose v. *Parker*, page 53, last line on page, strike out "defendant" and substitute therefor "plaintiff."

Norton, et als., Appellants, page 372, line 4 from bottom of page, strike out "proponent" and substitute therefor "Dr. Foss."

Chase v. *Scolnik*, page 374, last line on page, strike out "or" and substitute therefor "of".

McCann v. *Twitchell*, page 490, line 18 from bottom of page, strike out "plaintiff" and substitute therefor "defendant".

Shapiro v. *Sampson*, page 514, line 10 from top of page, strike out "plaintiff" and substitute therefor "defendant."