MAINE REPORTS

117

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

NOVEMBER 27, 1917—DECEMBER 31, 1918

TERENCE B. TOWLE

REPORTER

PORTLAND, MAINE

WILLIAM W. ROBERTS

C2716

JUSTICES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS

HON. LESLIE C. CORNISH, CHIEF JUSTICE
HON. ALBERT M. SPEAR
HON. ARNO W. KING[1]
HON. GEORGE E. BIRD[2]
HON. GEORGE F. HALEY[3]
HON. GEORGE M. HANSON
HON. WARREN C. PHILBROOK
HON. JOHN B. MADIGAN[4]
HON. CHARLES J. DUNN[5]
HON. JOHN A. MORRILL[6]
HON. SCOTT WILSON[7]
HON. LUERE B. DEASY[8]

[1]Hon. Arno W. King, died July 21, 1918
[7]Hon. Scott Wilson, appointed August 7, 1918
[2]Hon. George E. Bird, resigned August 28, 1918.
[8]Hon. Luere B. Deasy, appointed September 25, 1918
[3]Hon. George F. Haley, died February 19, 1918
[6]Hon. John A. Morrill, appointed February 25, 1918
[4]Hon. John B. Madigan, died January 19, 1918
[5]Hon. Charles J. Dunn, appointed January 28, 1918

Justices of the Superior Courts

HON. HENRY W. OAKES,	ANDROSCOGGIN COUNTY
HON. LAUREN H. SANBORN,	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 1918

LAW TERMS

BANGOR TERM, First Tuesday of June.

SITTING: SPEAR, Justice Presiding, HANSON, BIRD, PHILBROOK, DUNN, MORRILL, Associate Justices.

PORTLAND TERM, Fourth Tuesday of June.

SITTING: CORNISH, Chief Justice, SPEAR, HANSON, PHILBROOK, DUNN, MORRILL, Associate Justices.

AUGUSTA TERM, Second Tuesday of December.

SITTING: CORNISH, Chief Justice, SPEAR, HANSON, PHILBROOK, WILSON, DEASY, Associate Justices.

TABLE OF CASES REPORTED

A

American Sardine Co. *v.* Olsen, et al. 26
——— Express Co., Charlesworth *v.* . . . 219
Archibald *v.* Granite State Fire Ins. Co. 205
——— *v.* United Commercial Travelers . . . 418
Aroostook Valley R. R. Co., Briggs Hardware Co., *v.* 321
——— C. P. M. Fire Ins. Co., Greenlaw *v.* 514
Avery *v.* Thompson, et al. 120

B

Bailey *v.* M. C. R. R. Co. . 577
B. R. & E. Co., McKinnon *v.* 239
Bangor, City of, *v.* Ridley . 297
Barnes, The Morse Co., *v.* 569
Bass & Co. *v.* Wilton Woolen Co. 314
———, McCann *v.* 548
Batchelder *v.* Bickford . . 468
Bean, Ladd *v.* 445
———, Admr., *v.* Thorne . 554
Bell, et al., McIver, et al., *v.* 495
Benari, Admr., Nash *v* . . 491
Bennett, State of Maine *v.* . 113
Benton & Fairfield Ry., The, Lubin *v.* 556
Benton & Fairfield Ry., The, Thurston *v.* 561
Berman *v.* Langley . . . 559
Bertha B. Simmons' Case . 175
Bickford, Batchelder *v.* . . 468
Biddeford, Treas. of, *v.* Nedjip, et als. 339
Blaisdell *v.* The Inh. of York 379
Blanchard, et al., Hanscom *v.* 501
Boardman, Gile *v.* 52
B. & M. R. R., Stockman *v.* 35
Bouchles *v.* Tibbetts . . . 192
Bowles *v.* Sawyer . . . 49
Bradford, Walker *v.* 147
Braman, Dow & Co. *v.* Kennebec G. & F. Co. & Tr. . 291
Brann *v.* Leavitt . . . 144
Brawn, et als., Myers, et al. *v.* 80
Briggs Hardware Co. *v.* A. V. R. R. Co. 321
Briggs, et al., Davis, et al. *v.* 536
Brown *v.* Rouillard . . . 55
Buckwald, State of Maine *v.* 344
Buzzell, et al., Lawrence Co. *v.* 570

C

C. A. R. Machine Co., Carleton, et als. *v.* . . . 251
Campbell *v.* Peters . . . 555

Carleton, et als. *v.* C. A. R. M. Co. 251
Charlesworth *v.* American Express Co. 219
Cilley *v.* Herrick 264
City of Bangor *v.* Ridley . 297
Clark *v.* Luce, et al. . . . 578
Cleaves, et al., Kelsea, Petr., *v.* 236
Clement *v.* M. C. R. R. Co. 45
Cobb *v.* C. C. P. & L. Co. . 455
Coburn, Knox, Petr., *v.* . 409
Coe-Mortimer Co., R. & R. Lime Co. *v.* 558
Coffin *v.* Johnson . . . 565
Corinne McKenna's Case . 179
Cornforth, et al., Exrs., *v.* Est. of Simon G. Jerrard 303
Creedon *v.* Inh. of Town of Kittery 541
Crosby Co., Shepherd *v.* . 569
Crouse, State *v.* 363
Cumberland County P. & L. Co., Murray *v.* . . 165
——— ——— — —
— —, Cobb *v.* . . . 455
——— ——— — —
— —, Seeley *v.* . . . 564
——— ——— — —
— —, Dyer *v.* . . . 576
Curran *v.* Holt 369
Curtis *v.* Nixon 566
Cyr, et al., Zanoni *v.* . . 399

D

Dana *v.* Smith 198
Davis *v.* W. F. & O. Ry. . 32
———, Kimball *v.* . . . 187
Davis et al., Briggs et al., *v.* 536
Dean, Leighton *v.* . . . 40
Delaval Separator Co. *v.* Jones, et als. 95
Derrick, Spinney *v.* . . . 575
Dirigo Mutual Fire Ins. Co., Maxwell, Tr., *v.* . . . 431
Dr. D. P. Ordway Plaster Co., Tibbetts *v.* . . . 423
Dodge, State of Maine *v.* . 269
Donnell, Lembo *v.* . . . 143
Dumont, et al., Levesque *v.* 262
Durham, Inh. of, Applts. . 131
Dyer *v.* Helson 203
—— *v.* C. C. P. & L. Co. . 576

E

Eagle Lake, Inh. of, *v.* Inh. of Fort Kent 134
Eastman *v.* Eastman, et als. 276
Emmons, Penley *v.* . . . 108
——— *v.* King 556
Erasmo, State of Maine *v.* . 578
Est. of Simon G. Jerrard, Libby, et al., Exrs., *v.* . 303

F

Farmers' Union *v.* Hunt . 217
Farmington, Inh. of, Prest *v.* 348
Farnsworth, et als., Thomaston Savings Bank *v.* . . 211
———, Admrs., Hurley *v.* 552
Feingold, et als. *v.* Supovitz, et al. 371

Feyler, et al., Avery *v.* . . 120
Fire Ins. Co., Maxwell, Tr. *v.* 431
Flaherty *v.* Maine Motor Carriage Co. 376
————, Nissen *v.* 534
Ford Touring Car, State of Maine *v.* 232
Fort Kent, Inh. of, Inh. of Eagle Lake *v.* 134
Foss *v.* Foss 572
Fournier *v.* Gagne . . . 561
Frontier Nat. Bank, Tr. et al., American Sardine Co. *v.* 26

G

Gagne, Fournier *v.* 561
Gagnon *v.* L. A. & W. St. Ry. 553
Gayton *v.* Gayton . . . 565
Gerard *v.* L. A. & W. St. Ry. 563
Gile *v.* Boardman . . . 52
Goodwin, Treas. of City of Biddeford *v.* Nedjip, et als. 339
Googin, State of Maine *v.* . 102
Goulding & Tr., Rockland Hardware Co. *v.* 564
G. T. R. R. Co., Morrissette, Admrx., *v.* 573
Granite State Fire Ins. Co., Archibald *v.* 205
Grant *v.* P. A. M. Fire Ins. Co. 567
Granville Chase Co., Webber, et als. *v.* 150
Green, Martin *v.* 138
Greenlaw *v.* A. C. P. M. Fire Ins. Co. 514
Grossman *v.* Tibbetts . . 553
Grove Mfg. Co. *v.* Jacobs . 163

H

Hall, et al., Applts. . . . 106
Hamblen *v.* Irish . . . 522
Hanscom *v.* Blanchard, et al. 501
Hardware Co., Briggs, *v.* A. V. R. R. Co. 321
Harris *v.* Moses, et als. . . 391
Harry Scott's Case . . . 436
Harvey *v.* Harvey . . . 576
Haswell *v.* Walker, Admr. . 427
Hayden *v.* M. C. R. R. . . 560
Helson, Dyer *v.* 203
Herrick, Cilley *v.* . . . 264
Heselton, Inh. of Town of Skowhegan *v.* 17
Higgins, Sweeney *v.* . . . 415
Hobbs *v.* Hurley 449
Holland, State of Maine *v.* . 288
Holt, Curran *v.* 369
Howard, State of Maine *v.* 69
Hoyt, Williams, Admr., *v.* . 61
Hughes, Admrx., *v.* Metropolitan Life Ins. Co. . . 244
Hunt, Waldo County Farmers' Union *v.* . . 217
Hunter *v.* Mountfort . . 555
———————. . . 568
Hurley, et als., Thomaston Savings Bank *v.* 211
————, Hobbs *v.* 449
———— *v.* Farnsworth, Admrx. 552

I

Ice Co., Portland Sebago, Phinney *v.* 153
Ilsley, et al. *v.* Kelley . . 572
Ingersoll Sargent Drill Co., et als., Peoples' Trust Co. *v.* 507
Inh. of Town of Skowhegan *v.* Heselton 17
—— —— Durham, Applts. . 131
—— —— Eagle Lake *v.* Inh. of Fort Kent 134
—— —— Fort Kent, Inh. of of Eagle Lake *v.* . . . 134
—— —— Farmington, Prest *v.* 348
—— —— York, Blaisdell *v.* 379
—— —— ——, Stewart *v.* 385
Inh. of York, Marshall *v.* . 390
—— —— Town of Kittery, Creedon *v.* 541
Ins. Co., Hughes, Admrx., *v.* 244
—— ——*v.* Nelke . . . 366
—— ——., Maxwell, Tr., *v.* 431
—— ——., A. C. P. M., Greenlaw *v.* 514
Irish, Hamblen *v.* . . . 522

J

Jacobs, Grove Mfg. Co. *v.* . 163
Jerrard Est., Libby, et al., Exrs., *v.* 303
Jodoin *v.* M. C. R. R. Co. . 552
Jones, et als. Tr., Delaval Separator Co. *v.* . . . 95
Johnson, Coffin *v.* . . . 565
Jordan, Lyons *v.* . . . 117
Jordan, King *v.* 563
———, Martin *v.* . . . 574

K

Karakus, State of Maine *v.* 232
Kelley, Ilsley, et al. *v.* . . 572
————, Seavey *v.* . . . 572
Kelsea, Petr., *v.* Cleaves, et al. 236
Kennebec Gas & Fuel Co. & Tr., Braman, Dow & Co. *v.* 291
Kerr, State of Maine *v.* . . 254
Kidder *v.* Sadler . . . 194
Kimball *v.* Davis . . . 187
King, Rich *v.* 64
———, Emmons *v.* . . . 556
——— *v.* Jordan . . . 563
Kittery, Inh. of, Creedon *v.* 541
Knox, Petr., *v.* Coburn. . . 409

L

Ladd *v.* Bean, Exr. . . . 445
Lambert *v.* Lambert . . 471
Lambert, Applt. 471
Langley, Berman *v.* . . . 559
Lawrence Co. *v.* Buzzell, et al. 570
Leach, et als., Thomaston Savings Bank *v.* . . . 211
Leavitt, Brann *v.* . . . 144
LeClair, Petr. *v.* White . . 335
Leighton *v.* Dean . . . 40
Lembo *v.* Donnell . . . 143
Levenseller, et als., Myers, et al. *v.* 80
Levesque *v.* Dumont, et al. 262

Lewis Poultry Co. *v.* N. Y. C. R. R. Co. et al. . . 482
L. A. & W. St. Ry., Gagnon *v.* 553
———————., Rolfe *v.* 562
———————., Gerard *v.* 563
Lewiston Buick Co. *v.* Nelke, et al. 568
——— Trust Co. Tr. et al., Lewiston Buick Co. *v.* 568
Libby, et al., Exrs., *v.* Est. of Simon G. Jerrard . . 303
Livermore Falls L. & P. Co., Merrill *v.* 523
Look *v.* C. A. Watson & Sons 476
Lubin *v.* The B. & F. Ry. . 556
Luce, et al., Clark *v.* . . 578
Lyons *v.* Jordan 117

M

Machine Co., Carleton, et als. *v.* 251
Mahlman, McElwee *v.* . . 402
M. C. R. R. Co., Clement *v.* 45
Maine Motor Carriage Co., Flaherty *v.* 376
M. C. R. R. Co., Lewis Poultry Co. *v.* 482
———————., Jodoin *v.* . . 552
———————., Robash *v.* . . 558
———————., Hayden *v.* 560
———————., Bailey *v.* . . 577
Manufacturing Co., Grove, *v.* Jacobs 163
Marshall *v.* Inh. of York . 390
Martin *v.* Green 138
Martin *v.* Jordan . . 574
Maxwell, Tr., *v.* Dirigo Mut. Fire Ins. Co. 431
McAvoy, Webber, et als. *v.* 326
McCafferty, Sullivan *v.* . . 1
McCann *v.* Bass . . . 548
McDonald, State *v.* . . . 474
McElwee *v.* Mahlman . . 402
McIver, et al. *v.* Bell, et al. 495
McKenna's Case . . . 179
McKinnon *v.* B. R. & E. Co. 239
McLellan, State of Maine *v.* 73
Medical Co., J. R. Watkins, *v.* Stahl, et al. . . . 190
Merrill, Applt., *v.* Regan, Exrx. 182
——— *v.* L. F. L. & P. Co. 523
Metropolitan Life Ins. Co., Hughes, Admrx., *v.* . 244
Morrill *v.* Roberts, Jr., et als. 465
Morrissette, Admrx., *v.* G. T. R. R. Co. 573
Morse Co., The, *v.* Barnes . 569
Moses, et als., Harris *v.* . . 391
Mount Waldo Granite Works, et als., Peoples' Trust Co. *v.* 507
Mountfort, Hunter *v.* . . 555
———, ——— *v.* . . 568
Murinelli *v.* T. Stewart & Son Co. 87
Murray *v.* Cumberland County P. & L. Co. . . 165
——— Bros. Co., Smith, Tr., *v.* 566
Myers, et al. *v.* Levenseller, et als. 80

N

Nash *v.* Benari, Admr. . . 491
Nedjip, et als., Goodwin *v.* 339
Nelke, Royal Ins. Co. *v.* . 366
———, et al., Lewiston Buick Co. *v.* 568
N. Y. C. R. R. Co., Lewis Poultry Co. *v.* 482
Nissen *v.* Flaherty . . . 534
Nixon, Curtis *v.* 566
Nugent, et als., Tucker, Exr., *v.* 10

O

Olsen, et al., American Sardine Co. *v.* 26
O'Neil, et als., Thomaston Savings Bank *v.* 211
Order of U. C. T., Archibald *v.* 418
Ordway Plaster Co., Tibbetts *v.* 423

P

Patrons A. M. F. Ins. Co., Grant *v.* 567
Pembroke, Applt. . . . 396
Penley *v.* Emmons . . . 108
Peoples Trust Co. *v.* Mt. Waldo Granite Works, et als. 507
Peters, Campbell *v.* . . . 555
Phinney, Portland Sebago Ice Co. *v.* 153
Portland Sebago Ice Co. *v.* Phinney 153
Poultry Co. *v.* N. Y. C. R. R. Co. et al. 482
Power & Light Co., Murray *v.* 165
———————., Cobb *v.* 455
Prest *v.* Inh. of Farmington 348
Priest, State of Maine *v.* . 223

R

Railroad Co., Aroostook Valley, Briggs Hardware Co. *v.* 321
Reed *v.* Reed 281
——— *v.* ——— 579
Regan, Exrx., Merrill, Applt., *v.* 182
Rich *v.* Rich 64
Ridley, City of Bangor *v.* . 297
Robash *v.* M. C. R. R. Co. . 558
Roberts, Jr., et als., Morrill *v.* 465
Rockland & Rockport Lime Co. *v.* Coe-Mortimer Co. 558
———— Hardware Co. *v.* Goulding & Tr. . . . 564
Rolfe *v.* L. A. & W. St. Ry. . 562
Rouillard, Brown *v.* . . . 55
Royal Insurance Co. *v.* Nelke 366

S

Sadler, Kidder *v.* . . . 194
Sampson, Shapiro *v.* . . . 172
Sawyer, Bowles *v.* 49
Scott's Case 436
Seavey *v.* Kelley 572

Seeley *v.* C. C. P. & L. Co. . 564
Separator Co., Delaval, *v.* Jones 95
Shapiro *v.* Sampson . . . 172
Shepherd *v.* Crosby Co. . . 569
Sidelinker *v.* York Shore Water Co. 528
Simmons' Case 175
Skowhegan, Inh. of, *v.* Heselton 17
Slorah, State of Maine *v.* . 319
Small, et al., Zanoni *v.* . . 399
Smith, Worcester *v.* . . . 168
———, Dana *v.* 198
——— *v.* Somerset Traction Co. 407
Smith, Tr., *v.* Murray Bros. Co. 566
Somerset Traction Co., Smith *v.* 407
Spinney *v.* Derrick . . . 575
Stahl, et al., Watkins Medical Co. *v.* 190
State of Maine *v.* Howard . 69
——— *v.* McLellan . 73
——— *v.* Googin . 102
——— *v.* Bennett . 113
——— *v.* Priest . 223
——— *v.* Ford Touring Car 232
——— *v.* Kerr . . 254
——— *v.* Dodge . 269
——— *v.* Holland . 288
——— *v.* Slorah . 319
——— *v.* Buckwald 344
——— *v.* Crouse . 363
——— *v.* McDonald 474
——— *v.* Erasmo . 578
Stewart, et als. *v.* Stewart Drug Co. 84
——— Drug Co., Stewart, et als. *v.* . . . 84
——— *v.* The Inh. of York 385
Stockman *v.* B. & M. R. R. 35
Stuart & Son Co., Murinelli *v.* 87
Strout *v.* Strout, et als. . . 357
Sullivan *v.* McCafferty . . 1
Supovitz, et al., Feingold, et als. *v.* 371
Sweeney *v.* Higgins . . . 415

T

Thatcher, et als., Tr., *v.* Thatcher, et als. . . . 331
The Inh. of Eagle Lake *v.* Inh. of Fort Kent . . . 134
— Granite State Fire Ins. Co., Archibald *v.* . . . 205
— Inh. of Farmington, Prest *v.* 348
— Maine Motor Carriage Co., Flaherty *v.* . . . 376
— Inh. of York, Blaisdell *v.* 379
— — — — ———, Stewart *v.* 385
— — — — ———, Marshall *v.* 390
— Order of U. C. T., Archibald *v.* 418
— Peoples' Trust Co. *v.* Mt. Waldo Granite Works, et als. 507
— B. & F. Ry., Lubin *v.* . 556

The Morse Co. *v.* Barnes . 569
Thomaston Savings Bank *v.* Hurley, et als. . . . 211
Thompson, et als., Myers, et al. *v.* 80
———, — ——., Avery *v.* 120
Thorne, Bean, Admr., *v.* . 554
Thurston *v.* B. & F. St. R. R. Co. 561
Tibbetts, Bouchles *v.* . . 192
——— *v.* Ordway Plaster Co. 423
———, Grossman *v.* . . . 553
Town of Skowhegan, Inh. of, *v.* Heselton . . . 17
——— — Kittery, Inh. of, Creedon *v.* 541
Trust Co., The Peoples', *v.* Mt. Waldo Granite Works et als. 507
Tucker, Exr., *v.* Nugent, et als. 10

U

United Commercial Travellers, Archibald *v.* 418
Utterback - Gleason Co., Willey *v.* 557

W

Waldo County Farmers' Union *v.* Hunt . . . 217
Waldron, et al. *v.* Levenseller, et als. 80
Walker *v.* Bradford . . . 147
———, Admr., Haswell *v.* . 427
Walter, et al., Watkins Medical Co. *v.* 190
Water Co., York Shore, Sidelinker *v.* 528
W. F. & O. Ry., Davis *v.* . 32
Watkins Medical Co. *v.* Stahl, et al. 190
Watson & Sons, Look *v.* . 476
Webber, et als. *v.* Granville Chase Co. 150
———, et als. *v.* McAvoy 326
White, LeClair *v.* . . . 325
Willey *v.* Utterback-Gleason Co. 557
Williams, Admr., *v.* Hoyt. . 61
Wilton Woolen Co., Bass & Co. *v.* 314
Woolen Co., Bass & Co. *v.* . 314
Worcester *v.* Smith . . . 168

Y

York, Inh. of, Stewart *v.* . 385
York, Inh. of, Marshall *v.* . 390
York Shore Water Co., Sidelinker *v.* 528

Z

Zanoni *v.* Cyr, et al. . . . 399

TABLE OF CASES CITED

BY THE COURT

Acheson *v.* Miller, 2 Ohio St., 203 451
Action *v.* Co. Commrs., 77 Maine, 128 75
Adams *v.* Waggoner, 33 Ind., 531 144
——*v.* Clapp, 87 Maine, 316, 322 330
Alabama G. S. R. Co. *v.* Chapman, 3 So., 813 243
Alden *v.* Gilmore, 13 Maine, 178, 182 329
Allen *v.* Pioneer Press Co. (Minn.) 3 L. R. S., 532, 535 7
——*v.* Boardman, 193 Mass., 284 286 15
——*v.* Millville, 87 N. J. L., 356 176
——*v.* Alden, 109 Maine, 516, 519 268
Alter *v.* Union Casualty & Surety Co., 108 Mo. App., 169 422
Am. Agr. Co. *v.* Huntington, 99 Maine, 361 54
American Sardine Co. *v.* Olsen, 117 Maine, 26 174
————Waterworks Co. *v.* State (Neb.) 64 N. W., 711 52
Anderson *v.* Wetter, 103 Maine, 257 241
Andrews *v.* King, 74 Maine, 224 21, 76
———*v.*——, 77 Maine, 224 416
Angel *v.* McLellan, 16 Mass., 28, 31 204
Angle *v.* Alexander, 20 E. C. L., 71 59
Ann. Cas. 1913 D., p. 742 242
Armour Fertilizer Works *v.* Logan, 116 Maine, 33 378
Armstead *v.* Lounsberry, 129 Minn., 34, 56 L. R. A., N. S., 628 46
Arthur et al. *v.* Texas & C. Ry. Co., 139 Fed., 127 488
Aspden *v.* Nixon, 4 How., 467 493
Association *v.* Tryon, 42 Mich., 549, 4 N. W., 267 8
Atlantic Coast Line R. R. Co. *v.* Weir, 63 Fla., 69 463
———————— *v.* Riverside Mills, 219 U. S., 186 486
Austin *v.* Baker, 112 Maine, 267 191
————*v.* Oakes, 48 Hun., 492, 498 324

Babb *v.* Paper Co., 99 Maine, 298 243
Babcock *v.* Thompson, 3 Pick., 446 57
Bacon *v.* Haynes & Others, 14 Allen, 204, 205 15
Bailey *v.* Baker Ice Machine Co., 239 U. S., 268 99
————*v.* Myrick, 36 Maine, 50, 52 266
————*v.* Worster, 103 Maine, 170, 178 395
————*v.* Bussey, 28 Conn., 453 451
————*v.*————, 37 Conn., 349 451
Bakalars *v.* Continental Casualty Co., 141 Wis., 43, 18 Ann. Cas., 1125 422
Baker Ice Machine Co. *v.* Bailey, 209 F., 603 99
———*v.* Baker, 8 Gray, 101, 119 361
———*v.* Smith, 66 N. H., 422 473
Batchelder *v.* Robbins, 95 Maine, 59, 67 329
Baxter *v.* Ellis, 57 Maine, 178 119
Bearce *v.* Bass, 88 Maine, 521 7
————*v.* Dudley, 88 Maine, 410 110
Beard *v.* Klusmeier, 158 Ky., 153, 164 S. W., 319 (314) 126
Bell *v.* Terry & Tench Co., 163 N. Y. S., 733 441

Bell *v.* Keach, 80 Ky., 42, 45 442
Benedict *v.* Swain, 43 N. H., 33 57
Bennett *v.* R. R. Co., 102 N. S., 577 42
———— *v.* Dyer, 89 Maine, 17 279
———— *v.* Talbot, 90 Maine, 231 478
Benston *v.* B. E. Ry. Co., 202 Mass., 577 167
Bernard *v.* Am. Exp. Co., 205 Mass., 254 487
Berry *v.* Anderson, 22 Ind., 36 287
Betcher *v.* McChesney, 255 Pac., 394 453
Betts *v.* Gibbons, 2 Ad. and Ell., 57 451
Beverage *v.* Rockport, 106 Maine, 223 545
Bickford *v.* Ins. Co., 101 Maine, 125 519
Big Four Implement Co. *v.* Wright 207 F., 536 99
Billings *v.* Warren, 216 Ill., (1905,) 281, 287 333
Binks *v.* South Yorkshire Rwy., 32 Law Journal, N. S., 2. B. 26 42
Birmingham Ry. & L. Co. *v.* Aetna Acc. & Liab. Co., 184 Ala., 604 463
Black *v.* Moree, 139 Tenn., 73 463
Blackington *v.* Rockland, 66 Maine, 332 544
Blaisdell *v.* York, 110 Maine, 500 380, 386, 390
———— *v.* ————, 115 Maine, 351 380
Blakeslee *v.* Carroll, 64 Conn., 223 417
Blanchard, Admr., *v.* M. C. R. R. Co., 116 Maine, 179 552
Bliss *v.* Junkins, 106 Maine, 128 380, 389
———— *v.* ————, 107 Maine, 425 380, 389
———— *v.* Blaisdell, 110 Maine, 527 380
Bloom's Case, 222 Mass., 434, 436, 437 177
Bloss *v.* Tobey, 2 Pick., 320 60
Boardman *v.* Boardman, 78 Conn. (1905), 451, 455 333
Boardman *v.* Mansfield, 79 Conn. (1907), 634, 639 333
Bonney *v.* Greenwood, 96 Maine, 335 538
Bouch *v.* Sproule, L. R., 12 App. Cas. (1887) 385, 389 333
Bourgeois *v.* Bustanoby, 138 N. Y. S., 366 480
Bourne *v.* Whitman, 209 Mass., 155, 172 459
Bowden *v,* York Shore Water Co., 114 Maine, 150 529
Bowen *v.* Conner, 6 Cush., 132 169
Bradford *v.* Clark, 90 Maine, 298 417
Bretton *v.* Anthony, 103 Mass., 37 59
Briggs Hardware Co. *v.* A. V. R. R. Co., 117 Maine, 321 486
Brimley *v.* Grou, 50 Conn. (1882), 66, 76 333
Brown *v.* Simmons, 44 N. H., 475 215
———— *v.* ————, 66 Maine, 316 286
———— *v.* King, 5 Met., 173, 180 329
————, et al., Petrs., 14 R. I. (1884), 371, 372 333
———— *v.* New Jersey, 175 U. S., 172 337
———— *v.* Starbird, 98 Maine, 292 353
———— *v.* Smith, 101 Maine, 545 493
———— *v.* Dickey, 106 Maine, 97 539
Bryant *v.* Co. Commrs., 79 Maine, 128 75
———— *v.* Biddeford, 39 Maine, 193 463
Budrutha, et als., *v.* Goodrich, 3 Gray, 508 29
Bulger *v.* Eden, 82 Maine, 352 22
Burbank *v.* Holmes, 39 Maine, 233-236 59
———— *v.* Bethel Steam Mill Co., 75 Maine, 373, 382 189, 462
Butler *v.* Wentworth, 84 Maine, 25 337
———— *v.* Charlestown, 7 Gray, 12 387
———— *v.* Railway, 99 Maine, 160 408
Butterfield *v.* Converse, 10 Cush., 317, 319 86

Cadwalader *v.* Bailey, 17 R. I., 495 540
Campbell *v.* Atherton, 92 Maine, 69 99
———— *v.* Portland Sugar Co., 62 Maine, 552, 556 454
Capital City Drug Co. *v.* Ohio. 183 U. S., 238 337
Carey *v.* Donohue, 240 U. S., 430, 437 99
———— *v.* McKay, 82 Maine, 516 343
Carleton *v.* Ins., Co., 109 Maine, 79 516
Carrigan *v.* Stillwell, 97 Maine, 247 253 189
Carrington *v.* Worcester St. Ry., 222 Mass., 119 462
Carter *v.* Andrews, 16 Pick., 1, 5 60
————, Carter and Meigs Co. *v.* Stewart Drug Co., 115 Maine, 289 84
Central Lumber Co. *v.* South Dakota, 226 U. S., 157 267
Chadwick *v* Webber, 3 Maine, 141 286
2 Chamberlayne Ev., Secs. 1222-1223 119
4 ———————., Sec. 2911 136
Chandler *v.* Wilson, 77 Maine, 76, 82 327
Chapman *v.* Nobleboro, 76 Maine, 427 243, 546
Chase *v.* N. Y. C. R. R., 208 Mass., 137, 158 459
———— *v.* Surry, 88 Maine, 468 545
Chenery *v.* Fitchburg R. R. Co., 160 Mass., 214 42
Chicago Union Traction Co. *v.* Albert Guse, 229 Ill., 260 44
————, etc., Co. *v.* Burnett, 181 Fed., 799, 801 263
1st. Chitty on Pleading, 401 58
————————, 381 59
2nd. ————————, 256, note s 59
Cirkel *v.* Ellis (Minn.), 31 N. W., 513 480
City of Mares *v.* Botzet, 169 Fed., 321, 329, 330 263
Civil Rights Cases, 109 U. S., 3; Sup. Ct. Rep., 18 272
Claridge *v.* Evans (Wis.), 118 N. W., 198 99
Clark *v.* The People, 12 Am. Dec., 178 149
Clary *v.* Clary, 93 Maine, 220, 223 204
Clements *v.* Smith, 129 App. Div., 859, N. Y., Sup. 55 341
Clifford *v.* Stewart, 95 Maine, 38, 46 360
Clowes *v.* Dickinson, 4 John Ch. 235 215
Coakley's Case, 216 Mass., 71 440
Cobb *v.* Covenant Mut., Etc., 153 Mass., 76, 25 Am. St. Rep., 619 249
Coffin *v.* Rich, 45 Maine, 597, 511 181
Cohen Bros. *v.* Missouri & C. Ry. Co., 98 S. W., 437 488
Colbath *v.* Seed Co., 112 Maine, 277 398
Colfer *v.* Best, 110 Maine, 465, 466 91
Cole *v.* Ins. Co., 113 Maine, 512 206
———— *v.* Fickett, 95 Maine, 265 216
———— *v.* Cole, 112 Maine, 315 535
Collagan *v.* Burns, 57 Maine, 449, 473 189
Commercial Ins. Co. *v.* Un. Ins. Co., 19 How., 318 519
Com. *v.* Colberg, 119 Mass., 350 144
Commonwealth *v.* Coe, 115 Mass., 500 261
———————— *v.* Welsh, 7 Gray, 324 364
———————— *v.* Smith, 151 Mass., 491 366
————————Ins. Co. *v.* Un. Ins. Co., 19 How., 318 520
———————— *v.* Mass. Mut. Ins. Co., 112 Mass., 116 521
———————— *v.* Hutchinson, 6 Allen, 595 579
Concord Me. Mut. Fire Ins. Co. *v.* Woodbury, 45 Maine, 447, 454 268
Connecticut, etc., Co. *v.* Scammon, 117 U. S., 634 267
Conroy *v.* Mathes, 217 Mass., 91 462

Cooley Const. Limitations, 7th ed., 831 273
———————————, 98 274
———————————, 857 275
Coombs *v.* Fessenden, 114 Maine, 347 288
———*v.* King, 107 Maine, 376 370
Cooper *v.* Cooper, 147 Mass., 370 352
Copp *v.* M. C. R. R. Co., 100 Maine, 568 421
Corey *v.* Independent Ice Co., 106 Maine, 485 532
Cornish *v.* Acc. Ins. Co., L. R., 23 Q. B. Div., 453 422
9 Corpus Juris, 683 365
Coughlin *v.* Gillison (1899), 1 Q. B., 145 125
Counter *v.* Couch, 8 Allen, 436 462
Cowden's Case, 225 Mass., 66, 67 442
Cratty *v.* Bangor, 57 Maine, 423 463
Criminal Procedure, Vol. 1, Sec. 98 365
Crocker *v.* Crocker, 43 Maine, 561, 562 311
Crooker *v.* Buck, 41 Maine, 359 218
Crosby *v.* Redman, et al., 70 Maine, 56 151
———*v.* Cornforth, 112 Maine, 109, 115 312
Cross *v.* Clement, 70 Maine, 502 82
Crumley *v.* Watauga Water Co., 99 Tenn., 420 526
Cummings *v.* Everett, 82 Maine, 264 290, 429
Cundy *v.* Lindsay, L. R., 3 App. Cas., 459 142
Cushman *v.* Smith, 34 Maine, 247 531
Cutts *v.* Gordon, 13 Maine, 478 481
13 Cyc., 677 169

Daland *v.* Williams, 101 Mass., 571 573 334
Daly *v.* Children's Home, 113 Maine, 526, 528 330
Dana *v.* Smith, 114 Maine, 262 198
Danforth *v.* Bangor, 85 Maine, 423 406
Dartnell *v.* Bidwell, 115 Maine, 227 523
Dascomb *v.* Marston, 80 Maine, 223, 230 469
Davis *v.* Starrett, 97 Maine, 568, 575 5
———*v.* Central Cong. Society, 129 Mass., 367 43
———*v.* Stinson, 53 Maine, 493 101
Deane *v.* B. E. Ry., 217 Mass., 495 459
Debus *v.* Yates, 193 F., 427 99
DeGrau *v.* Wilson, 17 Fed., 698, 701 325
DeKoven *v.* Alsop, 205 Ill., (1903) 309, 314, 315 333
Deming *v.* Houlton, 64 Maine, 254 262 75
Denis *v.* St. Ry. Co., 104 Maine, 39 458
Dennis *v.* Packing, 113 Maine, 159 70
Derr *v.* R. R. Co., 163 Wis., 234 463
Dexter *v.* Blackden, 93 Maine, 473 343
Dickson *v.* Bubb, 88 N. J. L., 513, 515 181
Dilson *v.* Randall, 33 Maine, 202 142
Dinsmore *v.* Abbott, 89 Maine, 373 124
Diskon *v.* Bubb, 88 N. J. L., 513, 515 176
Doane *v.* Freeman, 45 Maine, 113 101
Dodge *v.* Adams, 19 Pick., 429 204
Doherty *v.* Grady, 105 Maine, 36 15
Dolliver *v.* Fire Ins. Co., 111 Maine, 275 475
Dolloff *v.* Ins. Co., 82 Maine, 266 206
Donworth *v.* Sawyer, 94 Maine, 242 111
Doylestown Ag. Co. *v.* Bracket, Shaw & Lunt Co., 109 Maine, 301 70
Duchemin *v.* Springfield St. Ry. Co., 186 Mass., 353 166
Dudley *v.* Northampton St. Ry., 202 Mass., 443 459
Dunn *v.* Motor Co., 92 Maine, 165 368
Duprey's Case, 219 Mass., 189, 193, 194 178
Duryee *v.* Hale, 31 Conn., 217 454

Eaton *v.* Manter, 114 Maine, 260 411
———*v.* Provident Ass'n, 89 Maine, 58 478
Edmunds, et als. *v.* Merchants Despatch Transportation Co., 135 Mass., 283 140
Ela *v.* Ela, 84 Maine, 423 186
Ela *v.* Edwards, 13 Allen, 48 493
Elie *v.* L. A. & W. St. Ry., 112 Maine, 178 197
2 Elliott Roads and Streets, 3rd. ed., Sec. 1115 463
Ellis *v.* Jameson, 17 Maine, 235 480
Emery *v.* Prescott, 54 Maine, 389 58
———*v.* Seavey, 148 Mass., 566-569 141
Emory *v.* Hazard Powder Co., 53 Am. Rep., 730 241
8 Enc. Ev. P., 38 20
Erskine *v.* Sawyer, 96 Maine, 57 111
Eubank *v.* City of Richmond, 226 U. S., 137 275
Eugley *v.* Sproul, 115 Maine, 463, 366 266
Executors of Wintermute *v.* Executors of Snyder, 3 N. J. Eq., 489 15

Fairbanks Appeal, 104 Maine, 333, 335 15, 102
Fales *v.* Hemenway, 64 Maine, 373 218
Fall *v.* Fall, 107 Maine, 539 54
Farnum's Appeal, 107 Maine, 488 186
Farr *v.* Valentine, 38 App. Cas. (D. C.), 413 Ann. Cas. 1913, Chap. 821 417
Feeley *v.* Melrose, 205 Mass., 329 459
Ferguson *v.* State, 178 Ind., 569, 99 N. E., 806 106
Ferguson *v.* Carrington, 9 B. & Cr., 59 352
Fessenden, Applt., 77 Maine, 98, 99 311
Fibre Co. *v.* Electric Co., 95 Maine, 318 160
Fierro's Case, 223 Mass., 378 441
Finnegan *v.* Winslow Skate Co., 189 Mass., 580, 582 189
Fish *v.* Baker, 74 Maine, 107 368
Fisher *v.* Sawyer, 32 Maine, 28 151
Fitch *v.* Sidelinger, 96 Maine, 70 222
Fitzgerald *v.* Calvin, 110 Mass., 153 144
Fitzjames *v.* Boyd, 123 Md., 497, 91 Atl., 547 (1914) 126
Flaherty *v.* Butte Electric Ry. Co., 115 Pac. Rep., 40 242
Fletcher *v.* Tuttle, 97 Maine, 491 54
———*v.* Lowell, 15 Gray, 103 387
Fleming *v.* Paper Co., 93 Maine, 110, 113 329
Follis *v.* U. S. Mut. Acc. Ass'n, 94 Iowa, 435 422
Ford *v.* Ford, 143 Mass., 577 441
Foss *v.* Haynes, 31 Maine, 89 279
Foster *v.* Old Colony St. Ry., 182 Mass., 378 34
———*v.* Sebago Imp. Co., 100 Maine, 196 159
Foster *v.* White, 86 Ala., 467, 6 So., 88 411
Fowle *v.* Robbins, 12 Mass., 498 60
Fox *v.* Waterloo Nat. Bank, 126 Iowa, 481 441
Frank *v.* Mallett, 92 Maine, 79 30
———*v.* Mangum, 237 U. S., 309-326 339
Frisbee *v.* Frisbee, 86 Maine, 444 267, 470
Frye *v.* Gragg, 35 Maine, 29, 32 330
Furbish, Petr., *v.* County Commissioners, 93 Maine, 117 531

Garcelon *v.* Commercial Travelers Assn., 195 Mass., 531 419
Gary *v.* Graham, 112 Maine, 452, 454, 455 87
Gas Light Co. *v.* Colliday, 25 Md., 1 526
Georgia F. & A. Ry. Co. *v.* Blish Milling Co., 241 U. S., 190 484
Gerkins *v.* Brown & Sehler Co., 177 Mich., 45, 48 L. R. A., N. S., 224 222

Gibbons *v.* Mahon, 136 U. S., 549, 559 332, 394
Gifford *v.* Thompson, 115 Mass., 478, 480 334
Gilkey *v.* Paine, 80 Maine, 319 334, 394
Gill *v.* Middleton, 105 Mass., 477 127
——*v.* Lyon, 1 John Ch., 447 215
Gilman *v.* B. & M. R. R. Co., 186 Mass., 454 34
————*v.* Com. Ins. Co., 112 Maine, 528 475
Gilmore *v.* Ross, 72 Maine, 194 189
————*v.* Bradford, 82 Maine, 547 353
Glass *v.* Fraternal Acc. Ass'n, 112 Fed., 495 422
Glynn *v.* Glynn, 94 Maine, 465, 469, 471 204
Goddard *v.* Rawson, 130 Mass., 97 119
Gooding *v.* Insurance Co., 110 Maine, 69 51
Goodrich *v.* Waterville, 88 Maine, 39 299, 387
Goodwin *v.* Hersom, 65 Maine, 223 65
————*v.* Prime, 92 Maine, 355 222
————*v.* Gardiner, 84 Maine, 478 546
Gordon Ware Savings Bank, 115 Mass., 588-591 267
————*v.* Parmalee, 2 Allen, 212 351
——— *v.* Stewart, 96 N. W., 624 442
Gould *v.* Elder, 219 Mass., 396 459
Gower, Applt., 113 Maine, 156 398
Graffam *v.* Cobb, 98 Maine, 200 222
Grant *v.* Duane, 9 Johns. 591 267
Great N rthern Mfg. Co. *v.* Brown, 113 Maine, 51 191
Green *v.* Bissell, 79 Conn. (1907), 547, 551 333
——*v.* Smith, 17 R. I. (1890), 28, 30 333
2 Greenleaf Ev., Sec. 85 144
————————, 16 Ed., Vol. 1, Sec. 15 440
Griggs *v.* Day, 32 American St. Rep., 704 511
Grotten *v.* Flidden, 84 Maine, 589 144
Guth Piano Co. *v.* Adams, 114 Maine, 390 99

Haley *v.* Palmer, 107 Maine, 311 360
Hall *v.* Hall, 140 Mass., 267 15
——*v.* Hall, 106 Maine, 392 170
——*v.* Geiger Jones Co., 242 U. S., 539 275
Hall *v.* Otis, 71 Maine, 326, 330 309
—— *v.* Cressey, 92 Maine, 514, 516 441
—— *v.* Ripley, 119 Mass., 135 462
Hamilton *v.* Davis, et al., 90 N. Y. S., 370 480
Hamlin *v.* Biddeford, 85 Maine, 308 21
Hannon *v.* Boston El. Ry. Co., 182 Mass., 425 167
Hanscom *v.* Ins. Co., 90 Maine, 333 433
Hardman *v.* Booth, 1 H. & C., 803 142
Harris *v.* Seal, 23 Maine, 437 218
—— *v.* Central R. R. Co., 3 S. E., 35 243
—— *v.* Sessler (Rex.), 3 S. W., 316 480
Harrison *v.* Dolan, 172 Mass., 395, 396 141
Hart *v.* Northern Pac. Ry. Co., 196 Fed., 180, 185 263
Hatch *v.* Bagley, 12 Cush., 27 119
—— *v.* Caine, 86 Maine, 282, 284 310
—— *v.* Consumer's Company, 17 Idaho, 204 526
Hathorn *v.* Stinson, 17 Maine, 123 159
Haug *v.* Haug (Ill.), 61 N. E., 1053 480
Hawkins *v.* Dannenbury Co., 234 F., 752 99
Haworth *v.* Norris, 28 Fla., 763 287
Hayden *v.* M. C. R. R. Co., 117 Maine, 560 487
Hayford *v.* Wentworth, 97 Maine, 347 513
Hazeltine *v.* Miller, 44 Maine, 177 478

Heath *v.* Stoddard, 91 Maine, 499 295, 373
Heaton *v.* Hodges, 14 Maine, 66 406
Hemming *v.* New Haven, 82 Conn., 661 461
Hendrick *v.* Maryland, 235 U. S., 611 275
Heron *v.* Webber, 103 Maine, 178, 182 204
Herrick's Case, 217 Mass., 111, 112 178
Heselton *v.* Seavey, 16 Maine, 212 551
Hewins *v.* Cargill, 67 Maine, 554 481
Hibbard *v.* Stein, 45 Or., 507, 78 Pac., 664 374
Hickey *v.* Veazie, 59 Maine, 284 218
Higgins *v.* Boston, 148 Mass., 484 459
Hignett *v.* Norridgewock, 105 Maine, 189 546
Hill *v.* Coburn, 105 Maine, 437, 446, 447 330
—— *v.* Murphy, 212 Mass., 1, 4 453
—— *v.* Foss, 108 Maine, 472 478
—— *v.* Tucker, 13 How., 458 493
Hinckley *v.* Penobscot, 42 Maine, 89 463
Hines *v.* Boston El. Rc. Co., 198 Mass., 346 167
Hitchcock *v.* Fortier, 65 Ill., 239, 244 268
Hoadley *v.* Savings Bank of Danburn, Conn., L. R. A., 44, 32 503
Holbrook *v.* Connor, 60 Maine, 578 351
———— *v.* Palmer, 106 Maine, 17 360
Holden *v.* McGillicuddy, 215 Mass., 563 459
Holland *v.* Boston, 213 Mass., 560 462
Holmes *v.* Drew, 151 Mass., 578 42
Holnback *v.* Wilson, 159 Ill., 148 442
Holt *v.* Skofield, 6 D. & E. 59
Horton *v.* Wright, 113 Maine, 439 143, 539
Howard *v.* Folger, 15 Maine, 447 368
Howe *v.* Watson, 179 Mass., 30; 36 Cyc., 673 279
—— *v.* Benedict, 142 N. W. (Mich.) 768 279
Hubbard *v.* Greeley, 84 Maine, 340 287
Hudson *v.* Coe, 79 Maine, 83, 93 330
Hughes *v.* Edwards, 9 Wheat., 389 470
Hunt *v.* U. S. Acc. Ass'n, 146 Mich., 521; 10 Ann. Cases, 451 422
Hunter *v.* City of Pittsburg, 207 U. S., 161 337
Hurd *v.* Chase, 100 Maine, 561 215
Hurley *v.* Farnsworth, 117 Maine; 102 Atl., 563 216
Hurtado *v.* California, 110 U. S., 516 338
Hussey *v.* Fisher, 94 Maine, 301 215
Huxen's Case, 226 Mass., 292, 295 181
Hyde *v.* McCreery, 130 N. Y. Supp., 269 463

Indianapolis, etc., R. R. Co. *v.* Horst, 93 U. S., 291, 298. 263
In re Kuse, 234 F., 470 99
—— Marriner, 220 F., 542 (Dist. of Maine) 99
—— Farmers' Co-Operative Co., 202 F., 1005 99
—— Chappell, 113 F., 545 99
Insurance Co. *v.* Young's Administrator, 23 Wall., 85 520

Jacobs *v.* Prescott, 102 Maine, 63 441
———— *v.* Pollard, 10 Cush., 287 451
James A. Bannister Co. *v.* Kriger, 84 N. J. L., 30, 32 181
Jashnig *v.* Ferguson Co., 197 Mass., 364 462
Jay *v.* Carthage, 48 Maine, 353-358 75

John Deere Plow Co. *v.* Edgar Farmer Store Co., (Wis.) 143 N. W., 194 99
Johnson *v.* Railroad Co., 111 Maine, 263 37
——— *v.* Powers, 139 U. S., 156 493
——— *v.* Hallend, 211 Mass., 363 503
Jones *v.* Oxford, 45 Maine, 428 133
11 ——— Mort., Sec. 1055 267
11 ——— ———., Sec. 1077 268
1 ——— ———., Secs. 409-410 268
——— *v.* Webster Woolen Co., 85 Maine, 210 328
——— *v.* Evans, L. R. 1 Ch. Div. (1918) 23, 32 333
——— *v.* Brown, 34 N. H., 439 473
Joslin *v.* Goddard, 187 Mass., 165 286
Joy *v.* York, 99 Maine, 237 545
Jozsa *v.* Moroney, 125 La., 813, 19 Ann. Cas., 1913 417

Kaherl *v.* Rockport, 87 Maine, 527 545
Kahn *v.* Bowden (Ark.), 96 S. W., 126 480
Kansas City Ry. Co. *v.* Carll, 227 U. S., 369 498
Kebbee *v.* John Deere Plow Co., 190 F., 1019 99
Keene *v.* N. E. Acc. Ass'n, 161 Mass., 149 419
Kennebec Purchase *v.* Tiffany, Greenleaf, 219 406
2 Kent, 616 30
——— *v.* Bougartz, 15 R. I., 72 417
—— Com., Vol. 11, pages 212-214 442
Kidder *v.* Dunstable, 11 Gray, 342 462
Kimball *v.* Page, 96 Maine, 487 57
Kimball *v.* Dresser, 98 Maine, 519 99
——— *v.* Crocker, 53 Maine, 262 271 359
——— *v.* Davis, 117 Maine, 187 462
King *v.* Walker, 87 Maine, 550 169
Kohn *v.* Washer 64 Tex., 131, 53 Am. Rep. 745 374
Kovnosky *v.* Quillette, 226 Mass., 474 459
Kritzer *v.* Sweet (Mich.), 24 N. W., 764 480

Labatt on Master and Servant, 2nd Ed., Sec. 1141 (235) 91
Lane *v.* Borland, 14 Maine, 81 99
—— *v.* Phillips, 69 Tex., 240 442
Lang *v.* Merwin, 99 Maine, 486 104
Larrabee *v.* Lambert, 32 Maine, 97 268
Lawrence *v.* Doe, etc., 144 Ala., 524, 527 329
Lawton *v.* Sager, 11 Barb., 349 287
Leland *v.* Hayden, 102 Mass., 542 334
Lesieur *v.* Rumford, 113 Maine 317 300
Levesque *v.* Dumont, 116 Maine, 25 263
License Cases, 5 Howard, 504 272
Lidgerling *v.* Zignego, 77 Minn., 421 540
Lindsay *v.* Cundy, 1 Q. B. Div., 348 142
Little *v.* Megquier, 2 Maine, 176, 178 329
Lizotte *v.* Nashua Mfg. Co., (N. H.), 100 Atl., 757, 758, 181
Lloyd *v.* Washington Gas Light Co., 1 Mackey, 331 526
Lockridge *v.* Minneapolis R. R., 161 Iowa, 74 463
Lockwood Co. *v.* Lawrence, 77 Maine, 229 159
Lomax *v.* Bird, 1 Vt., 182 267
Lombard Water Wheel Co. *v.* G. N. P. Co., 101 Maine, 114 378
Long *v.* Athol, 196 Mass., 503, 504 351
Lord *v.* M. C. R. R. Co., 105 Maine, 258 145
Lothrop *v.* Page, 26 Maine, 119 82
Love *v.* St. Ry., 213 Mass., 137 459

Low *v.* Bartlett, 8 Allen, 259 493
—— *v.* Windham, 75 Maine, 113 545
Low's Case, 4 Maine, 439 82
Lyon *v.* Lyon, 88 Maine, 395 441

Maine M. M. Ins. Co. *v.* Hodgkins, 66 Maine, 109 191
108 Maine, page 552 299
Manice *v.* Manice, 43 N. Y., 303 360
Marcotte *v.* Lewiston, 94 Maine, 233 545
Marden *v.* St. Ry. Co., 100 Maine, 41 457
Marshall *v.* Berry, 13 Allen, 43 473
Martin *v.* Bryant, 108 Maine, 256 290
—— *v.* M. C. R. R. Co., 83 Maine, 100, 103 329
Massalette *v.* Fitzroy, 228 Mass., 487 124
May *v.* Labbe, 112 Maine, 209, 210 327
Mayberry *v.* Sivey, 18 Kan., 291 125
—— *v.* Morse, 39 Maine, 107 218
—— *v.* No. Pac. Ry. Co., 100 Minn., 79 454
McCann *v.* Twitchell, 116 Maine, 490 189, 370
McCarthy *v.* Leeds, 115 Maine, 134 459
—— *v.* ——, 116 Maine, 275 459
—— *v.* Portland, 67 Maine, 167 463
McClain *v.* Caribou National Bank, 100 Maine, 437 41, 197
McCoy *v.* N. W. Mut. Relief Assn., 92 Wis., 557 521
McCullough *v.* Eagle Ins. Co., 1 Pick., 278 519
McDonough *v.* Blossom, 109 Maine, 141, 145 222
McIntire, et ux. *v.* Eastern R. R., 58 N. H., 137 242
McKay, Admr., *v.* N. E. Dredging Co., 92 Maine, 454 62
McKenzie *v.* Hospital Association, 106 Maine, 385 185
McKinnon *v.* Railway, 116 Maine, 289 408
McLean *v.* Meek, 18 How., 16 493
McMinn *v.* N. E. Tel. Co., 113 Maine, 519 196
McNamara *v.* Carr, 84 Maine, 302-3 30
McPherson *v.* Hayward, 81 Maine, 329, 337 266
Means *v.* Hoar, 110 Maine, 409 82
Melchey *v.* Meth. Relig. Soc., 125 Mass., 487 453
Merrill *v.* Odiorne, 113 Maine, 424 370
Merrimac R. Savings Bank *v.* City of Lowell, 26 N. E., 97 526
Merryweather *v.* Nixan, 8 T. R., 186 451
Miley's Case, 219 Mass., 136, 138 178
Miller *v.* Bayer, 94 Wis., 123; 68 N. W., 869 144
Mills *v.* Britton, 64 Conn. (1894), 4, 12 333
Minnesota Rate Cases, 320 U. S., 352 273
Minot *v.* Paine, 99 Mass. (1868), 101 333
Missouri, K. & T. Co. *v.* Ward, 244 U. S., 383 487
Mitchell *v.* Gooch, 60 Maine, 110, 113 87
Moffat *v.* Bateman, L. R. 3 P. C., 115 124
—— *v.* Kenney, 174 Mass., 311 197
Moore *v.* Stevenson, 27 Conn., 14, 28 7
—— *v.* Stetson, 96 Maine, 203 42
—— *v.* Beasom, 44 N. H., 215 267
—— *v.* M. C. R. R. Co., 106 Maine, 297 462
—— *v.* Hart, 171 Ky., 725 463

Morse *v.* Machias Co., 42 Maine, 119 280
——— *v.* Williams, 62 Maine, 445, 446 329
——— *v.* Hayden, 82 Maine, 227 361
——— *v.* Montville, 115 Maine, 454, 458 387
Morton *v.* Southgate, 28 Maine, 41 361
——— *v.* Morton, 62 Neb., 420 441
Motor Car Co. *v.* Hamilton, 113 Maine, 63 99
Mowry *v.* Henry, 86 Cal., 47 287
Mullen *v.* Insurance Co., 58 Vt., 113 209
Munro *v.* Barton, 98 Maine, 250 470
Murphy *v.* North Jersey St. Ry. Co., 81 N. J. L., 706; 80 Atl., 331 34
——— *v.* Utah, etc., Co., 114 Maine, 184, 185 178
Murphy's Case, 226 Mass., 60, 62, 63 176

Nares' Executors *v.* Van Shaick, 20 Wend., 565 359
Nash *v.* Drisco, 51 Maine, 417 110
National Fibre Board Co. *v.* Electric Co., 95 Maine, 318 253
Neal *v.* Williams, 18 Maine, 391 142
——— *v.* Randall, 98 Maine, 69, 77 189, 462
Nelson *v.* Butterfield, 21 Maine, 220 159
——— *v.* Burnham-Morrill Co., 114 Maine, 213 196
Nelson's Case, 217 Mass., 467, 470 440
New Memphis Gas Light Co. Cases, 105 Tenn., 268 510
Newman's Case, 222 Mass., 563 441
Newport Trust Co. *v.* Van Rensalaer, 32 R. I., (1911), 231, 237 333
Nichols *v.* Ashton, 155 Mass., 205 99
Nichols *v.* Nichols, et al., 61 Vt., 430 473
Nickerson *v.* Wheeler, 118 Mass., 295 451
Noonan *v.* Bradley, 9 Wall., 394 493
North Yarmouth *v.* Cumberland, 6 Maine, 21 218
Northern Pac. Ry. Co. *v.* Mores, 123 U. S., 710, 721 263
——— ——— — ——— *v.* Wall, 241 U. S., 97 486
Northrup *v.* Hale, 76 Maine, 306 136
Noyes *v.* Gooding, 104 Maine, 453 111
——— *v.* Loring, 55 Maine, 408, 411 352
Nugent *v.* Smith, 85 Maine, 433 279

O'Brien *v.* Hudner, 182 Mass., 381 462
——— *v.* Gilchrist, 34 Maine, 554 487
Ohio *v.* Dollison, 194 U. S., 445 337
Ordinary of N. J. *v.* Thatcher, 12 Vroom, 403 287
Osgood *v.* U. S. Acc. Co., 76 N. H., 475 421

Palmer *v.* Penn. Co., 111 N. Y., 488 33
Palmer's Appeal, 110 Maine, 441 398
Panasuk's Case, 217 Mass., 589, 592 177
Parsons *v.* Winchell, 5 Cush. 592 453
Patnode *v.* Foote, 153 N. Y. App. Div., 494 125
Patten *v.* Bartlett, 111 Maine, 409 42
——— *v.* Field, 108 Maine, 302 351
Patterson *v.* Creighton, 42 Maine, 378 401
Paul *v.* Frye, 80 Maine, 26 280
Payne *v.* Springfield St. Ry. Co., 203 Mass., 425 166
Peabody *v.* Acc. Ass'n, 89 Maine, 96 435

Pearson *v.* Skelton, 1 Mees. and Wels, 504 451
Pease *v.* Montgomery, 111 Maine, 582 450
——— *v.* Gardner, 113 Maine, 264 450
People *v.* Friedman, 205 N. Y., 55, 45 L. R. A. N. S. 45 231
——— *v.* Lawrence, 145 Cal., 148, 68 L. R. A., 193 232
People's National Bank *v.* Nickerson, 108 Maine, 241 191, 193
Perkins, Admr., *v.* Galloway, 194 Ala., 265 (1915), 69 So., 875 127
——— *v.* Stockwell, 131 Mass., 529, 530 169
Perry *v.* Somerby, 57 Maine, 557 86
——— *v.* Buswell, 113 Maine, 399 110, 199, 328, 406
Phelps *v.* Sheldon, 13 Pick., 52 352
Philbrick *v.* Kendall, 111 Maine, 198 378
——— *v.* Railway, 107 Maine, 429 408
Pigeon *v.* Lane, 80 Conn., 237 126
Pigeon's Case, 216 Mass., 51, 52 178
Piper *v.* Mercantile Mut. Acc. Ass'n, 161 Mass., 589 421
Plaisted *v.* Hoar, 45 Maine, 380, 384 87
Platt *v.* Squire, 12 Met., 494, 501 267
Plummer *v.* Dill, 156 Mass., 426 197
Poland *v.* Loud, 113 Maine, 260 215
Pollard *v.* Vinton, 105 U. S., 8 487
Pomeroy on Remedies, Sec. 452 241
——— *v.* Mills, 3 Vt., 279 538
Pottle *v.* Ins. Co., 108 Maine, 401 206
Prescott *v.* Winthrop, 101 Maine, 236 30
——— *v.* Morse, 64 Maine, 422 311
Proprietors, etc., *v.* Laboree, 2 Maine, 275, 283 329
——— of Kennebec Purchase *v.* Springer, 4 Mass., 416, 418 330
Pulitzer *v.* Livingston, 89 Maine, 359, 365, 372 359
Putnam *v.* White, 76 Maine, 55 151
Railway Co. *v.* McVay, 98 Ind., 391, S. C. 49 Am. Rep., 770 295
Raleigh & G. R. Co. *v.* Bradshaw, 39 S. E. Rep., 555 243
Rand *v.* Hubbell, 115 Mass., 461, 475 333
Rangeley *v.* Snowman, 115 Maine, 412, 416 329
Raymond *v.* Railroad Co., 100 Maine, 529 123
Re Heaton's Estate, 89 Vt., 561-2 333
Reed *v.* Reed, 113 Maine, 522 284, 579
—— *v.* ——, 115 Maine, 441 295, 579
—— *v.* ——, 117 Maine, 281 586
Reese *v.* Yale, etc., Co., 1 Conn. Comp. Dec., 154 177
Reynolds *v.* Stockton, 140 U. S., 254 493
Rhodes *v.* School District, 30 Maine, 110 286
Rice *v.* Barrett, 116 Mass., 312 480
Richards *v.* Enfield, 13 Gray, 344 459
Richardson *v.* Richardson, 75 Maine, (1884), 570, 574 333, 395
Riley *v.* R. I. Co., 29 R. I., 143 33
Ripley *v.* Berry, 5 Greenleaf, 24 406
Robbins *v.* Railway Co., 100 Maine, 496, 506 442
Roberts *v.* Richards, 84 Maine, 1, 9, 10 330
——— *v.* Whaley, 192 Mich., 133 442
——— *v.* Littlefield, 48 Maine, 61 470
Robichaud *v.* Maheux, 104 Maine, 524 145
Roche *v.* Smith, 176 Mass., 595 503
Rogers *v.* Rogers, 11 R. I., 38 361
——— *v.* P. & B. St. Ry., 100 Maine, 86 539
Rolli *v.* Converse, 227 Mass., 162 459
Rollins *v.* Blackden, 112 Maine, 459, 464, 465 330
——— *v.* Cen. Me. Power Co., 112 Maine, 175 426
Ross *v.* Gilmore, 72 Maine, 194 462

Ross *v.* M. C. R. R. Co., 112 Maine, 63 486
Rounds, Petr., *v.* Smart, 71 Maine, 380 114
Rovinsky *v.* Ins. Co., 100 Maine, 112 206
Royal Ins. Co. *v.* Nelke, 117 Maine, 366 568
11 Ruling Case Law, Par. 39, Page 857 257
Russell *v.* M. C. R. R., 100 Maine, 406 197
——— *v.* Mutual Fire Ins. Co., 107 Maine, 362 520
Rutherford *v.* Mothershed, 42 Tex. Civ. Appls., 360 442

St. Louis Iron Mountain & So. Ry. Co. *v.* Starbird, 243 U. S., 593 486
St. Louis & C. Ry. Co. *v.* Citizens Bank, 112 S. W., 154 488
Salter *v.* Greenwood, 112 Maine, 548 70
Sands *v.* Sands, 74 Maine, 239 110
Sarouche *v.* Despeaux, 90 Maine, 178 29
Saunders *v.* Weston, 74 Maine, 85 493
Savage *v.* Stevens, 126 Mass., 207 351
Sawyer *v.* Naples, 86 Maine, 453 545
Schouler's Dom. Rel. Sec.. 279 442
Schwartz *v.* Drinkwater, 70 Maine, 409 222
Scottish Com. Ins. Co. *v.* Plummer, 70 Maine, 540-544 119
Selway *v.* Fogg, 5 M. & W., 83 352
Septimo's Case, 219 Mass., 430, 434 178
Sharp *v.* Mayor, etc., of N. Y., 40 Barb., 256 352
Shaw *v.* Thielbar, 82 N. J. Law, 23 462
Shay *v.* Thompson, 59 Wis., 54; 18 N. W., 473 144
Sheeby *v.* Scott, 128 Iowa, 551, 553 442
Shepherd *v.* Rand, 48 Maine, 244 82
——— *v.* Adams, 32 Maine, 63 215
Shimoda *v.* Bundy, 24 Calif. App., 677 463
Shurtleff *v.* Wiscasset, 74 Maine, 130 539
Siegrist *v.* Arnot, 10 Mo. App., 197 12
Simond's Case, 117 Maine, 175, 177 444
Slattery *v.* Lawrence Ice Co., 190 Mass., 79 462
Sleeper *v.* Ins. Co., 61 Maine, 272 478
Sligh *v.* Kirkwood, 237 U. S., 58 273
Small *v.* Thompson, 92 Maine, 539, 544 311
——— *v.* Traveller's Protec. Ass'n, 118 Ga., 900 422
Smith *v.* Ladd, 41 Maine, 316 169
——— *v.* Chase, 71 Maine, 164 238
——— *v.* Kelley, 27 Maine, 237, 241 266
——— *v.* Sawyer. 108 Maine, 485, 487 327
——— *v.* Booth Bros. etc., Co., 112 Maine, 297, 306 327
——— *v.* Dana, 77 Conn. (1905), 543, 550 333
——— *v.* Pref. Mut. Acc. Ass'n, 104 Mich., 684 422
——— *v.* Hill, 45 Vt., 91 480
——— *v.* Madden, 78 Fed., 833 493
——— *v.* Guild, 34 Maine, 443 493
——— *v.* Howard, 86 Maine, 203 493
——— *v.* Ins. Co., 85 Maine, 348 577
Snell *v.* Snow, 13 Met., 278 60
Somerset Railway *v.* Pierce, 98 Maine, 528 362
Soon Hing *v.* Crowley, 113 U. S., 709 20
Southern Ry. *v.* Vaughan, 118 Va., 692 463
Southern Ry. *v.* Prescott, 240 U. S., 632, 637, 640 324, 486
——— *v.* Vaughan, 118 Va., 692 463

Spaulding *v.* Ins. Co., 61 Maine, 329 51
Spear *v.* Westbrook, 104 Maine, 496 545
Speer *v.* Bishop, 24 Ohio State, 598 479
Spoffard *v.* Harlow, 3 Allen, 176 462
Sposedo *v.* Merriman, 111 Maine, 530 280
Sprague *v.* Wheatland, 3 Met., 416 87
Stacy *v.* Thrasher, 6 How., 44 493
Stanwood *v.* Clancy, 106 Maine, 72 197
State *v.* Houlehan, 109 Maine, 281, 284 71
—— *v.* Bangor, 38 Maine, 592 71
—— *v.* Carver, 49 Maine, 588 71
—— *v.* Murphy, 72 Maine, 433 71
—— *v.* Snow, 74 Maine, 354 71
—— *v.* McCormick, 84 Maine, 566 72
—— *v.* Albanes, 109 Maine, 199 73, 227
—— *v.* Mulkerrin, 112 Maine, 544 73
—— *v.* McTear, 129 Tenn., 535, 167 S. W., 121 107
—— *v.* Reed, 67 Maine, 127 114
—— *v.* Clough, 49 Maine, 573 114
—— *v.* Bartlett, 55 Maine, 200 115
—— *v.* Acheson, 91 Maine, 240 116, 346
—— *v.* Googin, 117 Maine, 102 164
——, ex rel. Crookston Lumber Co. *v.* District Court, etc., 132 Minn., 251 177
—— *v.* Bartley, 106 Maine, 505, 506 189
—— *v.* Kingsbury, 58 Maine, 238, 242 189
—— *v.* Fortier, 106 Maine, 382, 384 189
—— *v.* Lambert, 97 Maine, 57 227
—— *v.* Grover, 96 Maine, 363 228
—— *v.* Gilman, 51 Maine, 206, 225 230
State *v.* Benner, 64 Maine, 267 230
—— *v.* Smith, 32 Maine, 369 232
—— *v.* ——, 33 Maine, 48 232
—— *v.* Roach, 74 Maine, 562, 563 235
—— *v.* McDonough, 84 Maine, 488, 489 235
—— *v.* Godfrey, 24 Maine, 232, 234, 235 235
—— *v.* Turnbull, 78 Maine, 392, 395, 396 235
—— *v.* Damon, 97 Maine, 323, 325 235
—— *v.* Intoxicating Liquors, 80 Maine, 91, 93 235
—— *v.* Whalen, 85 Maine, 469, 472 235
—— *v.* Intoxicating Liquors, 110 Maine, 260, 263, 264 235
—— *v.* Haskell, 76 Maine, 399 258
—— *v.* Kimball, 50 Maine, 400 259
—— *v.* Frye, 26 Maine, 316 259
—— *v.* Brown, 75 Maine, 456 321
—— *v.* Bennett, 117 Maine, 113 346
—— of Washington, Respondent, *v.* Felix Crane, Applt., 88 Wash., 210, 1915 347
—— *v.* Moran, 40 Maine, 129 364
—— *v.* Learned, 47 Maine, 426 364
—— *v.* Mace, 76 Maine, 64 364
—— *v.* Doran, 99 Maine, 391 364
—— *v.* Spencer, 38 Maine, 32 365
—— *v.* Pacific Brewing Co., 58 Pacific, 584, 47 L. R. A., 208 411
—— *v.* Middlesex Banking Co., 87 Conn., 483 413
—— *v.* Chandler, 79 Maine, 174 481
—— *v.* Intoxicating Liquors, 73 Maine, 278 484
—— *v.* Lashua, 79 Maine, 540, 543 579
Steam Mill Co. *v.* Westervelt, 67 Maine, 446, 449 352
Stevens *v.* Gordon, 87 Maine, 564, 566, 567 327
Stevenson *v.* Sherwood, 22 Ill., 238; 74 Am. Dec., 140 222

Stinson *v.* Gardiner, 42 Maine, 248 463
Stoehlke *v.* Hahn (Ill.), 42 N. E., 150 521
Stone *v.* Exp. Co., 116 Maine, 237, 240 189
—— *v.* Kellogg, 165 Ill., 192; 56 Am. St. Rep., 240 411
Storer *v.* Gowen, 18 Maine, 174 124
—— *v.* Taber, 83 Maine, 387 498
Story, Conflict, of Laws, Sec. 522 493
Stovall *v.* Corey Highlands Lands Co., 189 Ala., 516 463
Stowell *v.* Goodenow, 31 Maine, 538, 539 189
Strout *v.* Water Commissioners, 90 Conn., 412 461
Sullivan's Case, 218 Mass., 141, 143 177
Sweeney *v.* Old Colony R. R., 10 Allen, 368 42
Sweetapple *v.* Jesse, 5 B. & Ad., 27 60
Swineburn, Petitioner, 16 R. I., 208, 212 15

Talbot, et al. *v.* Whipple, 14 Allen, 177 550
Tayloe *v.* Ins. Co., 9 How., 390 520
Temple *v.* Phelps, 193 Mass., 297 119
Thatcher *v.* Thatcher, 117 Maine, 331 394
Thayer *v.* Thayer, 14 Vermont, 107 473
The Willie D. Sandoval, 92 Fed., 286 488
2 Thomp. Neg., 992-3 91
Thompson *v.* Ins. Co., 75 Maine, 55, 61 351
Thurston *v.* McMillan, 108 Maine, 67, 68 327
Tilton *v.* Hunter, 24 Maine, 29, 33, 34 329
Timson *v.* Moulton, 3 Cush., 269 119
Tinkham *v.* Arnold, 3 Maine, 12 159
Tinoley *v.* Anderson, 171 U. S., 101 339
Titcomb *v.* Wood, 38 Maine, 561 142
Toothaker *v.* Conant, 91 Maine, 438 6
———— *v.* Greer, 92 Maine, 546 453
Tourtellott *v.* Pollard, 74 Maine, 418 142
Towne *v.* Eisner, 245 U. S. (1918), 418, 426 333
Travellers Ins. Co. *v.* Jones, 80 Ga., 541 422
Traver, et al. *v.* Schell, et al.. 20 N. Y., 89 361
Trott *v.* Irish, 1 Allen, 481 119
True *v.* Plumley, 36 Maine, 466, 484 57
—— *v.* Haley, 24 Maine, 297, 298 267
Trundy *v.* Farrar, 32 Maine, 227 295
Tucker *v.* Bishop, 16 N. Y., 402, 406 360
Tukey *v.* Gerry, 63 Maine, 151, 153 353
Turner *v.* Hearst, 115 Cal., 394, 47 Pac., 129 8
——— *v.* Revere Water Co., 171 Mass., 329 526
Turton *v.* N. Y. Rec. Co., 144 N. Y., 144, 150 8
Tuttle *v.* Travellers Ins. Co., 134 Mass., 175 422
——— *v.* Davis, et al., 114 Maine, 109 470
Twiss *v.* George, 33 Mich., 253 279
Tyree *v.* Harrison, 100 Va., 540 417

Underwood *v.* North Wayne Scythe Co., 4 Maine, 291 159
Un. Mut. Fire Ins. Co. *v.* Keyser, 32 N. H., 313 521

Veazie *v.* Mayo, 45 Maine, 560 24
——— *v.* Parker, 72 Maine, 443 503
Vober's Vase, 224 Mass., 86 441

Viele *v.* Curtis, 116 Maine, 328; 101 Atl. Rep., 966 30, 178
Walker *v.* Savings Bank, 113 Maine, 353, 357 311
——— *v.* Metropolitan Ins. Co., 56 Maine, 371 519
Wallace *v.* Stevens, 64 Maine, 225 215
Ward *v.* Cobb, 148 Mass., 518 503
Warnekros *v.* Bowman, 43 L. R. A. (N. S.) 91 504
Warren *v.* Miller, 38 Maine, 108 287
111 Wash. Real Property, Sec. 1945 327
2 Washburn on Real Property, 25 538
———— —— Easements, 4th Ed. Page 11, 9 R. C. L., 739 540
Washington Gaslight Co. *v.* Lansdell, 172 U. S., 534, s. c., Law Ed. Bk. 43, Page 543 295
———— Ice Co. *v.* Webster, 62 Maine, 341 578
Watson *v.* French, 112 Maine, 371 539
Webb *v.* Steele, 13 N. H., 230 83
—— *v.* Gilman, 80 Maine, 177 145
Webber *v.* Stover, 62 Maine, 512-519 75
——— *v.* Proctor, 89 Maine, 404 111
Weeks *v.* Merrow, 40 Maine, 151, 152 204
West *v.* Jordan, 62 Maine, 484 82
—— *v.* Poor, 196 Mass., 183 127
Wharton's Crim. Pl. & Pr., 8 Ed. par. 243 258
Wheeler *v.* Newbald, 16 N. Y., 396 512
Whelan, Tr., *v.* Reilly, 5 W. Va., 356 360
Whippen *v.* Whippen, 147 Mass., 294 441
White *v.* Oakes, 88 Maine, 367 378
—— *v.* Manter, 109 Maine, 409 411
Whiting *v.* Sullivan, 7 Mass., 107 352
Whitney *v.* Gilman, 33 Maine, 273 243
Whitney *v.* Whitney, 10 Idaho, 633, 69 L. R. A., 572 287
Whittaker *v.* Sanford, 110 Maine, 77, 81 189
2 Wig. Ev., Sec. 1481 136
Wike Bros. *v.* Garner, 179 Ill., 257, 259 442
Wilberding *v.* Miller, 85 Ohio St., 609 (1913) 28, 54, 55 333
Willard *v.* Masonic Acc. Ass'n, 169 Mass., 288 422
Wilson *v.* Melvin, 13 Gray, 73 119
——— on Probate Practice, Edition of 1896, page 192 186
——— *v.* Lacroix, 111 Maine, 324 532
Wing *v.* Wing, 66 Maine, 52 58
Winkelman *v.* Chicago, 213 Ill., 360 531
Winslow *v.* Troy, 97 Maine, 130 453
Winthrop *v.* Fairbanks, 41 Maine, 307 169
Wipfler *v.* Wipfler, 153 Mich., 18 287
Withington *v.* Bradley, 111 Maine, 386 411
Witzler *v.* Collins, 70 Maine, 290 487
Wood *v.* Kelley, 30 Maine, 42 159
—— *v.* M. C. R. R. Co., 101 Maine, 469 462
—— *v.* Auburn, 87 Maine, 287 525
Woodbury *v.* Gardner, 77 Maine, 69 279
Woodcock *v.* Parker, 35 Maine, 138 82
Woodman *v.* Coolbroth, 7 Maine, 181 286
Woolen Co. *v.* Bass., 112 Maine, 483 314
Wooley *v.* Batte, 2 Car. & P., 417 451
Worcester *v.* Lord, 56 Maine, 265, 269 329
Words & Phrases, Vol. 6, page 56, 32 260
————————, Vol. 5, page 4173 499
Wormell *v.* Railroad Co., 79 Maine, 405 91

Wright *v.* Malden & Melrose R. R. Co., 4 Allen, 283, 290 189
——— *v.* Atlantic Works, 111 Mass., 136, 140 189
Wright *v.* Holmes, 100 Maine, 508 473
Young *v.* Railroad Co., 113 Maine, 113 37
Young's Case, 218 Mass., 346, 349 177
York & Cumberland R. R. Co. *v.* Clark, 45 Maine, 151, 154 221
—— *v.* Stewart, 110 Maine, 523 380
—— *v.* Athens, 99 Maine, 82 546

CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE

OSCAR U. SULLIVAN *vs.* DANIEL H. MCCAFFERTY.

Oxford. Opinion November 27, 1917.

Slander. Proof of malice. Punitive damages. General rule as to recovery of damages in action of slander. Rule as to necessity of allegation in order to recover special damages. General rule as to defendant making retraction and when the same may be offered in evidence in mitigation of damages. General rule to be applied on the question of whether defendant believed statements made by him to be true or otherwise. Scope of phrase "honest belief."

1. Where the defamatory words spoken impute the commission of a crime, and they are not justified by proof of their truth, or that they were spoken on a privileged occasion, the law in such case presumes that they were spoken maliciously. The malice so presumed is called malice in law, and is of itself sufficient to support that action. In such case the slanderous words are said to be actionable *per se*.
2. General damage, as applied to actions for libel and slander, as distinguished from special damage, means that damage which the law will presume must naturally, proximately and necessarily result to the plaintiff from the utterance of the slander, such as injury to the feelings and injury to the reputation of the plaintiff.
3. In an action of slander where the slanderous words accuse the plaintiff of the commission of a crime, he is entitled to recover such general damage as resulted to him from the slander, without special proof thereof, and irrespective of whether the defendant had an honest belief in the truth of the slanderous statements or not.
4. In an action of slander for accusing the plaintiff of the commission of a crime, a requested instruction which might be understood by the jury to mean that if the defendant had an honest belief in the truth of his slanderous statements concerning the plaintiff, then the plaintiff could recover only such damage as had

been actually proved, should not be given, for that would be an idea of the law of the case wholly erroneous. We think the requested instructions in the case at bar, if given as worded, might have been so understood by the jury, and for that reason the request as worded was properly refused.

5. The phrase "honest belief" as used in the requested instruction without addition or qualification, is not an adequate definition of a standard by which it is to be determined if the speaker of false and slanderous words, accusing another of a crime, was or was not actuated by malice in so doing.

6. Where, in an action of slander, it appears that the defendant falsely stated that the plaintiff had forged his name to a note, and the defendant sets up in defense that he made the statement in good faith and with an honest belief in its truth, mere belief on the part of the defendant in the truth of his false and slanderous statement is not alone sufficient, but it should be made to appear that his belief in the truth of the charge was based upon reasonable grounds for such a belief after the exercise of such means to verify its truth as would be taken by a man of ordinary prudence under like circumstances, and before making such an accusation.

7. Where in an action of slander the defendant seeks in mitigation of damages to establish an adequate retraction it should appear that it was fully, fairly and promptly made.

8. Where in an action of slander it appeared that the alleged retraction claimed by the defendant in mitigation of damages was a statement in a letter from him to the plaintiff written long after the suit was brought, and only four days before the case was in order for trial, and the court instructed the jury that a retraction to be of avail in mitigation of damages must be made within a reasonable time after the slander, or within a reasonable time after the defendant could have ascertained that his statement was not true, and left it to the jury to determine whether the retraction claimed was made within a reasonable time, such instruction and ruling were proper and unexceptionable.

9. Where, in an action of slander for stating that the plaintiff forged the defendant's name to a note, no special damages were proved or alleged, and but slight evidence in support of general damages was given, it appearing that no one believed, or regarded seriously, the defendant's accusation against the plaintiff, an award of $1475 is so plainly excessive as to indicate that the jury did not exercise a sound discretion free from bias or prejudice.

Action on the case to recover damages for alleged slander. Defendant filed plea of general issue and brief statement. Verdict for plaintiff in the sum of $1475.00. Defendant filed motion for new trial, and also exceptions to certain rulings of presiding Justice. Judgment in accordance with opinion.

Case stated in opinion.

Albert Beliveau, for plaintiff.

Matthew McCarthy, for defendant.

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

KING, J. Action for slander in which the plaintiff recovered a verdict of $1475. The case comes to this court on the defendant's general motion for a new trial, and on his exceptions to the refusal of certain requested instructions and to the giving of certain other instructions.

The slander complained of is that the defendant said of and concerning the plaintiff "he forged my name to that note," meaning a certain note for fifty dollars, dated September 12th, 1916, on four months, payable to the order of the Rumford Trust Company, and signed by the defendant and also by Thomas W. Penley and the plaintiff. The defendant pleaded the general issue with a brief statement thereunder in which he stated that at the time of the slander he had forgotten that he signed the note, but that his signature thereto is genuine, "and that any statements he may have made to the plaintiff or others concerning the forging of said note were made in good faith and without malice and with an honest belief in their truth."

The evidence was not materially conflicting. About a week before the maturity of the note the defendant, having received notice thereof, called at the bank and asked to see the note and it was shown to him. Thereupon, he immediately went to the plaintiff's store, called him out to the sidewalk, and then and there in a loud voice and angry manner and in the hearing of several persons accused the plaintiff of forging his name to the note. There was evidence that the defendant subsequently said to others that the plaintiff had forged his name to a note. In attempting to explain why he so accused the plaintiff, after he had seen the note at the bank with his signature thereon, the defendant said, "I didn't look particularly at the signature, I looked to see if there was a note there." And he testified that from an examination of the note four days before the trial he was satisfied at once that his signature thereto was genuine; and he then wrote the plaintiff a letter in which he admitted that fact, and said that he proposed to have the letter published in the Rumford Falls Times. It was not published.

THE EXCEPTIONS.

1. The defendant seasonably requested the following instruction: "If the statements made by the defendant were made with an honest belief in their truth, no actual malice should be inferred, and only such damage as has been actually sustained can be recovered." To that request the court said: "I decline to give you that instruction, gentlemen, as it is worded, but I do instruct you that if the statements made by the defendant were made in an honest belief in their truth, and he used the same degree of care that an ordinary prudent man would use, and should use, before accusing the plaintiff of crime, and he could not discover, by the exercise of that care, that the signature to the note was his signature, then no actual malice can be inferred; but it does not lie in the mouth of that man to shut his eyes to the truth so that he does not see. If the defendant knew, or should have known, that that was his note, then it is no excuse for him that he shut his eyes and would not learn the truth." The giving of that qualified instruction instead of the specific instruction requested, is the ground of the first exception.

It is to be observed that the last clause of the request, to wit, "and only such damage as has been actually sustained can be recovered," was not given at all. Two questions, therefore, are open under this exception, first, was it error to omit the last clause of the request? and, second, has the defendant any reasonable ground of complaint that the first part of the request was given with the qualification as above quoted?

In all actions for libel or slander malice is an essential element of the plaintiff's case. But where the defamatory words spoken impute the commission of a crime, and they are not justified by proof of their truth, or that they were spoken on a privileged occasion, the law in such case presumes that they were spoken maliciously. The malice so presumed is called malice in law, and is of itself sufficient to support the action. In the case at bar the defamatory words charged the plaintiff with the crime of forgery. It was a false charge, not privileged either absolutely or qualifiedly, and it was libelous per se. Upon that state of facts the plaintiff's cause of action was conclusively established, and he was entitled to recover some damages. What damages? In this State, two classes of damages may be recovered in actions for libel and slander, to wit, actual or compensa-

tory damages, and exemplary or punitive damage. The first class embraces both special and general damages, so called. By special damage is meant compensation for those injuries which are the natural and proximate, but not the necessary, result of the defamation of the plaintiff—the loss or deprivation of some material temporal advantage, which is directly capable of being valued in money. And to entitle a plaintiff to recover such damages he must both allege and prove them. General damage, however, as applied to such actions, means that damage which the law will presume must naturally, proximately, and necessarily result to the plaintiff from the utterance of the slander, such as injury to the feelings and injury to the reputation of the plaintiff. *Davis* v. *Starrett*, 97 Maine, 568, 575. And such general damages are recoverable without being specially pleaded or proved, and to such an amount as the jury determine will fairly compensate the plaintiff for such injuries necessarily resulting to him from the slander. In the case at bar the plaintiff did not claim special damages; but he did claim, and was entitled to recover, the general damages which he had sustained on account of the slander, that is, such damages as the jury should find would fairly compensate him for the injury to his reputation, to his feelings, and similar injuries, resulting to him from the defendant's defamatory statements concerning him. And no principle is more clearly established by an entire uniformity of decisions, than that damages in actions for slander may be increased upon proof of actual malice. *True* v. *Plumley*, 36 Maine, 466, 484. If the word "proved" had been used in that last clause of the request, instead of "sustained," then the request would have been entirely wrong as a statement of law applicable to the case, for, as we have seen, the plaintiff was entitled to such *general* damages as resulted to him from the slander, without special proof thereof, and irrespective of whether the defendant had an honest belief in the truth of his statements or not. And we think the requested instruction open to the criticism that as worded it might have been understood by the jury to mean, that if they found that the defendant made the statements with an honest belief in their truth, then they could award the plaintiff only such damages as had been actually proved, an idea of the law of the case wholly erroneous. For that reason we think the omission to give the last clause of the requested instruction should not be held reversible error. And the defendant has not really urged in argument that it should be so held.

But the defendant finds fault, and really puts this exception upon the complaint, that in giving the first part of his request the presiding Justice added to it the qualification that it was the defendant's duty, before accusing the plaintiff of the crime of forging his name to the note, to use reasonable care to ascertain whether or not the signature to the note was his own or a forgery, that he was required to use "the same degree of care that an ordinary prudent man would use, and should use, before accusing the plaintiff of crime." Is the defendant's complaint reasonable and sustainable? We think not. He used in his requested instruction the phrase "honest belief," What is the signification of that phrase? Can it be held to mean less than a belief based upon reasonable and probable grounds? In *Toothaker* v. *Conant*, 91 Maine, 438, the defendant claimed that the words used were privileged, and he asked the court to rule that the question for the jury to decide was not whether the defendant had reasonable ground to believe his statement to be true, "but whether he honestly believed it to be true." The request was denied, and the jury were instructed that the defendant "must have reasonable and probable grounds for his belief or his belief would be no defense." That instruction was sustained. In the opinion in that case PETERS, C. J., speaking of the phrase "honest belief," said: "the phrase without addition or qualification is not adequate and sufficient as a definition of the law of justification for what would otherwise be regarded as slanderous words." And certainly it is none the less true, that the phrase "honest belief," as used in the requested instruction, without addition or qualification, was not an adequate and sufficient explanation to the jury of the proper criterion by which they should try the disputed issue whether the defendant was actuated by malice in thus falsely accusing the plaintiff of forgery under the facts and circumstances disclosed. It was proper and necessary that the phrase "honest belief," as used in the requested instruction, should be explained to the jury, and we think the explanation given was correct and applicable to the case. The phrase "honest belief" imports substantially the same idea as the phrase "in good faith" when used, as in the requested instruction, to define a standard by which jurors are to determine if the speaker of false and slanderous words, accusing another of a crime, was or was not actuated by malice in so doing. To have an "honest" belief necessarily implies that one has acted in good faith in forming his belief. And, when one has falsely accused

his neighbor with the commission of a crime, how can it be determined more safely whether the accuser had an "honest" belief in the truth of his accusation than by trying the question of his good faith in forming his alleged belief, under all the circumstances in which he acted, by the standard of care and caution that a reasonably prudent man would have exercised, under the same facts and circumstances, before making such a false accusation? The principle that an "honest belief" must rest on reasonable and probable grounds is recognized in *Bearce* v. *Bass*, 88 Maine, 521, where the court, at page 543, speaks of "an honest belief that the communication is true, such belief being founded on reasonable and probable grounds." In *Allen* v. *Pioneer Press Co.*, (Minn.), 3 L. R. A., 532, 535, the court said: "Good faith . . . requires of the publisher that he exercise the care and vigilance of a prudent and conscientious man. . . ." And in a later case, the same court, affirming the principle laid down in *Allen* v. *Press Co.*, supra, said that to establish good faith mere belief on the part of the publisher in the truth of the publication is not alone sufficient, but it must have been honestly made in the belief of its truth "and upon reasonable grounds for the belief after the exercise of such means to verify its truth as would be taken by a man of ordinary prudence under like circumstances." To the same effect is the language of the court in *Moore* v. *Stevenson*, 27 Conn., 14, 28, where the court refers to unjustifiable publications, "made without authority, or such authority as would be regarded as entitled to credence among upright and careful men." See also 17 R. C. L., page 448. We think the trial court did not err in instructing the jury in this case that, in trying the issue whether the defendant uttered the slanderous accusation against the plaintiff "with an honest belief" in its truth, they should judge his admitted conduct by that decree of care and caution which an ordinary prudent man would use under like circumstances. This exception is, therefore, overruled.

2. The defendant also requested the following instruction: "The fact that the defendant has made a retraction, should be considered in mitigation of damages." To that the court said: "As a rule, a retraction does mitigate the damages, but it is the circumstances under which it is made. Here in this case you should consider that. The note was examined by the defendant. He had been sued by the plaintiff, and four days before this court sat he wrote a letter saying that the statement was false. If he had made the retraction within

a reasonable time from the time he made the statement, or within a reasonable time from the time when he could have ascertained whether it was true or not, it would be admissible in mitigation of damages. But you say, Gentlemen, whether it was in good faith to wait until four days before this court sat, when the writ was entered at the term before, four days before the case could come on for trial, was it a retraction in good faith to write a letter and say he intended to publish it in the paper, and you have no evidence that it has ever been published. The paper is a weekly paper, and it has been published several times since this slanderous statement was made by the defendant. If you think that is a reasonable time within which to make the retraction, why, you may consider it. If it was not within a reasonable time, then it is not to be received in mitigation of damages."

The retraction mentioned in the request evidently refers to the letter written by the defendant to the plaintiff four days before the trial, and three months after the suit was begun. It is by no means free of doubt if that letter, written so long after suit brought, was admissible at all in mitigation. It has been held that an apology or retraction must be made or offered before the person defamed has sought redress in the courts. *Association* v. *Tryon,* 42 Mich., 549, 4 N. W., 267. But in *Turton* v. *N. Y. Rec. Co.,* 144 N. Y., 144, 150, it is said: "We are not prepared to say that a retraction published in good faith after the commencement of an action for libel can under no circumstances be proved in mitigation of damages," adding that "if the defendant promptly after the suit was commenced published a fair and full retraction, we see no reason to doubt that such publication could be proved and submitted to the jury to be considered by them upon the question of exemplary damages." The claimed retraction in the case at bar was communicated only to the slandered person, and, if admissible at all in mitigation, it could be of but slight effect. In *Turner* v. *Hearst,* 115 Cal., 394, 47 Pac., 129, the court said: "The defendant . . . having sought in mitigation of damages to prove the publication of an adequate retraction, it was proper for the court to instruct the jury that when a defendant relies upon such retraction in mitigation of damages, to avail him it should appear that it was fully, fairly and promptly made, and is such as an impartial person would consider reasonable and satisfactory under the circumstances of the case. The question of the sufficiency or

insufficiency is peculiarly for the determination of the jury." In the case at bar the letter was submitted to the jury, and it was left to them to determine whether the defendant's admission that he signed the note, contained in that letter, written only a few days before the action came on for actual trial, and communicated only to the plaintiff, ought to be regarded as a retraction so fully, fairly and promptly made as would seem reasonable to require under the circumstances; if so, then it was to be considered by the jury in mitigation of damages. The defendant's exception to that instruction must be overruled, for it was a ruling as favorable to him, at least, as he was entitled to.

THE MOTION.

It is urged that the damages awarded against the defendant are excessive, and it is upon that point alone that the motion is to be considered. No special damages were claimed, and the evidence from which the jury could have assessed general damages to any considerable amount is comparatively slight. No one appears to have regarded the defendant's accusation against the plaintiff seriously. It seems evident, therefore, that the principal part of the verdict must have been awarded as punitive damages. That the jury were authorized by the facts and circumstances disclosed to include in their verdict some punitive damages is undoubtedly true, but such damages should be awarded in the exercise of a sound discretion taking into consideration all the circumstances in mitigation or aggravation. A study of the case convinces us that the damages awarded are so manifestly excessive as to indicate that the jury did not exercise a sound discretion free from bias or prejudice. It is the opinion of the court that the sum of $800 would be adequate as the damages, both actual and punitive, to be awarded against the defendant in this case. Accordingly the entry will be,

Exceptions overruled. The motion overruled, if the plaintiff, within thirty days after the certificate is filed, remits all of the verdict in excess of $800, otherwise the motion is sustained.

FRANK M. TUCKER, Ex'r., In Equity,

vs.

PATRICK NUGENT, et als.

Washington. Opinion November 30, 1917.

Wills. Life estate. General rule to be applied in construction of wills. Rule as to heirs taking "per stirpes" or "per capita."

1. The intention of the testatrix as expressed by her through the language which she employed to express her will is to control. The words of her will are to have their usual, ordinary and popular signification, technical words excepted, unless there is something in the context or subject matter to indicate that she intended a different use of the terms employed, and her intention is to be gathered from the words of the particular devise and bequest, considered in connection with the whole will and its manifest scope and purpose, and in the light of the circumstances surrounding the testatrix and known to her when the will was made.
2. There is some difference in the wording of the two paragraphs in question, but we conclude that the testatrix used the words "divided equally between", in the first paragraph, and the words "share and share alike," in the third paragraph, in the same sense.
3. From a study of the language which the testatrix used in both the first and third paragraphs of her will, considered in the light of the circumstances surrounding her and known to her at the time the will was made, the court is of opinion that her intention was to divide such of her estate as should remain at the death of her husband into two equal parts, one part to go to her heirs and the other part to go to her husband's heirs.
4. A devise or bequest to heirs designates not only the persons who are to take but also the manner and proportions in which they are to take, and the law presumes in such case that the testator intended that they would take as heirs would take by the rules of descent, that is per stirpes.
5. It is the opinion of the court that under the provisions of the first paragraph of the will of the testatrix one-half of the remainder in the homestead, household goods and furnishings, goes to the heirs of the testatrix, and that the other half thereof goes to the heirs of her husband, Matthew Dagnan, and that the heirs in each class take per stirpes and not per capita; that under the provisions of the third paragraph of the will all the rest, residue and remainder of her estate, her husband being dead, is to be divided into two equal parts, one part to go to the legal heirs of the testatrix, and the other part to go to the legal heirs of said Matthew Dagnan, and that the heirs in each class take per stirpes and not per capita.

Bill in equity asking for the construction of certain parts or clauses of the will of L. Annie Dagnan, of Washington County, State of Maine. Cause was heard upon bill, answers of the several defendants and replication, and it appearing that questions of law of sufficient importance were involved and the parties agreeing thereto, it was reported to the Law Court for determination. Judgment in accordance with opinion.

Case stated in opinion.

L. H. Newcomb, for plaintiff.

W. B. Peirce, J. F. Devault, James H. Gray, Baruch & Baruch, and A. D. Davis, of California, for defendants.

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

KING, J. This case comes up on report. It is a bill in equity brought to obtain a construction of the will of L. Annie Dagnan.

The testatrix died April 22, 1914. The first paragraph of her will reads as follows:

"I give, bequeath and devise to my husband, Matthew Dagnan, for and during the term of his natural life my homestead in Lubec and the household goods and furnishings therein. After the decease of my said husband it is my will and desire that the same may be divided equally between my heirs and the heirs of the said Matthew Dagnan."

In the second paragraph of her will the testatrix provided that the rest and remainder of her estate should be held by her executor in trust the income therefrom to be applied to the care and support of her said husband during his life, and the keeping of the house in repair; and she therein expressed her fixed purpose that the trustee should see that her husband was properly looked after in all respects, and if the income of the trust fund should not be sufficient for the purpose then a part or the whole of the principal might be used for that purpose. And she further provided, that, should her husband waive the provisions of the will for his support, and take his share of the estate, nevertheless, the rest of the estate should be held by the trustee and used in the same manner for the support of her husband, whom she did not consider mentally capable of caring for property and looking after himself.

The third paragraph of the will reads thus: "After the decease of my said husband all the rest, residue and remainder of my estate of whatever nature and wherever situate I give, bequeath and devise to my legal heirs and the legal heirs of my said husband, the said Matthew Dagnan, share and share alike."

The testatrix left as her heirs one brother, two children and a grandchild of a deceased sister, one child of a deceased brother, and three children of another deceased brother—in all eight persons.

Matthew Dagnan accepted the provisions of the will and died December 20, 1915, leaving as his heirs one brother, one sister, three children of a deceased sister, and seven children of a deceased brother—in all twelve persons.

The executor—trustee asks this court to construe the first and third paragraphs of the will, in respect to the residuary clauses therein. And the real questions presented are, whether the testatrix gave the remainder and residue of her estate, mentioned in those respective paragraphs, to her heirs and the heirs of her husband as individuals, to take per capita, or gave it to her heirs and the heirs of her husband as two classes, each class taking one half of it; and, if the latter, whether the heirs comprising each class take per stirpes or per capita.

Under the well recognized rule of testamentary construction, so often expressed in our decisions as to need no formal restatement here, it becomes necessary to determine what the intention of the testatrix was as expressed by her through the language which she employed to express her will. The words of her will are to have their usual, ordinary and popular signification, technical words excepted, unless there is something in the context or subject matter to indicate that she intended a different use of the terms employed, and her intention is to be gathered from the words of the particular devise and bequest, considered in connection with the whole will and its manifest scope and purpose, and in the light of the circumstances surrounding the testatrix and known to her when the will was made.

The inference is justified, that the testatrix had no issue. She states that she did not regard her husband as mentally capable of caring for property or looking after himself. She was deeply solicitous that he should be carefully and amply provided for through her property, and protected even against his own incapacity. Her controlling purpose was to make ample provision for his care and support. To that end her plan was to give him the homestead, household goods

and furnishings, for his life, and to place all the rest of her estate in trust, the income thereof, and the principal if necessary, to be applied for his proper care and maintenance during life. That plan made it necessary for her to make a testamentary disposal of the homestead, household goods and furnishings, after the termination of her husband's life estate therein, and also of the residue, if any, of the trust fund after his death. As to the former she expressed her intention in these words, contained in the first paragraph of the will: "After the decease of my said husband it is my will and desire that the same may be divided equally between my heirs and the heirs of the said Matthew Dagnan." And she expressed her disposal of the residue of the trust fund, if any, in these words, contained in the third paragraph of her will: "I give, bequeath and devise (the same) to my legal heirs and the legal heirs of my said husband, the said Matthew Dagnan, share and share alike."

There is some difference in the wording of the two paragraphs, but we conclude that the testatrix intended by the third paragraph of the will to make the same disposition of the residue, if any, of the trust fund, that she did by the first paragraph as to the remainder in the homestead, household goods and furnishings. In other words, she used the words "divided equally between," in the first paragraph, and the words "share and share alike," in the third paragraph, in the same sense. And we do not understand that any of the interested parties contend otherwise. But, while admitting that the testatrix used those expressions in the same sense, it is suggested that in seeking for her intention more weight should be given to the words "share and share alike" because they were the latest expression of her intention as to how her heirs and her husband's heirs should take. It does not seem to us that the rule, that where there is a conflict in the different provisions of a will the last expression of the testator's intention shall govern, is quite applicable here. This is not a case where a subsequent expressed intention in a will conflicts with an intention previously expressed therein, but rather a case where a testatrix disposes of property in one paragraph, and then in a later paragraph disposes of *other* property in slightly differing language, but admittedly intending to make a similar disposition in both paragraphs, her intention, however, not being clearly expressed in either. In such a case we can perceive no reason why the language of the later paragraph should have controlling effect, simply because it was last

expressed. Where both expressions admit of doubt as to the meaning of the testatrix, they should both be considered, and each in connection with the other.

From a study of the language which the testatrix used in both the first and third paragraphs of her will, considered in the light of the circumstances surrounding her and known to her at the time the will was made, we are well convinced that her intention was to divide such of her estate as should remain at the death of her husband into two equal parts, one part to go to her heirs and the other part to go to her husband's heirs. We think that is the only reasonably permissible interpretation of the words used in the first paragraph of her will, namely, "that the same may be divided equally between my heirs and the heirs of the said Matthew Dagnan." The use of the words "divided" and "between" is a circumstance of considerable weight bearing upon the question of her intention. The word "between" applies properly to only two parties, and although a strict application of that ordinary and primary meaning of the word is not imperative in the construction of wills, yet, when the word is used, as in this case, in connection with two designated classes of beneficiaries, it seems reasonable to conclude that the testator intended the division to be "between" the two classes, and not among the several individuals of both classes. In this case the testatrix expressly stated that the remainder in the property mentioned in the first paragraph of the will was to be "equally divided between my heirs and the heirs of the said Matthew Dagnan." The words "equally divided between," used in connection with the two designated classes of beneficiaries, materially supports, we think, the conclusion we have reached as to the intention of the testatrix.

Furthermore, it is natural to expect that the testatrix, leaving no issue, making no special bequests, and having made ample provision for her husband, which might take substantially all of her estate, would divide the residue of it, if any, into halves, her own heirs to have one half, and her husband's heirs the other half; but it would be quite unnatural to expect that, under such circumstances, she would desire and will that the residue should be distributed in equal shares among all the persons who might be her legal heirs and her husband's legal heirs, regardless of the degrees of relationship. We do not think the testatrix so intended, and the language she used does not require such construction.

It is a well recognized rule of testamentary construction, that a devise or bequest to heirs designates not only the persons who are to take, but also the manner and proportions in which they are to take, and that the law presumes in such case that the testator intended that they would take as heirs would take by the rules of descent, that is per stirpes. *Fairbank's Appeal*, 104 Maine, 333, 335; *Allen* v. *Boardman*, 193 Mass., 284, 286. And this rule should be applied in this case, unless the words of the testatrix, "divided equally between," used in the first paragraph, and "share and share alike," used in the third paragraph, indicate that she intended a different disposition.

As to the words, "divided equally between," we feel clear that the most natural and reasonable construction is that they were intended to refer to the division between the two classes, each class to take an equal portion, and not to a division between the members of the classes. The words "share and share alike" have caused us some hesitation, for they have been usually construed to call for an equal division among all the persons entitled. But the authorities hold that such construction is not imperatively necessary, especially where, as in this case, the will makes a division of property equally between two designated classes, since the words may be satisfied by being applied to the division between the classes, and not to that between the individuals. See *Bacon* v. *Haynes & others*, 14 Allen, 204, 205; *Hall* v. *Hall*, 140 Mass., 267; *Swineburn, Petitioner*, 16 R. I., 208, 212; *Executors of Wintermute* v. *Executors of Snyder*, 3 N. J., Eq., 489. The case at bar is plainly distinguishable from *Doherty* v. *Grady*, 105 Maine, 36, where the provision was "to my legal heirs, in equal shares," for in that case there was no division between two classes, a very important distinction. *Fairbank's Appeal*, 104 Maine, 333, is more nearly in point, though not so in all respects.

It seems to us that the use of the words "share and share alike," in the third paragraph, may reasonably be applied to the division of the residue of the trust fund between the two classes designated, namely, "my legal heirs" and "the legal heirs of my said husband," importing that each class shall take an equal share. This construction harmonizes with what we consider the plain intention of the testatrix as expressed in the first paragraph of her will, that her heirs on the one side, and her husband's heirs on the other, as two classes, are to take, by an equal division between those classes, so much of her estate as should remain at the death of her husband, each class taking

as "heirs," the distribution among them to be according to the rules of descent. And we cannot refrain from again suggesting that such construction, that the respective classes of heirs take per stirpes and not per capita, presents a natural disposition of property, and one in accord with family ties and affections. There is nothing in the case to suggest a reason why the testatrix would dispose of the balance of her estate so that the numerous nieces and nephews of her husband should each share equally with her own surviving brother. Such a disposition of property would be unnatural. We think the testatrix did not so intend.

Testamentary words very similar to those under consideration in the case at bar have been frequently interpreted in judicial decisions as indicating an intention of the testator to make a distribution per stirpes and not per capita. See *Allen* v. *Boardman*, 193 Mass., 284, where several such decisions are collated.

It is therefore the opinion of the court, that under the provisions of the first paragraph of the will of the testatrix one half of the remainder in the homestead, household goods and furnishings, goes to the heirs of the testatrix, and that the other half thereof goes to the heirs of her husband, Matthew Dagnan, and that the heirs in each class take per stirpes and not per capita; that under the provisions of the third paragraph of the will all the rest, residue and remainder of her estate, her husband being dead, is to be divided into two equal parts, one part to go to the legal heirs of the testatrix, and the other part to go to the legal heirs of said Matthew Dagnan, and that the heirs in each class take per stirpes and not per capita.

Taxable costs and reasonable counsel fees incurred by the parties may be allowed by the Judge of Probate and paid out of the estate.

Bill sustained.
Decree to be in accordance with the opinion.

MR. JUSTICE HANSON does not concur.

INHABITANTS OF THE TOWN OF SKOWHEGAN, In Equity,

vs.

MARTIN B. HESELTON.

(*Two Cases*)

Somerset. Opinion December 13, 1917.

Ordinances. Motive of framers of Ordinances or Statutes. State or Municipal officers. Police power. Rule as to inhabitants of city or town having control or direction of State officers. When equitable proceedings may lie. Ordinances relating to the rebuilding or repairing of buildings partly destroyed by fire.

This proceeding is based upon two bills in equity by the *Inhabitants of the Town of Skowhegan* vs. *Martin B. Heselton* of that town, praying for an injunction to restrain him from erecting or extensively repairing a burned wooden building situated within the fire limits of the plaintiff town. The first bill comes up on defendant's appeal from the decree of the court granting an injunction. The second bill comes on report. The two bills aim at precisely the same end the only difference being that the second bill was brought upon the ordinance amended since the fire.

The cases finally resolve themselves into an interpretation of the town ordinances.

The by-laws and ordinances under which these bills are brought have the following origin. Chapter 247 of the Private and Special Laws of 1909 is entitled "An act to Provide for a Fire and Police Commission for the Town of Skowhegan. Section 1. Upon the acceptance of the provisions of this act, as hereinafter provided, a board of fire commissioners is hereby created in and for the town of Skowhegan to consist of three persons who shall be appointed by the selectmen of said town." The act has been accepted. This section creates the office of commissioners. It is created by the State and not the town. Instead of being elective it is to be filled by appointment by the selectmen. They are not municipal but public officers. They hold a legislative office. They are not the agents of the town. They act upon their own responsibility and are not subject either to the control or direction of the inhabitants of the town.

When these commissioners are once appointed they then become legislative and not town officers. The act of 1909, Section 3, confers certain express powers and duties upon the commissioners, entirely independent of any action of the town. This section provides: "Said commissioners shall have power to adopt by-laws and ordinances, and perform all the duties imposed upon said town and municipal officers by chapter thirty of the Revised Statutes." This chapter covers prevention of fires; inspection of buildings; protection of life in public buildings and investigation of fires.

It therefore seems clear that the only inquiry herein involved is (1) the constitutionality and (2) reasonableness of chapter thirty of Revised Statutes. Of the constitutionality there can be no question. Take away the police power of the State and you at once put in jeopardy both life and property. It is the one inherent power of all government.

Whatever may be said regarding the original ordinance which gave no right of appeal, we think the amended ordinance giving the right of appeal is reasonable and therefore valid.

Now, coming to that part of the ordinance which provides "if such damage shall amount to more than one-half of such value thereof (the wooden or frame building exclusive of the foundation) then such building shall be torn down," we believe the rule too drastic and therefore unreasonable. But this part of the ordinance is entirely distinct from the first part and does not necessarily affect its validity.

It is therefore the opinion of the court that the first part of this ordinance is valid and applies to the repair of the defendant's building.

Proceeding in equity in which the town of Skowhegan, acting through its selectmen, sought to restrain the defendant from restoring to its former condition a business block owned by him which was damaged by fire in March, 1917. After the answer and replication were filed, a hearing was held before a single Justice upon the motion for a temporary injunction. The sitting Justice granted the temporary injunction and made certain findings which represent substantially his opinions upon the questions of law involved. The parties then being desirous of securing final determination of their rights as soon as possible, it was agreed, in order that the issues involved might be argued at the next term of the Law Court, that the temporary injunction be made permanent. This was done and an appeal was entered from the decree sustaining the bill and granting the prayer for a permanent injunction. Judgment in accordance with opinion.

Case stated in opinion.

George W. Gower, for plaintiff.

Fred F. Lawrence, for defendant.

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

SPEAR, J. This proceeding is based upon two bills in equity by the *Inhabitants of the Town of Skowhegan* v. *Martin B. Heselton* of that town, praying for an injunction to restrain him from erecting or extensively repairing a wooden building situated within the fire limits of the plaintiff town. The first bill comes up on defendant's appeal from the decree of the court granting the injunction. The second bill comes on report. The facts briefly stated are as follows:

The defendant is the owner of a two story business block on the southerly side of Water Street in Skowhegan Village within the fire limits of the town. This block is 57 feet, 8 inches wide and 187½ feet long. It was damaged by fire, smoke and water in March, 1917. The reproduction cost of the building above the foundation under present conditions as estimated in round numbers would be from nineteen to twenty-two thousand dollars. Among other things, it is alleged in the bill that the defendant intends to "fully complete, erect, alter, raise, roof, enlarge, add to, build upon with wood and extensively repair," the building in question.

It is unnecessary to review all the facts as those found by the sitting Justice are alone material. He found that the repairs contemplated were "extensive and within the provisions of the ordinances." The legal situation, only, upon this finding is involved and is as follows: April 27, 1917, the plaintiff town filed its bill in equity. Answer and replication were duly made and a decree filed on the 8th day of May granting a temporary injunction, which by agreement, to expedite an appeal, was made permanent, from which an appeal was duly taken. At this time Section 4 of the town ordinances, which will be referred to later, did not provide for any appeal from the board of fire commissioners created by the ordinances. On the 26th of May, 1917, at a legal meeting the town voted to amend this section by allowing the right of appeal, providing a method of procedure and, in case of damage by fire amounting to more than half the value of the building, that it should be torn down.

After this ordinance was adopted the plaintiff brought a new bill dated June 7th, 1917, under the amended ordinance but embracing the same state of facts, as no change had taken place in the meantime in the status of the burned building. Answer and replication were duly filed. This case was then reported upon a stipulation, the

material parts of which are as follows: "The finding of facts in the decree in the bill already heard and now filed, which finding was based upon evidence, not stenographically reported, shall constitute a part of the evidence in this bill.

"The evidence reported under the case already pending between the same parties is to be considered as in evidence and made a part of the report in this case so far as it may be material under the issues raised herein."

The next paragraph admits that the building was damaged to more than half of its value above the foundation at the time of the passage of the ordinance, May 26, 1917; also that there was no other building then located within the fire limits of the village which was damaged to the extent of more than one-half of its value above the foundation. These stipulations, and the fact found in the first case, that the repairs contemplated "were extensive," bring the reported case within the terms of the amended ordinance if the ordinance is valid and applies.

Accordingly, as the case now stands, the solution of the problems presented will be determined by a consideration of the reported case, if the reported case can be maintained under the amended ordinance. And it may be said here, we have no doubt it can. The burned condition of the building was existing precisely the same, when the ordinance was amended and when the bill was brought, as for some time previous. It is claimed, however, that the ordinance under the circumstances is discriminatory and made especially to fit the case of the defendant. But this contention is untenable. "The motive of the framers to discriminate against a certain class which does not appear from the language of the ordinance or statute will not make the enactment void or unconstitutional." *Soon Hing* v. *Crowley*, 113 U. S., 709. "Evidence as to the motive of the framers of the law or the influences under which they are enacted is not admissible for the purpose of nullifying an ordinance." 8 Enc. Ev., P. 38, and cases cited.

The original ordinance read as follows: "No building shall hereafter be erected or extensively repaired within the fire limits until plans shall have been approved by a majority of the board of fire commissioners and building permits are issued by the selectmen." It was amended by adding the following: "Whenever the fire commissioners to whom such plans shall have been submitted shall reject or refuse to approve the same, the owner or lessee of such building or

structure or his duly authorized agent may appeal from the fire commissioners to the board of selectmen." It then prescribes the method of procedure. It further provides: "Every wooden frame building within the fire limits which is or which may hereafter be damaged to an amount not greater then one-half of the value thereof, exclusive of the valuation of the foundation thereof at the time of such damage may be repaired or rebuilt; but if such damage shall amount to more than one-half of such value thereof, exclusive of the value of the foundation, then such building shall be torn down." It then provides for the method of appraisal.

Section 4, as amended, was adopted by the fire commissioners June 6, 1917. The ordinances under which the plaintiff proceeds are Sections 1 and 4. Section 1 reads: "Within the fire limits of Skowhegan now or hereafter established there shall not hereafter be erected any wooden building except small additions to existing structures and those only with and by written consent of a majority of each of the board of fire commissioners and selectmen. No shingled roof shall be allowed within the fire limits only as above excepted. Section 1 was not amended. This section, however, in express terms applies to buildings "hereafter erected;" that is, after the passage of the ordinances. As there is neither allegation nor proof that this building was erected after the passage of this ordinance, Section 1 does not apply. The remaining question, therefore, is, are the provisions of Section 4 above quoted, applying to the right of the defendant to make "extensive repairs" constitutional and valid?

The by-laws and ordinances under which these bills are brought have the following origin. Chap. 247 of the Private and Special Laws of 1909 is entitled "An Act to Provide for a Fire and Police Commission for the Town of Skowhegan."

"Section 1. Upon the acceptance of the provisions of this act, as hereinafter provided, a board of fire and police commissioners is hereby created in and for the town of Skowhegan to consist of three persons who shall be appointed by the selectmen of said town." The act has been accepted. This section creates the office of commissioners. It is created by the State and not the town. Instead of being elective it is to be filled by appointment by the selectmen. They are not municipal but public officers. They hold a legislative office. *Andrews* v. *King*, 74 Maine, 224. They are not the agents of the town. *Hamlin* v. *Biddeford*, 85 Maine, 308. "They act upon their own

responsibility and are not subject either to the control or direction of the inhabitants of the town." *Bulger* v. *Eden*, 82 Maine, 352.

When these commissioners are once appointed they then become legislative and not town officers. Upon this theory of their office and their functions, these officers, by the act of 1909, are given their powers and duties directly by the State, entirely independent of the right of the town to pass by-laws and ordinances tending to regulate their conduct in the discharge of their duties. It accordingly becomes unnecessary to consider whether the town was authorized to pass the ordinances under consideration or whether such ordinances if authorized could be applied to the case at bar. The act of 1909, Section 3, confers certain express powers and duties upon the commissioners, entirely independent of any action of the town. This section provides: "Said commissioners shall have power to adopt by-laws and ordinances, and perform all the duties imposed upon said town and municipal officers by chapter thirty of the Revised Statutes," and also all those relating to the "police and police officers in sections ninety-three and ninety-four of chapter four of the Revised Statutes (1916) but no change in the liability of said town shall thereby be created."

This section is broad and comprehensive, complete in itself, is not modified by any other provision, and was undoubtedly intended to place in the hands of this commission, not only all authority relating to the menace and control of fires and doing all things necessary thereto but also the complete control of the police department. We have no occasion to discuss the provision relating to the police officers. With reference to the powers and duties prescribed in the first clause, this section provides two distinct things: 1. Said commissioners shall have power to adopt by-laws and ordinances. 2. And perform all the duties imposed upon the town and municipal officers by chapter thirty of the Revised Statutes.

The report shows that they adopted the ordinance passed by the town. It is immaterial that it was first passed by the town. When the commissioners adopted it, it became theirs under an ordinance of their own adopted by authority of the express statute. The legislature imposed no limitation upon the scope of such ordinance. But like all regulations under the exercise of the police power it must stand the test of reasonableness. 2. The statute then confers very broad powers upon the commissioners,—all the duties imposed upon the

town and the municipal officers, by chapter thirty of the Revised Statutes. This chapter covers prevention of fires; inspection of buildings; protection of life in public buildings and investigation of fires. Section 25 provides for the appointment by the selectmen of the town of an inspector of buildings. Section 27 prescribes his duties: "He shall inspect all buildings while in the process of being repaired and see that all reasonable safeguards are used against the catching and spreading of fire." The phrase "being repaired" clearly applies to the case at bar.

It was the undoubted intention of the legislature to confer upon these commissioners the duties of the inspector named in this section. Accordingly, there are two grounds above named upon which this ordinance may be regarded as legally operative, granted by act of the legislature, each entirely free from powers delegated by the town. This leads to the inquiry: First, is the ordinance, adopted by the fire commissioners reasonable? Second, is section twenty-seven constitutional? Because it is evident that the power given by the ordinance is no greater than that given the inspector by section twenty-seven. Hence if section twenty-seven is constitutional the ordinance is.

This section, which directs the inspector to inspect all buildings while in the process of "being repaired" and see that all reasonable safeguards are used against the catching and spreading of fire, is sufficiently broad and comprehensive and was undoubtedly intended to give the building inspector authority without any ordinance, to do what the commissioners in the case at bar are authorized to do by virtue of the ordinance. He "may give such directions to the owner in writing as he deems necessary concerning the repairs." The commissioners must approve a plan for "extensive repairs." In the one case the inspector initiates the proceedings in writing. In the other, the owner must submit a plan. "Directions in writing" is amply broad to embrace a plan. If the statute is reasonable the ordinance is.

It therefore seems clear that the only inquiry herein involved is (1) the constitutionality and (2) reasonableness of chapter thirty of Revised Statutes. Of the constitutionality there can be no question. Take away the police power of the State and you at once put in jeopardy both life and property. It is the one inherent power of all government. It antedates and supercedes constitutions. It is founded upon the maxim that self-preservation is the first law of

nature. The police power is inherent in every form of government. In this State this function is declared to be "an exercise of that police power which is always necessarily retained by the people, in their sovereign capacity, for the public safety, and of which they cannot be deprived by prior legislative enactments, nor by chartered immunities. *Veazie* v. *Mayo*, 45 Maine, 560. It is a power over which the federal constitution has no control except to see that it is not used as an excuse for violating private or federal rights. Briefly, it has been thus defined: "The police power may be defined in general terms as that power which inheres in the legislature to make, ordain, and establish all manner of reasonable regulations and laws whereby to preserve the peace and order of society and the safety of its members, and to prescribe the mode and manner in which every one may so use and enjoy that which is his own as not to preclude a corresponding use and enjoyment of their own by others."

The authorities upon this subject are endless. The exercise of the power conferred by this statute is undoubtedly constitutional if it is reasonable.

We come, then, to the second inquiry, is it reasonable that the ordinance should require plans to be approved by the fire commissioners and permits to be issued by the selectmen?

Under the original ordinance, giving no right of appeal, the courts differ upon the validity of such a provision. But the weight of authority is in favor of sustaining it. But the amended ordinance giving the right of appeal is undoubtedly valid. It is an appeal which vacates the finding of the commissioners and submits the whole case de novo to the selectmen. If they conclude upon the evidence that the plans required are unreasonable in any regard they have power to modify them. In view of the great menace to property in a thickly settled part of a town or city, which may be due to a building so constructed that it may be calculated, by its very construction, to facilitate the communication and spread of fire, a provision for safety, that, in the end, is subject to the approval of two distinct boards of officers, one acting under the authority of the State, and the other, under the authority of the town, both living in the community and responsible to public opinion, cannot be said to be unreasonable.

We now come to a consideration of the second provision in the ordinance which declares, "if such damage shall amount to more than one-half of such value thereof (the wooden or frame building) exclu-

sive of the foundation then such building shall be torn down." This ordinance assumes that a portion of the value, up to 50% may be still remaining. We can conceive of many a case where the application of this rule would be confiscatory. It may be that such a rule is necessary in large cities where all buildings are required to be of brick or stone, but in small villages in country towns where nearly all the buildings are necessarily of wood, we believe the rule too drastic and therefore unreasonable. But this part of the ordinance is entirely distinct from the first part which we have already considered and does not affect its validity and is not in the present case involved.

It is therefore the opinion of the court that the first part of this ordinance is valid and applies to the repair of the defendant's building. The remaining question is whether equity will lie under the facts in this case. We think it will. The case comes up on report and every question which the evidence raises is open to the consideration of the court. Paragraph 12 of the bill alleges that the building, if repaired will become a nuisance by force of the ordinance and the statute. This paragraph may be regarded as surplusage, if the rest of the bill sets out a sufficient cause. We think section 11 accomplishes this end: "The said Martin B. Heselton threatens, purposes, intends and is about to proceed forthwith to fully complete, erect, alter, raise, roof, enlarge, add to, build upon with wood and extensively repair said wooden building, without any license or permit from the Selectmen or Board of Fire Commissioners of the said town of Skowhegan to do so, and without having plans therefor first approved by a majority of said Board of Fire Commissioners, and is now at work upon the same in violation of said By-Laws and Ordinances."

This section sets out an intended violation of the law. There is apparently no other legal process which can reach it. R. S., Chap. 82, Sec. 6, Paragraph XLV, Equity Powers, provides: "And has full equity jurisdiction according to the usage and practice of courts of equity, in all other cases where there is not a plain, adequate and complete remedy at law."

First bill dismissed without costs.
Second: Bill sustained with costs.
Writ of permanent injunction to issue.

AMERICAN SARDINE COMPANY

vs.

KORNELIUS OLSEN

and

FRONTIER NATIONAL BANK, Trustee.

Washington. Opinion December 13, 1917.

Bills of exceptions. Rule as to what is necessary to allege in order to constitute a valid bill of exceptions. Right of an attorney to enter a general appearance for defendant and thereby bind party for whom he purports to act. Rule as to permitting party to action to prove by parol that the attorney representing him has no such authority.

This case comes up on exceptions stated as follows: "This is an action for breach of contract. Writ dated November 2, 1915. Entered at the January Term, A. D. 1916. Service made on defendant March 23rd, A. D. 1916. Reed V. Jewett made a general appearance as attorney for defendant on the 10th day of the May Term, 1916, and continued the case to the October Term, A. D. 1916."

At the October Term, 1916, Reed V. Jewett moved the court for leave to withdraw his appearance as attorney for defendant.

The court allowed his motion to which exception was taken. The writ, a copy of the docket entries, the petition of claimant to appear, letters and telegrams on file are made a part of the exceptions. The letter was as follows:

"Co. New York, N. Y., May 11th.

Reed V. Jewett, Calais, Maine.

Writ of attachment was served in Norway March twenty-third in American Sardine Co. against Kornelius Olsen returnable at Calais second Tuesday, May defendant is my client just received all correspondence re matter are you in position to handle action at Calais will write particulars wire collect immediately.

T. L. ANGDON THOMPSON,
No. 27 William Street, New York City"

So far as the exceptions show, the claimant's motion for withdrawal involved pure questions of fact.

Held:

(1). An exception to be valid must raise a question of law.

(2). If it calls in question the interpretation of a written document it must specify in what regard.

(3). That a bill of exceptions to be available must show clearly and distinctly that the ruling excepted to was not upon a question in which law and fact are so blended as to render it impossible to tell on which the adverse ruling was based.

(4). That whether authority is given an attorney to appear generally, is a question of fact.

(5). That whether delay in invoking a right is unreasonable and thereby amounts to a ratification, is a question of fact unless only one inference can be drawn from the evidence.

(6). That the ruling of the presiding Justice in favor of the claimant was warranted by the evidence.

Action for breach of contract with trustee process, principal defendant being a non-resident of the State. Appearance was entered for principal defendant. At a later term the same attorney filed motion to withdraw his appearance as attorney for defendant. Motion was allowed by presiding Justice; to which ruling plaintiff filed exceptions. Judgment in accordance with opinion.

Case stated in opinion.

E. W. Pike, and H. H. Gray, for plaintiff.

R. V. Jewett, and L. H. Newcomb, for defendants.

SITTING: CORNISH, C. J., SPEAR, KING, MADIGAN, JJ.

SPEAR, J. This case comes up on exceptions. It is an action for breach of contract upon the alleged failure of the defendant to deliver to the plaintiff 1500 cases of sardines. The case arises upon the following facts: Kornelius Olsen, the defendant, shipped 500 cases of sardines to the American Sardine Company, the plaintiff, at Eastport, Maine, on the 12th day of October, 1915, invoiced at $2,904.85, and drew on the sardine company for $2,957.63, the amount of the draft including insurance. The defendant on the same day discounted the draft at Stavanger Handels og Industribank of Norway, receiving the full amount due thereon. The draft was then forwarded in due course of business, passing through several banks until it arrived at the Frontier National Bank of Eastport, where it was paid.

This payment, remaining on deposit, is claimed under trustee process by the plaintiff as the funds of the defendant and by the Norway bank by virtue of an alleged assignment of the draft when it was discounted and the proceeds paid to the defendant. The alleged assignment was made before the service of the trustee writ.

The plaintiff's first exception is as follows:

"This is an action for breach of contract. Writ dated November 2, 1915. Entered at the January Term, A. D. 1916, and order of notice on defendant a resident of a foreign country at January Term, A. D. 1916. Service made on defendant March 23rd, A. D. 1916. Reed V. Jewett made a general appearance as attorney for defendant on the 10th day of the May Term, 1916, and continued the case to the October Term, A. D. 1916. Stavanger Handels og Industribank appeared as claimant for funds trusteed at the October Term, A. D. 1916.

"At the said October Term, A. D. 1916, Reed V. Jewett moved the Court for leave to withdraw his appearance as attorney for defendant.

"The Court allowed his motion pro forma, from which ruling plaintiff took exceptions and prays that its exceptions may be allowed and that the motion to withdraw, the writ, a copy of the docket entries of said Court, the petition of claimant to appear, the letters and telegrams on file, viz: Dispatch from T. Langland Thompson to Reed V. Jewett dated May 11, 1916, dispatch from Reed V. Jewett to T. Langland Thompson dated May 12, 1916, letter from T. Langland Thompson to Reed V. Jewett dated July 7, 1916, be made a part hereof." The dispatch of May 11th was as follows:

"Co. New York, N. Y. May 11th

REED V. JEWETT, Calais, Maine.

Writ of attachment was served in Norway March twenty-third in American Sardine Co. against Kornelius Olsen returnable at Calais second Tuesday May defendant is my client have just received all correspondence re matter are you in position to handle action at Calais will write particulars wire collect immediately.

T. L. ANGDON THOMPSON,
27 William Street, New York City."

So far as the exceptions show, the granting of Jewett's motion for withdrawal involved pure questions of fact. The papers, letters and telegrams are made a part of the exceptions but the legal interpretation of any of these documents is not called in question by the exceptions. An exception to be valid must raise a question of law. If it calls in question the interpretation of a written document it must specify in what regard. In the case before us the exceptions do not submit the question, whether the letter of instructions sent to Jewett must be regarded, as a matter of law, as an instruction to appear generally or otherwise, but refers to the letter as a document tending to prove or disprove whether such instructions were given, leaving the presiding Justice to decide both the legal interpretation and the evidential value of the letter.

Sarouche v. *Despeaux*, 90 Maine, 178, is a case in which the court was asked to rule as a matter of law that a mortgage covered a soda fountain. The court had already found as a matter of fact that the soda fountain at the date of the mortgage was the property of a third party, was not intended to be covered by the mortgage, and declined to rule as requested. Exceptions then state: "To the foregoing rules in matters of law the defendant excepted. The court: 'We search this bill of exceptions in vain for rulings in matters of law. Of course, the decision of the cause involved questions of law as well as questions of fact. Every cause does. But we look in vain for any such distinct ruling on a question of law as could furnish a basis for a valid bill of exceptions.' " Whether the interpretation of the mortgage is raised does not appear. The court then lays down this rule: "Exceptions lie to rulings upon questions of law only and not to findings upon questions of fact. And a bill of exceptions, to be available, must show clearly and distinctly that the ruling excepted to was upon a point of law, and not upon a question of fact; nor upon a question in which law and fact are so blended as to render it impossible to tell on which the adverse ruling was based."

The cases show, that whether authority is given an attorney to appear generally, is a question of fact.

In *Budrutha et als.* v. *Goodrich*, 3 Gray, 508, the Justice says in his decision: "But there is another question here, and that is, whether the defendant is conclusively bound by the entry of the name of an attorney on the docket, purporting to be an appearance for him although it is true and susceptible of proof, that such entry was made

by the accident or mistake of the attorney, or that, through some false and fraudulent representation made to the attorney or other cause, in fact the attorney was never authorized to enter such appearance.

"It would certainly be very strange if an inhabitant of another State could thus be bound by a jurisdiction without any act or default of such party."

McNamara v. *Carr*, 84 Maine, 302-3, holds that want of authority to appear may be found by parol. "But two objections are stated to the maintenance of the right to review on the part of the petitioner. One is that he did not commence his petition for review in season. The other is that an attorney at law appeared for the defendant in that action and continued to act as his attorney until judgment was rendered. And it is claimed that it is not competent for the petitioner to prove that Mr. Pierce appeared without his knowledge and authority. But in such a case we think it well settled that the party for whom the appearance was made may prove by parol that it was without his knowledge or authority, and if the fact is established the appearance can in no way legally affect him."

The defendant also claims in its argument that even if the letter did not authorize Jewett to appear generally, the fact that he did so appear, and notified the general counsel of the defendant in New York to that effect, several months before the filing of his motion to withdraw, should be regarded as a ratification by the general counsel of his general appearance. But this presented a question of fact. "When the principal is informed of what has been done he must dissent, and give notice of it in a reasonable time, and if he does not his assent and ratification will be presumed." 2 Kent, 616. Whether delay in revoking a right is unreasonable, and thereby amounts to a ratification, is a question of fact unless only one inference can be drawn from the evidence. *Viele* v. *Curtis*, 116 Maine, 328; 101, Atl. Rep., 966. The decision found the delay not unreasonable. "Reasonableness" is a question of fact.

Accordingly, these exceptions cannot be sustained, as clearly appears. "In cases heard by a judge without intervention of jury, by agreement, his findings of fact are conclusive." *Frank* v. *Mallett*, 92 Maine, 79, and numerous other Maine cases. *Prescott* v. *Winthrop*, 101 Maine, 236, is a case involving adverse title against a deed. The case was heard without a jury. The presiding Justice found

against the deed. The court say: "We are not required, however, to consider the force and effect of this evidence since that question was solely for the Justice hearing the case and his decision thereon is not subject to exception. The right of exception is limited to rulings upon questions of law."

It may be proper, however, to here note that a legal construction of the letter of instructions to Mr. Jewett does not warrant the conclusion that he was authorized to appear generally. The ruling of the presiding Justice was right both upon the interpretation of the letter and its evidential value.

The plaintiff states its second exception as follows:

"Trustee filed its disclosure in the above entitled action and the Stavanger Handals og Industribank appeared as claimant of the fund disclosed by the trustee.

Depositions were then taken by claimant and a hearing had at this term of said Court. The Justice presiding ruled that the claimant be allowed the funds in the hands of said trustee and the trustee be discharged, to which ruling the plaintiff excepts and prays that his exceptions be allowed and the allegations and pleadings of claimant, admissions of both parties, so much of the disclosure as shows the amount due and how the funds come into its hands and said depositions be made a part of these exceptions and that the original depositions go forward with the case without printing.

By agreement of counsel these exceptions are to be printed and argued, considered and determined with the exceptions already taken on another branch of above entitled case."

The only question put in issue here is, whether the draft was discounted in good faith by the defendant, Kornelius Olsen, and whether the Norway bank became a bona fide holder for value before maturity for a sufficient consideration or whether the Norway bank was merely an agent for the defendant for collection of the draft so that the title to the draft and the proceeds thereof belonged to Olsen and not the bank. As shown by the exceptions the presiding Justice found in favor of the claimant.

We think the finding was warranted by the evidence and must be sustained.

Exceptions overruled.

LUCY A. DAVIS

vs.

WATERVILLE, FAIRFIELD AND OAKLAND RAILWAY.

Kennebec. Opinion December 13, 1917.

Negligence. General rule as to railroad company being responsible for the existence of ice or snow upon the steps of its car.

This case came to the Law Court on a motion to set aside the jury's verdict for injuries received by the plaintiff in slipping on an icy step on one of the defendant's cars. The defendant's conductor testified that before starting the trip, some twenty minutes before the accident, he carefully removed all snow and ice from the steps with an iron scraper and broom, and the plaintiff urges that the amount of ice or frozen snow on the step, the small number of passengers entering the car during the trip, and the fact that the storm had practically ceased, conclusively prove that the conductor's testimony is untrue.

Held:

1. Assuming that the car steps are in proper condition at the beginning of a specific journey, the carrier should not be held responsible under ordinary circumstances for snow and ice upon the steps accumulated through natural causes during the journey, until it has had reasonably sufficient time and opportunity, consistently with its duty to transport passengers, to remove such accumulation. To require the immediate and continuous removal of all snow from the steps during the journey would usually be impracticable.
2. There was sufficient evidence in this case to warrant the jury in finding that the defendant violated its duty to the plaintiff under the foregoing rule.
3. The expenses of plaintiff's illness because of the injury were about $1,000. Two ribs were fractured and a stiffness was caused by a fixation of the sacro iliac joint. For the suffering, permanent impairment of health, and expenses shown by the evidence the verdict of $3,975.50 is not excessive.

Action on the case to recover damages on account of injuries received by plaintiff through alleged negligence of defendant. Plea of general issue filed. Verdict for plaintiff in the sum of $3975.50. Motion for new trial filed by defendant. Motion overruled.

Case stated in opinion.

Benedict F. Maher, and James L. Boyle, for plaintiff.

Johnson & Perkins, for defendant.

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

MADIGAN, J. As plaintiff was alighting from defendant's car she slipped on an icy step breaking two ribs and injuring her back. The jury returned a verdict in her favor which the defendant on the usual motion asks the court to set aside.

The accident happened on March 22, about 9.35 in the evening in Waterville. A damp snow storm commenced about five in the afternoon and had practically stopped when the plaintiff boarded the car. The conductor testified that before starting the trip at Fairfield at 9.15 he removed with iron scraper and broom all snow and ice from the car steps. The defense contends that the slippery condition of the step at the time of the accident was due to the snow which fell or to what was brought on and tramped down by the passengers during the trip. The plaintiff forcefully urges that the conductor's testimony is refuted by the condition of the step, the slight snowfall during the trip and the small number of passengers on the car.

We think the true rule as to the duty of the carrier under such conditions is this: Assuming that the steps of the car are in proper condition when it begins a specific journey, the railroad company should not be held responsible, under ordinary circumstances, for the existence of snow or ice upon the steps accumulating through natural causes, during the journey, until it has had a reasonably sufficient time and opportunity, consistently with its duty to transport its passengers, to remove such accumulations. To require the immediate and continuous removal of all snow from the steps during the journey would be impracticable.

"A railroad company is not responsible for the existence of snow or ice upon the steps of its cars until it has had sufficient time and opportunity consistent with its duty to transport its passengers to remove the accumulation." *Riley* v. *R. I. Co.*, 29 R. I., 143.

"A passenger on a railroad train has no right to assume that the effects of a continuous storm of snow, sleet, rain or hail will be immediately and effectually removed from the exposed platforms of the car while making its passage between stations or termini of its route, and it would be an obligation beyond reasonable expectation of performance to require a railroad corporation to do so." *Palmer* v. *Penn. Co.*, 111 N. Y., 488.

Foster v. *Old Colony St. Rwy.*, 182 Mass., 378, recognizes these general principles, but held the defendant had made no effort to remove the snow during a wait of fifteen minutes at the terminus, also had failed to cover the snow or ice with sand when it had ample opportunity so to do.

Gilman v. *B. & M. R. R. Co.*, 168 Mass., 454, held that the jury was warranted in finding snow and ice were on the step of the car when it left the station.

"A carrier of passengers for hire is legally responsible for injuries happening to a passenger from such an accumulation of ice upon its car steps as to cause a passenger, using ordinary care, to slip and fall, if sufficient previous opportunity has been had to remove the source of danger. The duty of the carrier in such regard is not performed simply by appointing servants whose duty it is to keep the car steps in a safe condition, nor is it any excuse that the servants neglected their duty, and where a substantial conflict as to the actual performance of such duties by the servants appears from the evidence, such conflict must be determined by the jury." *Murphy* v. *North Jersey St. Rwy. Co.*, 81 N. J. L., 706—80 At., 331.

The plaintiff testifies that the step was rounded up with ice. The policeman, apparently disinterested, who helped her from the ground, says the step was ridged up at least an inch and a half across the center with hard packed snow with an icy surface. The conductor admits the step was slippery and says he cautioned the plaintiff about its condition and had her by the arm to help her off of the car, thereby negativing, in a great measure at least, testimony of other passengers that they did not notice the step was slippery. The storm had practically subsided and only six or seven passengers had taken the car. While the question is close, we do not feel that the jury were not justified from the testimony of the plaintiff and the policeman as to the conditions of the step, and from the attending circumstances, in discrediting the testimony of the conductor that he cleaned the step properly only twenty minutes before the accident.

Was the plaintiff in the exercise of due care? She had on new rubbers, was sixty-two years of age, and was cautioned by the conductor before stepping from the platform. No other mode of egress but by the step was open to her, and the mere fact that her feet slipped on ice is not sufficient to show carelessness. Many falls on icy streets and walks occur when people are using the utmost care.

While the accident might have been averted had she taken hold of the hand rail, we do not feel that she was not justified in relying on the strong supporting and guiding arm of the conductor as sufficient protection.

On the whole the damages do not seem excessive. The expenses of the sickness were in the neighborhood of $1,000. Two ribs were fractured and a stiffness caused by a fixation of the sacro iliac joint. For the suffering and expenses and permanent impairment of health we do not feel like disturbing the verdict of $3975.50

Motion overruled.

MELVIN D. STOCKMAN *vs.* BOSTON & MAINE RAILROAD.

Cumberland. Opinion December 21, 1917.

Negligence. Duties of common carriers. Rule as to common carriers using reasonable despatch. Meaning of the words "reasonable despatch."

In an action on the case to recover damages for injuries to plaintiff's horses while being transported from Watertown, Mass., to Portland, Maine, which is before this court on defendant's general motion for a new trial it is

Held:

1. That the general rule is that defendant was bound to exercise reasonable care and diligence in transportation, to transport in a reasonable time without unnecessary delay and to prevent, so far as is reasonable and practicable, any loss or damage which may be occasioned by delays in transit. What is reasonable in this class of cases, as in all others where reasonableness is the standard, must depend upon the circumstances of each particular case.
2. That the Uniform Live Stock Contract in this case required the horses to be transported "with reasonable despatch," and this imposed upon the carrier the duty of using all reasonable effort to move the live stock quickly to its destination.
3. That the finding of the jury that the defendant did not transport these horses with reasonable despatch is not manifestly wrong, it appearing that the horses

left Watertown, Mass., at 4.30 P. M. and arrived at Portland yard about noon of the next day and the place of unloading about three or four P. M. This was about twice the usual time required for the trip.

4. That while the plaintiff should be held responsible for any injury resulting from lack of ventilation which he had directed and prescribed, yet in so specifying the amount of ventilation he had the right to expect that the transportation would be completed within the usual time, and if the delay beyond that time was the proximate cause of the injuries the defendant should be held responsible therefor. The jury must have so found.

Action on the case to recover damages of defendant as common carrier for alleged negligence in transporting horses of the plaintiff from Watertown, Mass., to Portland, Maine. Defendant filed plea of general issue. Verdict for plaintiff in the sum of $707.71. Defendant filed motion for new trial. Motion overruled.

Case stated in opinion.

Max L. Pinansky, and Dennis A. Meaher, for plaintiff.

Symonds, Snow, Cook & Hutchinson, for defendant.

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

CORNISH, C. J. The plaintiff at about 4.30 P. M. on March 29, 1916, delivered to the defendant ten horses at Union Market Station in Watertown, Massachusetts, to be transported to Portland, Maine. He had purchased these horses at Brighton and was shipping them to himself as consignee at Portland where he was the proprietor of a sales stable. They were delivered to him at Portland on the afternoon of March 30, 1916, in such a damaged condition, as the plaintiff claims, that three died within a few days from pneumonia and the other seven were sick for a considerable period so that they were depreciated in value and were sold at a loss.

For damages thus sustained the plaintiff brought this action and recovered a verdict of $707.71. The case is before the Law Court on a general motion to set this verdict aside as against the evidence.

The plaintiff set up two grounds of negligence, insufficient ventilation and delay in transportation. At the close of the evidence the presiding Justice took from the jury the question of insufficient ventilation because the proof was overwhelming that the plaintiff specified the amount of ventilation desired and the manner in which

the car door should be arranged in order to effect it, and his instructions and requests were strictly complied with. This left the question of delay in transportation and on that point the jury found negligence on the defendant's part.

The legal duty of the defendant as a common carrier is settled. It was bound "to exercise reasonable care and diligence in transportation, to transport in a reasonable time, without unnecessary delay, and to prevent so far as is reasonable and practicable any loss or damage which may be occasioned by delays in transit. What is reasonable diligence in this class of cases as in all others where reasonableness is the standard must depend upon the circumstances of the particular case." *Johnson* v. *Railroad Co.*, 111 Maine, 263; *Young* v. *Railroad Co.*, 113 Maine, 113. The Uniform Live Stock Contract under which this shipment was made contains this condition: "No carrier is bound to transport said live stock by any particular train or vessel, or in time for any particular market, or otherwise than with reasonable despatch."

Were these horses transported with reasonable despatch? The jury have said that they were not and we do not think their verdict is so manifestly wrong that it should be set aside.

The following facts are not in controversy. The plaintiff brought these horses to the station at Watertown and they were loaded in a box car at 4.30 P. M. They were properly tied and one door was cleated open, leaving a space eight or ten inches wide for ventilation, the space at the bottom for a vertical distance of some three feet being covered so that the horses could not put their legs through the opening. The entire journey consisted of two parts, first from Watertown to Boston, and then from Boston to Portland. The car left Watertown at 6.10 P. M. and arrived at Boston, a distance of about six miles, at 7.05 P. M. It appears that there is no regular freight train from Union Market station to Boston. A "road switcher" and crew leave Boston every morning at 7.15 and work on the Watertown branch between West Cambridge and Waltham during the day. When they complete their work in the late afternoon they return and take with them any cars destined for Boston. Their time of departure is therefore indefinite, and their time of arrival in Boston is also indefinite depending upon the amount of work they are obliged to do between Watertown and Boston. The run can be made in twenty-five or thirty minutes. It might well be doubted whether this uncertain

and almost haphazard method of transportation of live stock over the short distance between Watertown and Boston is consistent with that reasonable despatch which the defendant has agreed to furnish.

But the greatest and it would seem an unnecessary delay occurred after the car reached Boston. Two trains left Boston for Portland in the evening, one at 7.05 P. M. and the other at 8.23 P. M., and a third in the early morning at 3.50 A. M. It is not too much to ask of the Company that if they take a carload of horses at 4.30 P. M. in Watertown they shall use every reasonable effort to connect with one or the other of the evening trains, so that the car can reach Portland the following morning. And the testimony of the plaintiff is that he had shipped many carloads of horses over this same route before and they had reached Portland about four or five o'clock A. M. and had been unloaded by him about seven or eight o'clock. They had evidently left Boston on one of those two evening trains, probably the 8.23.

There was ample time to have made that connection in this case. Over an hour and a quarter elapsed after the car reached Boston. The defendant attempts to furnish an excuse by explaining the location of the tracks, the interference with passenger traffic, and the delays that necessarily occur. The fact however remains that on all previous occasions there had been no difficulty and nothing has been shown to create any peculiar difficulty at this time.

The result was that the car remained in Boston from 7.05 P. M. until 3.50 A. M. before it started for Portland, nearly twelve hours after the horses had been loaded at a point only six miles away.

This is not that reasonable despatch which the contract demands. "Despatch" implies celerity, expedition, speed. It imposes upon the carrier the duty of using all reasonable effort to move the live stock quickly to its destination. Special trains cannot be expected, but a reasonably close connection with scheduled and existing trains can be insisted upon. In this case no more effort was apparently made to hasten these horses to their destination than if the car had been filled with flour or lumber.

The trip from Boston to Portland when once begun was completed within the usual time. No complaint can be made of that portion of the journey. The train left Boston at 3.50 A. M. and arrived at Portland at noon, or at 12.05 to be exact. Here however another delay followed. It was necessary to take this car from the yard where the train arrived, to what is called the bulkhead, where the horses

were to be unloaded. The defendant claims the car was in place for unloading at two-thirty or three o'clock, the plaintiff says at four or four-thirty o'clock. The evidence on this point was contradictory, and we cannot say that the jury were not warranted in accepting the later hour. This completed a period of nearly if not quite twenty-four hours that the horses were on the road, which was about twice the usual limit. Considering all the facts we do not think the jury erred in finding want of reasonable diligence on the part of the defendant and its servants.

We think too that this long delay in transportation was the proximate cause of the condition of the horses on their arrival in Portland. The preponderance of the evidence is to the effect that when unloaded the horses were dripping with perspiration, were weak, and sick. The weather was unseasonably warm, especially during the day. They had been breathing the contaminated air, and they were in a sick and debilitated condition. Bronchitis and pneumonia followed in several instances. The defendant urges that this condition was due wholly to lack of sufficient ventilation, and for that the plaintiff himself was responsible. The plaintiff replies that from his long experience he is confident the ventilation was ample for the trip had it been made in the night and with ordinary despatch, and we think there is force in the reply. The plaintiff in directing and specifying the amount of ventilation had a right to expect that the transportation would be completed within the usual time. Had this been done doubtless all would have been well. The extra hours of delay, during the warm day and under the existing conditions, evidently were the proximate cause of the damages sustained.

Motion overruled.

Mr. JUSTICE HALEY does not concur.

CELIA E. LEIGHTON *vs.* ALVIN F. DEAN.

Cumberland. Opinion December 21, 1917.

Negligence. Duty of property owner to invitee upon his premises. Rule where the accident itself affords reasonable evidence of negligence.

The defendant was the proprietor of a retail boot and shoe store on Monument Square, in Portland, near the transfer station of the street railways. Between the front of the store and the legal limits of the highway was a strip of land three feet wide, paved and surfaced as was the sidewalk on which it abutted, with no visible mark on the surface to indicate to the public that the strip was not a part of and included within the legal limits of the public street. While the plaintiff and a lady friend were waiting for a car they stepped to the defendant's window to inspect his display of goods and were standing on the three foot strip when the awning which the defendant erected and maintained on the front of his store fell and injured the plaintiff. Neither the plaintiff nor her companion had any intention of entering the store or making purchases of the defendant. This action was brought for injuries which the plaintiff claims to have received. The case was reported to the Law Court to determine the question of liability the damages having been fixed by the jury at $500.

Held:

1. Window displays by retail dealers are among the most common and effective methods of advertising, challenging the attention of the public and inviting and inducing closer inspection. The plaintiff was therefore upon the three foot strip as an implied invitee of the defendant, and he owed to her the duty to see that such premises were in a reasonably safe condition.
2. Where private property abutting on a public way is so surfaced and finished that intelligent and prudent persons would understand they were invited to use the property as a public way, the public are justified in accepting such invitation, and the owner of such private property is bound to take such precaution from time to time as ordinary care and prudence would suggest to be necessary for the safety of those who may have occasion to use said premises for the purposes to which it was apparently appropriated.
3. Lingering upon premises so appropriated while waiting for a car, the plaintiff did not become a trespasser upon the defendant's property or otherwise exceed the bounds of said invitation.
4. The evidence discloses that the awning was under the management of the defendant and that the accident was such as in the ordinary course of affairs would not have happened but for the want of due care on the part of the defendant, and affords reasonable proof, in spite of the explanation of the defendant, that it was the result of lack of proper care on the defendant's part.

Action on the case to recover damages for personal injuries sustained through the falling of an awning from a building occupied by defendant. Defendant filed plea of general issue. Verdict for plaintiff in sum of $500.00. By agreement of counsel case was reported to Law Court upon certain agreed stipulations. Judgment in accordance with opinion.

Case stated in opinion.

William C. Eaton, and Coombs & Gould, for plaintiff.

Joseph B. Reed, for defendant.

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

MADIGAN, J. An action for personal injuries resulting from the falling of an awning in front of store occupied by defendant under a lease. By agreement the case was reported to the Law Court to determine the question of liability, the damages having been fixed by the jury at $500.00.

The defendant was the proprietor of a retail boot and shoe store on Monument Square, in Portland, near the transfer station of the street railways. Between the front of the store and the legal limits of the highway was a strip of land three feet wide, paved and surfaced as was the sidewalk on which it abutted, with no visible mark on the surface to indicate to the public that the strip was not a part of and included within the legal limits of the public street. While the plaintiff and a lady friend were waiting for a car they stepped to the defendant's window to inspect his display of goods and were standing on the three foot strip when the awning fell. Neither the plaintiff, nor her companion had any intention of entering the store or making purchases of the defendant.

The defendant contends that the plaintiff was at most a mere passive licensee to whom he owed no duty except not to do wanton injury. *McLean* v. *Caribou National Bank*, 100 Maine, 437. With this we cannot agree. The window displays by abutting retail salesmen are among the most common and effective methods of advertising. They challenge the attention of the public and invite and induce closer inspection of the dealer's wares. It is not expected that all who stop to gaze should become immediate purchasers but all are invited that some may be persuaded. We hold therefore that the

plaintiff was upon the three foot strip as a licensee by the express or implied invitation and allurement of the defendant, and that he consequently owed to her the duty to see that his premises were in a reasonably safe condition. *Moore* v. *Stetson,* 96 Maine, 203. *Patten* v. *Bartlett,* 111 Maine, 409. *Bennett* v. *R. R. Co.,* 102 U. S., 577. The strip being so surfaced and finished that to all intents and purposes it was a part of the street intended for foot passengers extended to the public an implied invitation to use it as such. *Holmes* v. *Drew,* 151 Mass., 578. *Sweeney* v. *Old Colony R. R.,* 10 Allen, 368.

In *Holmes* v. *Drew* the plaintiff was injured by defect in what she believed was a part of the sidewalk but which was in fact private land of the defendant abutting thereon. The court says the jury might have inferred from the facts stated that the defendant laid out and paved the sidewalk on her own land in order that it should be used by the public as a sidewalk or street and allowed it to remain, apparently a part of the street that was intended to be used by foot passengers. "This would amount to an invitation to the public to enter upon and use as a public sidewalk the land so prepared and the plaintiff so used it whenever going upon the defendant's land by her implied invitation, and she would owe to him the duty not to expose him to a dangerous condition of the walk which reasonable care on her part would have prevented. The ground of the defendant's liability is not her obligation to keep the way in repair but her obligation is to use due care that her land should be reasonably safe for the use which she invited the plaintiff to make of it."

In *Sweeney* v. *Old Colony Rwy.,* the plaintiff was using for his own purpose a private crossing over the tracks of the defendant. The defendant's flagman indicated to the plaintiff that the way was open to passage and he was injured when responding to such notice. The court held that though he was not upon the defendant's property for the purpose of transacting business with it but solely for his own purposes, he was nevertheless an invited licensee and therefore the defendant was liable.

The test is whether an intelligent and prudent person would understand there was an invitation to use private land as a public way. *Chenery* v. *Fitchburg R. R. Co.,* 160 Mass., 214.

Binks v. *South Yorkshire Rwy.,* 32 Law Journal N. S., Q. B. 26.

There might be a case where permission to use land as a path may amount to such an inducement as to lead the persons using it to suppose it a highway and thus induced them to use it as such.

It makes no difference that no pecuniary profit or other benefit was received or expected. The fact that the plaintiff came by invitation is enough to impose upon the defendant the duty which lies at the foundation of the liability, and that the defendant in giving the invitation was actuated only by motives of friendship or Christian charity. *Davis* v. *Central Cong. Society,* 129 Mass., 367.

"Where the public were invited to use the premises for the purpose to which it had been appropriated by the defendant, it was, the defendant's duty to take such precaution, from time to time, as ordinary care and prudence would suggest to be necessary for the safety of those who had occasion to use the premises for the purpose to which they had been appropriated by the company, and for which, with its knowledge and permission, it was commonly used by the public." *Bennett* v. *R. R. Co.,* 102 U. S. at 585.

In the case at bar the plaintiff was upon the strip as an invited licensee of the defendant, although neither she nor her companion had any intention of entering the defendant's store or transacting business with him.

Neither can it be said that she forfeited her rights as such licensee by lingering on said strip while waiting for a car. The easement of the public on highways is not restricted to such narrow limitation. One does not become a trespasser or forfeit rights in the street as a traveler by stopping to converse with a friend while waiting for a car or any other harmless purpose. The mere fact that waiting accommodation was provided by the street railway for the convenience of its patrons would not deprive of their rights the large number of patrons who prefer the fresh air on the sidewalk.

The defendant claims the awning fell as the result of a violent gust of wind against which he could not be expected to provide, and that the awning was substantial and carefully inspected. At no time during the day did the velocity of the wind, as shown by the official record, exceed twenty-six miles an hour, and it goes without saying that an awning which would fall under such a strain was most dangerous to the public. The supports or frame work were attached to the building by lag-screws driven into soft pine plugs which in turn were

driven into the masonry. The pine plugs expanding and contracting, according to the weather, must loosen, and require careful inspection. The only examination apparently made of the awning was that of the clerk in raising and lowering it. The very circumstances of this accident seem to establish the plaintiff's claim that the awning was insecure and that the defendant failed to use proper care to make it reasonably safe.

"When the thing which has caused the injury is shown to be under the management of the party charged with negligence, and the action is such as in the ordinary course of affairs does not happen if those who have the management use proper care, the accident itself affords reasonable evidence, in the absence of an explanation by the party charged, that it was caused by lack of proper care by the party charged with negligence." *Chicago Union Traction Co.* v. *Albert Guse,* 229 Ill., 260.

Judgment for plaintiff for $500 as found by jury.

GEORGE A. CLEMENT

vs.

MAINE CENTRAL RAILROAD COMPANY.

Kennebec. Opinion December 21, 1917.

Federal Employers' Liability Act of 1908. Rule as to fellow-servant doctrine. General rule as to the effect of contributory negligence under this Act. What is meant by assumption of risk.

This is an action of personal injuries under the provisions of the Federal Employers' Liability Act of 1908. It was stipulated and agreed that the defendant was engaged in interstate commerce and that the plaintiff was employed in that capacity at the time of the accident. Jury returned a verdict in favor of the plaintiff for $4,791.75 and the matter is before the court on the usual motion.

Held:

1. The jury were justified in finding from the evidence that the accident in which the plaintiff was injured was the result of the negligence of one of plaintiff's fellow-servants; the defendant was therefore liable under the terms of the Federal Employer's Liability Act.
2. There was ample evidence to satisfy the jury that the plaintiff was not guilty of contributory negligence.
3. The accident was not caused by defective machinery, faulty appliances or incompetent or defective fellow-servants, but was the result of a single heedless, unaccountable, careless act of a fellow-servant, and to which the doctrine of assumption of risk cannot be held to apply.
4. At the time of the accident the plaintiff was thirty years of age, was earning as fireman $20 a week, and having completed two years of service in that capacity, would soon have been able to qualify as a locomotive engineer at increased pay. He suffered a bad fracture of the leg, followed by the resulting expensive and painful illness, has a shortened leg and a crippled foot, affecting his ability to labor, and producing continued pain and inconvenience. While his condition may be slightly improved by further surgical treatment, the injured limb can never recover its former shape and usefulness. The jury's verdict of $4,791.75 is not excessive.

Action brought under Federal Employers' Liability Act of 1908 to recover for personal injuries sustained by plaintiff through alleged

negligence of defendant. Defendant filed plea of general issue and also brief statement, claiming that plaintiff was familiar with the condition which caused the accident and that he had, therefore, assumed the risk and was guilty of contributory negligence. Verdict for plaintiff in sum of $4791.75. Defendant filed motion for new trial. Motion overruled.

Case stated in opinion.

Andrews & Nelson, for plaintiff.

Johnson & Perkins, for defendant.

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

MADIGAN, J. This is an action of personal injuries under the provisions of the Federal Employers' Liability Act of 1908. It was stipulated and agreed that the defendant was engaged in interstate commerce and that the plaintiff was employed in that capacity at the time of the accident. Jury returned a verdict in favor of the plaintiff for $4791.75 and the matter is before the court on the usual motion.

The plaintiff had been in the employ of the defendant for about three years as fireman working on different runs for various lengths of time as he was needed, but having no regular assignment. On December 1, 1915, he went to work as hostler in the engine house at Oakland, remaining there in that capacity until the accident the 23rd of that month. He had had no experience as an engineer and admittedly lacked the experience and qualifications to serve in such capacity.

The round house at Oakland was located at the southerly end of the yard facing north. It contained five stalls with an ash pit under each, with tracks leading to the turntable, which was just north of the round house. The stall tracks and one or two extra tracks, to the west of the round house, number six and seven, converged toward the turntable pit where the usual movable table served to turn the engine from the turntable track to the various stalls and vice versa. The turntable track lined with number three pit extended in a northerly direction with a curve to the northeast, northerly from the table. About 172 feet distant therefrom, on the westerly side of the track was a sand house, and further along on the same side was a paint shop. The track curved again to the northwest to the coal shed where the

round house engines were coaled. Among other duties the hostler was required to coal the engines, moving the same from the various stalls on to the turntable and thence to the coal shed, after which the engine and tender were backed across the turntable into the round house. In moving the engine the plaintiff had no fireman or other assistance.

On the morning of the accident the plaintiff took an engine from number 5 pit across to the coal shed, coaling her and turning her over to the engineer on the main line. He was requested by Frost, the repair man, to move the engine in number 2 pit over into number 3 pit, as some work had to be done under the engine and number 2 pit contained water which prevented their working in it. As the engine in number 3 had to be coaled he moved it to the coal shed, filled the tender and was backing into the round house. He testifies that when within fifty feet of the table he looked back, with his engine nearly at a standstill, and noticed that the track on the table was properly lined to receive the tender and engine. As the tender passed onto the table he found that the latter had been moved and it being too late to stop the engine and prevent the accident he jumped receiving the injuries sued for. An employee, whose duty it was to clean the pits, during the plaintiff's absence had moved the table and placed an ash car thereon. No warning was given to the plaintiff that the table had been moved or was about to be moved. There were no regulations governing the use of the table or signs to guard against such accident. The plaintiff, however, testified that he locked the table before he went out and did not notice that it had been moved.

After a careful study of the evidence we feel that the accident was due to the negligence of one Trask, a fellow-servant of the plaintiff, who moved the table during the ten or fifteen minute period that the plaintiff was absent from the round house. It is not claimed that the plaintiff had any way of knowing that the table had been moved except from observation. In returning to the round house the plaintiff to operate the engine, was on the right hand side of the engine, and the curve in the track and the coal piled up as it was in the tender, according to the testimony, would prevent his seeing, from that side of the engine, the alignment of the table track. The slightest degree of care or caution on the part of Trask would have prevented the accident. Trask must have known, or could easily ascertain, when he

found the table lined up to the outside track, that it was in use. Frost who knew the conditions and the purpose and intention of the plaintiff could easily have informed Trask that the plaintiff was about to return. As under the Federal Employers' Liability Act the defendant is not relieved, by reason of the negligence of a fellow-servant, the jury were justified in returning verdict on this ground in the plaintiff's favor.

Nor do we feel that the plaintiff was guilty of contributory negligence, which at most would affect only the amount of recovery. There is ample evidence to satisfy the jury, if they found it credible, that the plaintiff was, under all the circumstances, in the exercise of due care. Alone upon the engine, under the orders of the defendant, with the curve in the track, the coal piled up in the tender, we feel that the jury were justified in finding, that under the circumstances, he was in the exercise of all the care that would be required of a reasonable and prudent man. The wheels of the tender had left the track and the engine had jumped before his attention was called to the fact that the table had been moved. While he might not have been injured had he remained in the cab, under the existing conditions he could not be said to be at fault in attempting to avoid injury by jumping from the engine.

Nor can it be said that he assumed the risk. Assumption of risk implies prior knowledge of conditions from which accidents result. If held to apply here it would be difficult to conceive of a case in which recovery might he had. The accident was not the result of faulty appliances or defective machinery but was caused by the heedless, almost unaccountable carelessness of a fellow employee, who might have awaited the plaintiff's return, or with the least possible amount of exertion, given him due and timely warning of the change in the position of the table.

The amount of the damages are not excessive. Plaintiff is about thirty years old, was earning $20. a week, and in a short time would have become a duly qualified engineer with an increase of salary. He suffered a great deal of pain, one leg is shortened and left in such condition that his ability to labor is greatly impaired and he suffers constantly when using it.

Motion overruled.

HARVEY W. BOWLES *vs.* IRA S. SAWYER.

Penobscot. Opinion December 21, 1917.

Insurance contract. General rule as to right of agent of insurance company being entitled to commissions on renewal premiums paid after the agent's contract has been terminated.

This is an action of debt on an insurance contract, and is before the court on an agreed statement of facts, from which it appears that the defendant was general agent of the New England Life Insurance Company, and employed the plaintiff to act as his special agent to procure applications for life insurance policies, deliver policies and premium receipts, and to collect premiums and transmit the same to the general agent. The contract was dated March 18, 1911, and was terminated by the plaintiff on the third day of May, 1913, by giving written notice as provided therefor in the contract. All commissions on first premiums, and on renewals prior to said third day of May, 1913, were paid to the plaintiff, who now sues to recover for commissions on renewal premiums.

Held:

1. The terms of the contract are clear and unambiguous. The commission on the renewal premiums were to be paid "during the continuance of the agreement," or, as provided in Section 14 for such contingency, after the expiration of one year, if the agreement shall be terminated by the general agent.
2. The plaintiff received all commissions to which he was entitled at the date of the termination of the agency. He cannot recover further compensation under the contract. The claim advanced by the plaintiff to be meritorious must be supported by evidence of continued service, which is not pretended here.
3. In the absence of express stipulation to the contrary, an agent is not entitled to commissions on renewal premiums paid after the termination of the agency.

Action of debt upon an insurance contract. By agreement of parties case was reported to Law Court upon agreed statement of fact. Judgment for defendant.

Case stated in opinion.

P. B. Gardner, for plaintiff.

Scott Wilson, and E. L. Bodge, for defendant.

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

HANSON, J. This is an action of debt on an insurance contract, and is before the court on an agreed statement of facts, from which it appears that the defendant was general agent of the New England Life Insurance Company, and employed the plaintiff to act as his special agent to procure applications for life insurance policies, to deliver policies and premium receipts, and to collect premiums and transmit the same to the general agent. The contract was dated March 18, 1911, and was terminated by the plaintiff on the third day of May, 1913, by giving written notice as provided therefor in the contract. All commissions on first premiums, and on renewals prior to said third day of May, 1913, were paid to the plaintiff.

For the first year's business the plaintiff's remuneration was to be a commission ranging from four per cent to fifty per cent on the premiums on policies secured by him.

Further provision was made in his favor under sections seven and eight of the contract, and as the suit is based on section seven, that section is here given:

"Section VII. During the continuance of this agreement, without any of its terms or conditions having been violated in any particular, the said General Agent agrees to pay or allow to the said party of the second part, a commission of 5 per cent on the first nine renewal premiums, so called, on policies for the term of life, and on endowments of 20 or more annual payments; and 3 per cent on the first nine renewal premiums, so called, on endowments of less than 20 annual premium payments, on all policies placed by said party of the second part, and standing to his credit, when, and as, such renewal premiums are actually collected by the said General Agent."

The plaintiff sues to recover for commissions on renewal premiums and asserts his claim in his declaration, "That by virtue of the provisions of the seventh condition of said herein mentioned agreement, he became and was entitled to, on the thirty-first day of December, A. D. 1915, certain renewal commissions for the years 1913, 1914 and 1915, for insurance written subsequent to the eighteenth day of March, A. D. 1911, and prior to the third day of May, A. D. 1913, at the rates of five and three per cent respectively on the basis of annual

premium payments, for such policies of insurance as aforesaid, according to the terms of said itemized account annexed hereto and made a part of this declaration."

The terms of the contract are clear and unambiguous. The commission on the renewal premiums were to be paid, "during the continuance of the agreement," or, as provided in section 14 for such contingency, after the expiration of one year, if the agreement shall be terminated by the general agent.

As above stated the agreement was terminated by the plaintiff. He had received all commissions to which he was entitled at the date of the termination of the agency. He cannot recover further compensation under the contract. The claim advanced by the plaintiff to be meritorious must be supported by evidence of continued service, which is not pretended here.

No citation has been presented, or reason advanced why we should depart from the rule that, "In the absence of express stipulation to the contrary, an agent is not entitled to commissions on renewal premiums paid after the termination of the agency." *Spaulding* v. *Ins. Co.*, 61 Maine, 329. *Gooding* v. *Insurance Company*, 110 Maine, 69. The entry will be,

Judgment for the defendant.

SAMUEL M. GILE *vs.* SAMUEL H. BOARDMAN.

Piscataquis. Opinion December 21, 1917.

Real actions. Sheriff's deeds. Adverse possession.

This is a real action brought to recover the north half of lot No. 9, Range 17, in Kingsbury Plantation, Piscataquis County, and is before the court on report. The writ is dated August 28, 1915.

Held:

1. The testimony supports the plaintiff's contention that he was seized of the demanded premises within twenty years.
2. To render the defendant's contention available it should be made to appear that his grantor was a creditor, and that the conveyance was made for the purpose of defeating his claim, and it should be so apparent in a proper proceeding under a statute not invoked by him originally, or by the defendant in this case.
3. The legal title was in Mary E. Cooley. In 1888, the sheriff seized on execution the property of William Smith and sold the same to Henry Hudson, the defendant's grantor. That seizure and sale did not affect the title and ownership of Mary E. Cooley in the demanded premises. She had a right to sell and did sell the same to the plaintiff on January 20, 1913, by deed recorded February 1, 1913, which record antedates the record of a similar deed from the same grantors to Mr. Hudson, which for some reason he had held for years without recording. It does not appear that the plaintiff had knowledge of the latter deed to Mr. Hudson. The record of seizure and sale of the property of William Smith does not affect the title of Mary E. Cooley. That title was complete, and passed without legal interruption to Samuel M. Gile under the deed from Mary E. and Homer W. Cooley, dated January 20, 1913.

Writ of entry to recover certain lands in the County of Piscataquis, State of Maine. Defendant filed plea of general issue and brief statement. At the close of testimony, by agreement of parties, case was reported to Law Court for determination upon so much of the evidence as legally admissible. Judgment for plaintiff.

Case stated in opinion.

J. S. Williams, and Turner Buswell, for plaintiff.

Hudson & Hudson, Robert E. Hall, and Charles W. Hayes, for defendant.

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

HANSON, J. This is a real action brought to recover the north half of lot No. 9, Range 17, in Kingsbury Plantation, Piscataquis County, and is before the court on report. The writ is dated August 28, 1915.

Both parties claim under one William Smith. The plaintiff introduced a deed from William Smith to Mary E. Cooley, dated August 5, 1886, and recorded October 5, 1886, and a deed from Mary E. Cooley and Homer W. Cooley to the plaintiff of the same premises, dated January 20, 1913, and recorded Feby. 1, 1913, and again recorded May 2, 1913.

The defendant claims title as follows: On September 15, 1886, six weeks after the date of the deed from William Smith to Mary E. Cooley, and before that deed was recorded, Henry Hudson of Guilford sued out a writ of attachment against William Smith, returnable at the February term, 1887, of the Supreme Judicial Court for Piscataquis County, on which a real estate attachment was made. Judgment was rendered therein September 25, 1888, and on October 25, 1888, the property was seized and advertised, and on December first following was sold to said Hudson, the sheriff's deed thereof being recorded February 26, 1889. Henry Hudson conveyed the property to the defendant Samuel H. Boardman, April 22, 1901, by deed recorded April 26, 1901.

The defendant claims further that the action was not brought within twenty years after the right of action accrued, or in other words that Henry Hudson and his grantee, the defendant, had been in actual possession of the premises for more than twenty years when the writ in this action was brought.

The defendant at the outset attacks the conveyance from William Smith to Mary E. Cooley, and says that at the date of such conveyance Smith was indebted to Mr. Hudson in a sum, including interest, amounting to about $40, and that the conveyance being for support was without consideration, and void as to Mr. Hudson, the only creditor.

As to the first contention, that the action was not brought within the statutory period, and that the defendant and his grantee had been in actual possession for more than twenty years: The testimony shows that the dwelling house on the premises was destroyed by fire in 1893, and that Mary E. Cooley and her husband moved to another

house nearby and remained there for two or three years, occupying the land in the meantime. One witness whose testimony appears to be clear and impartial fixes the date of removal of the Cooleys in 1896. The testimony of the local witnesses is conflicting, but we think the weight of the testimony supports the plaintiff's contention that he was seized of the demanded premises within twenty years. This conclusion is further supported by the fact that on August 3, 1899, Mr. Hudson procured from Mary E. and Homer W. Cooley a quitclaim deed of the demanded premises, which deed was recorded February 9, 1914. To render available the second contention it should be made to appear that Mr. Hudson was a creditor, and that the conveyance was made for the purpose of defeating his claim, and it should be so apparent in a proper proceeding under a statute not invoked by him originally, or by the defendant in this case. R. S., 1903, Chap. 78, Sec. 14; (R. S. 1916, Chap. 81, Sec. 14). *Fletcher* v. *Tuttle,* 97 Maine, 491; *Am. Agricultural Co.* v. *Huntington,* 99 Maine, 361; *Fall* v. *Fall,* 107 Maine, 539.

The defendant's counsel does not now rely upon the attachment, but does rely upon the seizure. This election simplifies the remaining questions which relate to the record title. As has been seen, William Smith conveyed to Mary E. Cooley, August 5, 1886. The legal title was then in Mrs. Cooley. In 1888, the sheriff seized on execution the property of William Smith and sold the same to the defendant. That seizure and sale did not affect the title and ownership of Mary E. Cooley in the demanded premises. She had a right to sell and did sell the same to the plaintiff on January 20, 1913, by deed recorded February 1, 1913, which record antedates the record of a similar deed from the same grantors to Mr. Hudson, which for some reason he had held for years without recording. It does not appear that the plaintiff had knowledge of the latter deed to Mr. Hudson. The record of seizure and sale of the property of William Smith does not affect the title of Mary E. Cooley. That title was complete, and passed without legal interruption to Samuel M. Gile under the deed from Mary E. and Homer W. Cooley, dated January 20, 1913.

The entry will be,

Judgment for the plaintiff.

LESLIE J. BROWN *vs.* JENNIE ROUILLARD.

Somerset. Opinion December 28, 1917.

General rule applicable to declarations in actions of slander. Effect of filing specifications. How same are to be considered.

This is an action for slander, in which the plaintiff complained that the defendant accused him of burning his buildings to defraud his insurers. In response to an order of court the defendant filed the following specification. "The words 'you burned your buildings' is the language claimed to have been uttered by the defendant, relied upon as being actionable"—Defendant thereupon filed a special demurrer which was sustained by the presiding Justice, to which ruling plaintiff excepted.

Held:

1. The specification amended the declaration, stated the ground of plaintiff's claim and restricted his right of recovery to that claim.
2. When words complained of are harmless in themselves, or of doubtful import, a declaration for slander must contain averments sufficiently full and complete of such facts and circumstances as together with the uttered words justify the hearers in giving to the language a slanderous interpretation with at least a reasonable certainty.
3. Omission of such averments will not be aided by innuendos and those cannot add to, or extend, the sense or effect of the words set forth, or refer to any thing not properly alleged in the declaration.

Action on the case for slander. The declaration originally contained four counts. The writ was entered at the January term, 1917, Somerset County. At the April term, 1917, defendant filed motion asking that the plaintiff file specific items under the third and fourth count of his writ. At said April term, by agreement, the first, second and third counts of plaintiff's declaration were stricken out and specifications filed under the fourth count. Defendant thereupon was given leave to file demurrer with right to plead over. Demurrer was sustained by presiding Justice; to which ruling plaintiff filed exceptions. Exceptions overruled. Demurrer sustained.

Case stated in opinion.

Merrill & Merrill, for plaintiff.

Fred F. Lawrence, for defendant.

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

MADIGAN, J. This is an action for slander; the declaration reading as follows:—

"For that the said Jennie Rouillard, at said Skowhegan, fraudulently and maliciously contriving and intending to injure, blacken and defame the said Leslie J. Brown, in his good name and reputation, on the fourth day of September, A. D. 1916, and there, on divers days and times between that day and the day of the purchase of this writ, in certain other discourses which the said defendant then and there had with divers good citizens of this State of and concerning the said Leslie J. Brown, did fraudulently, falsely, maliciously, openly and publicly charge the said Leslie J. Brown with the crime of burning his own property to defraud his insurers, in the presence and hearing of the said citizens, by which false and malicious charge and accusation the said Leslie J. Brown has been greatly injured and prejudiced in his good name, character and reputation, and has been and is exposed to a prosecution for said crime and has undergone great pain, distress and trouble of mind and body, and has otherwise been greatly injured, to the damage of said plaintiff, (as he says) the sum of Two Thousand Dollars, which shall then and there be made to appear with other due damages."

In response to the order of court the plaintiff filed the following specification;—"The words 'you burned your buildings' is the language claimed to have been uttered by the defendant relied upon as being actionable."

The defendant thereupon filed a special demurrer claiming that the declaration and specifications set forth no legal cause of action. The case is before the court on exceptions to the ruling of the presiding Justice sustaining the demurrer.

It is well settled that the specification is practically an amendment to the declaration and the two must be considered together. "A specification must particularly state the ground of claim, the gist of the action. It limits the proof and restricts the right of recovery to that claim." *Gooding* v. *Morgan*, 37 Maine, 423. "The claim of the plaintiff is restricted and his right to recovery limited by his specification." *Carson* v. *Calhoun*, 101 Maine, 456. *Smith* v. *Kirby*, 10 Met., 150. "The bill of particulars should give as much informa-

tion as a special declaration so that the defense may know the real ground of the action." *Babcock* v. *Thompson*, 3 Pick., 446.

"A bill of particulars is an amplification of more particular specification of the matter set forth in the pleading. The declaration, plea, or notice of set-off, may be so general in its terms that the opposite party will not be fully apprised of the demand which will be set up on the trial, and he is therefore permitted to call on his adversary to give a more detailed and particular statement of the claims on which he intends to rely. When the bill is furnished, it is deemed a part of the declaration, plea, or notice to which it relates, and is construed in the same way as though it had originally been incorporated in it."

Another court states the principle thus: "Specifications or bills of particulars are of the nature of amendments to the declaration. They become part of the record only by the allowance or order, actual or presumed, of the court. The defendant may apply to the court to order a specification in cases where from the indefiniteness of the declaration he is uncertain what claim in particular is designed to be insisted upon, and the court may order specifications to be filed forthwith or at a specified time, and the specifications, being filed in pursuance of such order, *become a part of the declaration and of the record and may be treated as such in the pleadings.*" *Benedict* v. *Swain*, 43 N. H., 33.

"One furnishing a bill of particulars under an order of court must be confined to the particulars he has specified as closely and effectually as if they constituted the essential allegations in a special declaration." *Commonwealth* v. *Giles*, 1 Gray, 466, 469.

In its original form the writ alleged a charge of crime which being actionable per se the allegation was sufficient. *Kimball* v. *Page*, 96 Maine, 487. *True* v. *Plumly*, 36 Maine, 477. But as amended it charges the uttering of words, harmless in themselves, and which could only be slanderous when united by the hearers with facts and circumstances, which together with the uttered words conveyed a charge of crime. Averments sufficiently full and complete, to set forth such facts and circumstances, are essential to support a charge of slander when the words, as in this case, are harmless or of doubtful import.

"Words cannot be regarded upon demurrer to the declaration as actionable unless they can be interpreted as such with at least a

reasonable certainty. In case of uncertainty as to the meaning of the expression of which the plaintiff complains he must make the meaning certain by means of proper colloquium and averment. It is always within his power to do so." *Wing* v. *Wing*, 66 Maine, 62.

In *Emery* v. *Prescott*, 54 Maine, 389, plaintiff brought an action of libel on the ground that the article suggested he should be carried back to Thomaston where he came from. The innuendo alleging that the article intended to convey the charge that the plaintiff had been an inmate of the state's prison, the court says, "in the absence of any introductory matter, by the way of explanation, carrying him back to Thomaston would be no more libellous than carrying him back to any other town. Nor does the innuendo that Thomaston means 'the state prison situated in the town of Thomaston, which place is known by the name of the town,' unexplained by introductory matter, make the words actionable, which, without innuendo would not be libellous. An innuendo is only explanatory of some matter already expressed; it serves to point out when there is precedent matter but never for a new charge; it may apply to what is already expressed but cannot add to or enlarge or change the sense of the previous words." "Upon its face then the libel contains no words charging the plaintiff with having been convicted and sent to the state's prison at Thomaston. It is sought by innuendo to make these words libellous but as has been seen the authorities concur in the proposition that an innuendo cannot enlarge or alter the meaning of the words which constitute the alleged libel."

"If the libel or words did not acknowledge, or per se convey the meaning the plaintiff would wish to assign to them, are ambiguous and equivocal, and require explanation by reference to some extrinsic matter to show that they are actionable, it must be expressly shown that such matter existed and that the slander resulted therefrom. When what is complained of in the declaration as a libel does not, upon the face of it, apply to the plaintiff and impute a libel, there must be an inducement stating such facts as will support an innuendo and show the libellous application of the statement to the plaintiff." 1st. Chitty on Pleading, 401.

"The innuendo is larger than the natural meaning of the words and the rule is that an innuendo cannot enlarge the meaning of the words unless it is connected with some matter of fact before expressly

averred." *Angle* v. *Alexander*, 20 E. C. L., 71. *Burbank* v. *Holmes*, 39 Maine, 233-236.

"When the slander is prima face actionable, as calling a person directly a thief or charging him with having been guilty of perjury, a declaration stating the defendant's malicious intention of the slander concerning the plaintiff, is sufficient without any preparatory inducement." 1st. Chitty on Pleading, 381. "Where the words themselves are such as can only be understood in a criminal sense no inducements of any extrinsic matter is requisite, but if the charge is not necessarily slanderous the plaintiff must by way of introduction or inducement state that some fact has taken place to which the defendant alluded and to which the innuendo must afterwards refer." Citing 2nd Chitty on Pleading, 256, note s.

It is said by Lord Kenyon in *Holt* v. *Skofield*, 6 D. & E., which was an action of slander for the charge against the plaintiff made by the defendant that he had resworn himself, either the words themselves must be such as can only be understood in a criminal sense or it must be shown by a colloquium in the introductory part that they have that meaning, otherwise they are not actionable.

Under the modified procedure in Massachusetts observance of these rules is still required.

In *Brettun* v. *Anthony*, 103 Mass., 37, the court said:

"Words in themselves harmless, or of doubtful import, become slanderous when used with reference to known existing facts and circumstances in such manner as to convey to the hearer a charge of crime. This limited protection to reputation the law attempts to give against indirect verbal imputation. It must however be made apparent, by suitable averments in the declaration, that the language employed was used by the defendant slanderously, to the extent stated; and the words, when taken in their plain and natural import, must be capable of the meaning attributed to them."

"The facts which determine the alleged meaning are usually stated in a prefatory manner, followed by a positive averment, or colloquium, that the discourse was of and concerning these circumstances. Whatever the particular order of their arrangement, these averments become material and traversable, and it must appear from them that the words impute the alleged offence. It is a further elementary principle, that the colloquium must extend to the whole of the prefatory inducement, necessary to render the words actionable."

"An omission in the respect indicated will not be aided by mere innuendoes, whose office cannot add to or extend the sense or effect of the words set forth, or refer to anything not properly alleged in the declaration. *Snell* v. *Snow*, 13 Met., 278. General allegations, that the defendant charged the plaintiff, falsely and maliciously, with the commission of a particular crime, accompanied by innuendoes, however broad and sweeping, will not aid a declaration otherwise imperfect. Thus, the act of burning one's own property becomes a crime only under special circumstances, as when done for the purpose of defrauding the insurers, or in violation of the provisions of the bankrupt act. Conversation about such burning, otherwise innocent, or of doubtful import, may be made actionable, if reference was had in it to these special circumstances, in such manner as necessarily to impute the crime. And the declaration is defective, if it does not set this forth by suitable averments."

"It is no answer, that facts and circumstances enough are stated, unless it is also averred that the speech of the defendant was with reference to such facts, or so many of them as are essential elements in the crime. Nor is this want supplied by alleging that the defendant, at the time of speaking the words, had knowledge of the particular circumstances which make the act of which he speaks criminal. He is to be charged only for a wrong actually committed, irrespectively of his secret knowledge or intent. He is responsible only for the meaning which the words used by him, reasonably interpreted, convey to the understanding of the persons in whose presence they were uttered. See *Fowle* v. *Robbins*, 12 Mass., 498; *Bloss* v. *Tobey*, 2 Pick., 320; *Carter* v. *Andrews*, 16 Pick., 1, 5; *Sweetapple* v. *Jesse*, 5 B. & Ad., 27."

Exceptions overruled.
Demurrer sustained.

CHARLES S. WILLIAMS, Admr., *vs.* ERNEST T. HOYT.

York. Opinion December 31, 1917.

Action under R. S., 1916, Chap. 92, Sec. 9. Damages recoverable under this form of action. Method of computing and what can be considered in fixing damages. Rule where parents die pending the action.

This is an action under Sec. 9, Chap. 92, R. S., 1916, for the benefit of the father and mother of Harry L. Williams who was negligently killed by the defendant. The case is before the court on report.

Defendant's guilt was established as the result of an offer of reward made by the plaintiff. After he was bound over to the grand jury and before trial in the upper court, the defendant paid the plaintiff $300. the amount of the reward, and the defendant claims said payment was made and accepted in full settlement of his civil liability.

Held:

1. The payment was intended to reimburse the plaintiff for the reward and to placate the family of the deceased with a view of mitigating defendant's punishment, and is no bar to this action.
2. The rights of the beneficiaries vest as of the time of death, and the amount recoverable is not lessened by the fact that the mother died pendente lite.
3. Funeral expenses are not recoverable, but simply the estimated amount of future pecuniary assistance the deceased would have been to his beneficiaries.
4. Deceased was nearly sixteen years of age, bright, active, studious, thrifty, healthy, industrious and kind to his parents. We estimate the damages at fifteen hundred dollars.

Action on the case brought under R. S., 1916, Chap. 92, Sec. 9, to recover damages for the negligent killing of plaintiff's intestate. Defendant filed plea of general issue and also brief statement, setting forth that payment had been made in settlement of the claim prior to the bringing of the suit. At close of testimony case was reported to Law Court for determination upon so much of the evidence as legally admissible. Judgment in accordance with opinion.

Case stated in opinion.

E. P. Spinney, for plaintiff.

Aaron B. Cole, for defendant.

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

MADIGAN, J. This is an action under Sec. 9, Chap. 92, R. S., 1916, for the benefit of the father and mother of Harry L. Williams, who was instantly killed by the defendant, and is before the Law Court on report. The deceased was shot while hunting, and the defendant, well knowing that the accident was due solely to his negligence and carelessness, to the family of the deceased and at the inquest, denied all knowledge of the matter. Despairing of otherwise learning the truth the father of the deceased offered a reward of $300. and as a result obtained evidence to establish defendant's guilt and finally secured his acknowledgment of the same. The defendant pleaded guilty in the lower court, was bound over to the grand jury, convicted and sentenced. The day after he pleaded guilty in the lower court, the defendant, and his father and mother, interviewed the father of the deceased and paid the latter $300. The defense urges that this payment was made and accepted in full settlement and satisfaction of the damages sought to be recovered in this action, and the plaintiff contends that it was to reimburse Charles Williams for the amount of the reward and that the defendant and his relatives were influenced simply by a desire to placate the family of the deceased, and thereby lessen defendant's punishment.

While the beneficiaries might have thus settled and thereby barred this action the evidence fully satisfies us that they did not do so. This conclusion must at one time have been shared by the defendant since his attorney wrote the father demanding the $300. on the ground that it was paid and received without consideration.

The principles to be followed in the assessment of damages, which is the only question remaining, are stated in *McKay, Admr.*, v. *New England Dredging Co.*, 92 Maine, 454, viz: "The injury occasioned by such death must be wholly to the beneficiaries named in the statute, and the damages to be recovered for such injury are limited to the pecuniary effect of the death upon them. It is not essential to the right of the beneficiaries to recover damages for such death, that they should have had any legal claim against or upon the deceased. Wherever there exists a reasonable probability of pecuniary benefit to one from the continuing life of another, however arising, the untimely extinction of that life is a pecuniary injury. In estimating the amount

which shall be the 'fair and just compensation' for such injury provided by the statute, the various circumstances of the beneficiaries and the deceased and the relations between them are to be ascertained; the certainties, probabilities and even possibilities of the future are to be considered; and from these data the amount of the compensation is to be estimated by a careful calculation of what would have been the reasonably probable pecuniary benefit to the survivor from the continued life of the deceased."

The mother died pendente lite. That does not affect the result in this case. The rights of beneficiaries vest as of the time of the death, not as of the time of bringing suit or of recovery.

Recovery cannot be had for funeral expenses, but simply for estimated amount of future financial assistance. The deceased was fifteen years, eleven months and fifteen days old, energetic, industrious and kind to his parents. He was a student at the academy, earning while attending school, about $2. a week besides assisting his mother about the house. In the summer time he earned on the golf links $30. a month and his dinners and suppers. The year previous to his death he earned and brought home $125. Living at home his earnings would, in a large measure, if not entirely, during his school life, be off-set by his board and sustenance. Had he entered college he could not, during his minority, have been of any pecuniary assistance to his father. On the other hand if he went to work, after finishing the academy, or at once, his surplus earnings after deducting his necessary personal expenses could not be large as he was too young to have received such training as would command a large salary, and the wages of a day laborer, or a beginner in mercantile pursuits, would not be large.

The amount of the pecuniary benefit he would be to his father after arriving at his majority is no easier to determine. Probabilities of marriage, sickness, personal responsibilities and the vicissitudes of life all must be considered. At best it is entirely a matter of conjecture. We feel that the pecuniary loss to the parent under the rules above given, for a boy of this kind, sixteen years of age, should be $1500.

HARRY H. RICH *vs.* ALFRED KING.

Penobscot. Opinion January 5, 1918.

Malpractice. General rule as to duty of physician to inform patient of nature of treatment given.

On report. An action on the case whereby the plaintiff seeks the recovery of damages from the defendant for alleged malpractice in the exercise of his profession of physician and surgeon. The writ is dated June 16, 1915.

Defendant operated in July, 1909, upon plaintiff who was suffering from appendicitis. The plaintiff alleges that defendant, after the operation, told plaintiff that his appendix had been removed when in fact it had not been removed and that, in consequence of this statement, he suffered great pain and was put to great expense and suffered irreparable injury. The plaintiff admits that no error was committed in what was done in performance of the operation.

It is the opinion of the court that the plaintiff has not supported his allegations by a preponderance of the evidence.

Action on the case to recover damages for alleged malpractice in treating plaintiff. Defendant filed plea of general issue. At close of testimony, by agreement of parties, case was reported to Law Court to be determined upon so much of the evidence as legally admissible, and in event that defendant was found liable the Law Court was to assess damages for plaintiff. Judgment for defendant.

Case stated in opinion.

F. Wade Halliday, for plaintiff.

William H. Gulliver, for defendant.

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

BIRD, J. This action on the case, whereby the plaintiff seeks the recovery of damages from the defendant for alleged malpractice in the exercise of his profession of physician and surgeon is before this court upon report to be determined upon so much of the evidence as is legally admissible. The writ is dated June 16, 1915.

In brief, the declaration alleges that in July, 1909, the plaintiff "suffering from what is known as appendicitis" was operated upon by the defendant at his hospital and on the day following the operation was told by the defendant "that the appendix had been decayed and that he removed what was left of the appendix," that two or three days later defendant told plaintiff "that he now belonged to the no appendix class;" that after remaining in the hospital until the twenty-first day of August, 1909, plaintiff left the hospital without having been notified by defendant that his appendix was still in his abdomen and that it had not been removed; that a few months after leaving the hospital he was attacked with pains in the abdomen, as before the operation, and that, with his knowledge that the appendix had been removed, his physician could not determine the nature of his ailment; that he suffered many subsequent attacks of like nature; that on the twenty-second day of December, 1912, he was attacked with most severe pains in the region of the appendix, when Dr. Simmons of Bangor was called, who after removing him to Bangor, immediately operated and found the plaintiff's appendix in his body, decayed and rotten, whence it was removed by Dr. Simmons. The declaration continues: "The plaintiff says that it was the duty of the said defendant to notify him that the appendix had not been removed; that the defendant did not so notify the plaintiff; the plaintiff further says that it was an added duty of the defendant not to tell the plaintiff that he had removed said appendix from the body of the plaintiff when in truth and in fact he had not removed said appendix; that because the plaintiff was informed that his appendix had been removed and because the appendix had not been removed in fact, the plaintiff suffered great pain both bodily and mentally and was put to great expense for care, attention and nursing; and that the plaintiff was weakened in the abdominal cavity so that he could never be well again."

Disregarding the want of express allegations, the injuries alleged to have been suffered by plaintiff seem to be ascribed to the express statement of defendant to plaintiff that his appendix had been removed when in fact it had not been removed and is not based upon the alleged omission to declare to him that the appendix had not been removed and that it was still in his body. *Goodwin* v. *Hersom*, 65 Maine, 223.

In support of the allegation that defendant expressly declared to plaintiff that his appendix had been removed, the plaintiff introduces

evidence of two conversations with defendant. It is well first to dispose of that later in time. Its occurrence and nature are testified to by the plaintiff and his wife. Their evidence is to the effect that some two or three days after the operation at the hospital, the plaintiff, his wife and the defendant were in the room of the plaintiff engaged in conversation which turned to the subject of a base ball game in which Dr. King had taken part. The plaintiff remarked that he played when at school and defendant said "you can play on the non-appendix team now." Both the plaintiff and his wife admit that defendant spoke in a "joking way" and the wife states that the conversation was not of a serious nature. The court is clearly of the opinion that the statement of defendant made in the manner in which it was made and in a conversation of such character should not be considered sufficient evidence to sustain the grave charge made and alleged in the declaration.

The first conversation is testified to by plaintiff alone. He fixes its occurrence as shortly after the operation and before the other conversation above referred to (the declaration alleges it to be the day after the operation). The defendant was in his room and plaintiff details the conversation as follows: I asked him "in regard to my condition and Dr. King says; "we found your condition very bad," and I says, "Did you remove my appendix?" and he says, "We found the appendix decayed and partially sloughed off, and we removed what remained of the appendix." Other than the parties to the suit, no one appears to have been present. Dr. King denies that he ever told defendant that he had removed his appendix and states that when the operation was completed he knew that he had not removed the appendix and that he had removed nothing except the pus in the cavity of the abscess.

It may be well to state, as concisely as possible, the history of the operation. On the nineteenth day of July, the plaintiff, while at Brooks, was seized with intense pain in the region of the appendix; Dr. Kilgore was called and found "all the symptoms of pus in the abdomen"; plaintiff's wife, Mrs. Ada E. Rich, having already made arrangements with Dr. King, she and Dr. Kilgore took plaintiff by the first train next morning to the hospital. Arriving there about noon, Dr. King found the case so serious that he left his dinner and made preparations for an immediate operation which he performed in the presence of Dr. Kilgore. Both physicians say that a large abscess

was found; that the intestines were so inflamed and the condition of the plaintiff so serious that extensive exploration was highly dangerous; that the appendix was not removed nor was any attempt made to do so, and that the pus was drained from the cavity of the abscess. Dr. King states that in the examination of the cavity of the abscess which he felt he could safely make, he could not detect the presence of the appendix and that if he had he should have removed it. Subsequent measures were such as provided for continued drainage and healing of the wound. The plaintiff admits no error was committed in what was done in the performance of the operation.

Under the circumstances attending the operation the statement of the plaintiff that defendant told him that the appendix had been removed is grossly improbable. He was a surgeon of great skill and long experience. He had then no interest to state other than the truth. The plaintiff now has. But plaintiff at the time he alleges the conversation occurred must have within twenty-four or forty-eight hours suffered surgical shock and the shock following the administration of ether, for which he was a bad subject. His mind may have not comprehended clearly what took place and was said and he may have unconsciously intermingled what Dr. King or Dr. Kilgore or others truthfully told with conclusions of his own and figments of his own imagination.

While the plaintiff was at the hospital he had with him a memorandum or note book in which he from time to time made minutes of occurrences, many of them being of a most trivial and unimportant nature. In it occurs the following entry: "Tuesday, July 20, 1909 Went to hospital today accompanied by Ada. Dr. King operated on me in less than half an hour; in operating room nearly one hour; the appendix was all decayed and had pus which they removed, nearly one-half pint of pus; put packing in my side, ten yards of gauze." The entry is in substantial conformity with the testimony of Drs. King and Kilgore. The book contains, as the plaintiff admits, no entry of the conversation in which he alleges that defendant stated that he removed the remainder of the appendix. This omission and the entry already quoted are significant. We are forced to the conclusion that plaintiff has not sustained by a preponderance of the evidence the allegation of his declaration which we have been considering.

Nor is the allegation of the declaration that "it was the duty of defendant to notify the plaintiff that the appendix had not been removed; that the defendant did not so notify the plaintiff," assuming plaintiff not precluded from relying upon it for the reasons already stated, sustained by the evidence. Whatever the duty of defendant, he could state only what he knew and he testifies explicitly that at the time of the operation he did not know whether or not the appendix was still in the body of the patient. This evidence is uncontradicted.

Neither is the evidence tending to show that the appendix was found in the body of plaintiff at the time of the second operation satisfactory. The recurrence of the abscess does not, upon the evidence, indicate that it was due to the presence of the appendix or a portion of it. It might be due to other causes. On the occasion of the last attack of plaintiff, Dr. Simmons was called. After listening to the history of the case and making an examination, he communicated by telephone with Dr. Kilgore. At once he ordered plaintiff's removal to Bangor where, immediately upon his arrival, an operation was performed. Three physicians present at that operation, testify to the removal of a solid substance. All gave it but a casual examination. It was in the hands of but one. None states positively that it was a portion of the appendix. One has no opinion, another thinks it was appendix tissue but admits he did not have it in his hands and that it may have been something else, while the third who took it from the body gives no unqualified opinion, thinks it may have been appendix tissue but states that a microscopical examination would be needed for a positive determination. All this afforded but little more than an opportunity for a guess by a jury.

It is, however, unnecessary to come to a conclusion upon this matter.

The court is clearly of opinion that no breach of duty on the part of defendant by reason of any statement made to the effect that the appendix had been removed, as alleged in the declaration, is supported by the evidence.

In arriving at the conclusion which we have reached, the court has not found it necessary to make any findings of law as to the duty of a physician and surgeon in the premises but have assumed, without declaring, the law to be as plaintiff claims.

Judgment must therefore be entered for defendant.

So ordered.

STATE OF MAINE *vs.* AUGUSTUS S. HOWARD.

Cumberland. Opinion January 14, 1918.

Exceptions. How same should be drawn and what should be stated therein. General rule as to offering evidence in regard to character and reputation. Motion in arrest of judgment. Defects reached by motion in arrest of judgment. Meaning of term "record" and what is included therein. Right of jury to separate in certain criminal cases before verdict is rendered.

In an indictment for rape, after a verdict of guilty, upon exceptions and appeal it is,

Held:

1. That evidence of statements and discussions occurring after the date when the respondent was accused and arrested for the offense, to the effect that his reputation for morality had always been good in the community where he lived and carried on business, was properly excluded as being mere hearsay.
2. A motion in arrest of judgment can reach only intrinsic defects, apparent on the face of the record which would render the judgment erroneous, and cannot reach matters of procedure.
3. It was not error to allow the jury to separate during the progress of the trial, as under the present statute the penalty for the offense is not imprisonment for life but any term of years.
4. The evidence to sustain the verdict is abundant, if believed, and a careful study fails to convince the court that the jury were not warranted in believing the respondent guilty beyond a reasonable doubt.

Indictment for rape under R. S., 1916, Chap. 120, Sec. 16. Verdict of guilty. Respondent filed exceptions to rulings of presiding Justice relative to the matter of the admissibility of certain testimony, and to the overruling of a motion in arrest of judgment. Respondent also filed an appeal. Exceptions overruled. Appeal dismissed. Judgment for the State.

Case stated in opinion.

C. L. Beedy, and J. H. Hone, for State.

William C. Eaton, and George S. Murphy, for respondent.

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

CORNISH, C. J. Indictment for rape. Verdict guilty. The case is before this court on exceptions and on appeal from the denial of a motion for a new trial by the presiding Justice.

EXCEPTIONS.

1. The first exception is to the exclusion of evidence offered by the respondent, "of statements and discussions occurring after the date when he was accused and arrested for the offense, to the effect that his reputation for morality had always been good in the community where he lived and carried on his business."

This court might well decline to entertain this exception because it is drawn in such general language as not to comply with the established rules. Not even the names of the witnesses, whose evidence was excluded, are given, nor the questions that were excluded. There is only the general statement above quoted and a reference to the entire transcript of evidence, which is made a part of the bill. This involves the examination of nearly one hundred pages of testimony in order to ascertain, if possible, the precise interrogatories that are covered by the exceptions. Clearly, this method meets neither the requirement of the statute nor of the decisions based thereon. R. S., 1916, Chap. 82, Sec. 55; *Doylestown Ag. Co.* v. *Bracket, Shaw and Lunt Co.*, 109 Maine, 301; *Salter* v. *Greenwood*, 112 Maine, 548; *Dennis* v. *Packing Co.*, 113 Maine, 159.

But waiving that technical point and passing to the merits of the exception, as the case is important, it is obvious that the evidence offered was merely hearsay and therefore inadmissible. The statements and discussion of the respondent's reputation by B., C. and D. as related by a listener A. are outside the line of admissible testimony. If B., C. and D. knew the character and reputation of the respondent for morality and chastity in the community in which he resided, it was competent for the respondent to summon and offer them as witnesses in his behalf, as he in fact summoned many others on that point. The testimony of A. who simply listened to their discussion is a step too far removed. This exception must be overruled.

2. The second exception is taken to the refusal of the presiding Justice to grant the respondent's motion in arrest of judgment.

This motion was based upon the fact that the jury were not kept together in charge of an officer but were allowed to separate at various times during the progress of the trial and before the cause was given to them at the close of the charge of the presiding Justice. Were this in fact an irregularity in procedure, it could not be reached by a motion in arrest of judgment. It is an invariable rule of criminal pleading that a motion in arrest of judgment can reach only intrinsic defects apparent on the face of the record which would render the judgment erroneous, and the term "record" as used in this connection does not include or mean the evidence in the case, often referred to colloquially as the record, but the court's record of the cause as then made up by the Clerk, or the papers filed and minuted on the docket, the full record to be made up later. It comprises the indictment, pleadings, written motions if any, verdict, etc., in the particular case under consideration. It was in this sense that the word was employed in the recent statement of the familiar principle by this court: "As a demurrer in a criminal case reaches the indictment as the same may be recorded, so a motion in arrest of judgment reaches the whole record of the cause as made up to the time of filing the motion. Each can reach only errors of record. Neither can plead facts not of record." *State* v. *Houlehan*, 109 Maine, 281, 284. Where proof of extraneous facts is required, the motion cannot be entertained. It cannot therefore reach matters of evidence, process, service or procedure.

The following are illustrative cases of its denial: Where the respondent alleged that another and different indictment for similar neglect had been found against it at the same term when the indictment under consideration was found. *State* v. *Bangor*, 38 Maine, 592; where objections were made to the manner in which the grand jurors had been drawn; *State* v. *Carver*, 49 Maine, 588; where search was alleged to have been made illegally in the dwelling house of the respondent; *State* v. *Murphy*, 72 Maine, 433; where improper evidence is alleged to have been admitted; *State* v. *Snow*, 74 Maine, 354; where the indictment alleged the same offense for which the respondent had been found guilty by a verdict of a jury in another case; *State* v. *Houlehan*, 109 Maine, 281.

The pending case falls in the same class as the above. The motion is based upon what took place at the trial, upon facts outside, not inside, the record. It therefore need not be entertained.

In *State* v. *McCormick*, 84 Maine, 566, the respondent combined a motion in arrest of judgment with a motion for new trial addressed to the presiding Justice for an error in law in permitting the jury to separate in a case then punishable by imprisonment, after they had agreed upon a verdict and before they had returned it to court. This court in effect sustained exceptions to the overruling of so much of the motion as pertained to the new trial, but such a combination is, to say the least, clumsy pleading and should not be encouraged. In any event that case is not a precedent for the pleading here.

It may be added however that the respondent has lost no rights. There was no error in permitting the jury to separate during the progress of the trial. The procedure in such cases is not regulated by statute here as it is in some other States, but so far as we know it has been the universal practice in this State in capital cases, when capital punishment existed and in felonies punishable by imprisonment for life since capital punishment has been abolished, to keep the jury together until a verdict is rendered or a disagreement is accepted. But this case does not fall within that category. This is a case of rape and while rape was formerly punishable by imprisonment for life or for any term of years,—R. S., 1883, Chap. 118, Sec. 17,—since the revision of 1903 the penalty has been simply imprisonment for any term of years. R. S., 1903, Chap. 119, Sec. 16; R. S., 1916, Chap. 120, Sec. 16. This case therefore does not fall within the accepted rule of criminal procedure above stated, and the presiding Justice did not err in allowing the jury to separate during the progress of the trial.

The case of *State* v. *McCormick*, 84 Maine, 566, relied upon by the respondent, does not apply and for two reasons. In the first place at the time of the commission of the offense in that case the penalty for rape was imprisonment for life or for any term of years. In the second place the jury was allowed to separate after agreeing upon a verdict and before it was returned to court. This was clearly irregular.

APPEAL.

A careful study and analysis of the evidence fail to convince us that the jury erred in their verdict of guilty. The evidence to sustain it is abundant if believed, and the credibility of the witnesses was within the province of the jury. The charge of the presiding Justice contained full and explicit instructions as to the burden of proof and called

specific attention to the caution with which they should proceed in a charge of this character. It was as favorable to the respondent as the law and the facts permitted. After a full, fair and impartial trial the jurors who watched and heard the witnesses have declared the respondent guilty. The only question before this court on the appeal is whether the jury were warranted in believing him guilty beyond a reasonable doubt. *State* v. *Albanes*, 109 Maine, 199; *State* v. *Mulkerrin*, 112 Maine, 544. This question we must answer in the affirmative.

The entry must therefore be,

Exceptions overruled.
Appeal dismissed.
Judgment for the State.

STATE OF MAINE

BY

Information of GUY H. STURGIS, Attorney General,

vs.

ROBERT H. MCLELLAN.

Washington. Opinion January 29, 1918.

Powers and duty of selectmen in relation to appointment and removal of road commissioner or public officials. R. S., Chap. 4, Sec. 16, interpreted. Right of one board of selectmen to remove public official for alleged incompetence or neglect occurring during the administration of a previous board of selectmen. General rule governing the presentation of charges. Hearing on removal of road commissioner by selectmen.

This information involves the title of road commissioner in the town of Baileyville. One Malloy was appointed by the selectmen on March 29, 1916, for a term of three years. He was removed by the selectmen of the following year on May 24, 1917, and one McLellan appointed for a term of one year.

Held:

1. The appointment of Malloy in 1916 was legal. While only two of the selectmen signed the written appointment, all three were present at the meeting and the signatures of a majority was sufficient.

2. The attempted removal of Malloy on May 24, 1917, was illegal. While selectmen have the statutory power to remove a road commissioner from office for incompetency or neglect to perform his official duties, the manner in which that authority shall be exercised and the principles governing proceedings of this nature are well settled.
3. The selectmen do not sit as municipal officers, but for the time being as a judicial tribunal, and they should hear the evidence and pass upon the facts, deliberately, without bias or prejudice and with no preconceived opinion or judgment.
4. The proceedings must be according to the common law, which is the "law of the land." This necessitates the specification of charges, reasonable notice, impartial hearing, separate adjudication on each charge and adjudication on the order of removal.
5. In the case at bar, all of these elements were disregarded. The proceedings were perforated with irregularities and illegalities and the attempted removal of Malloy from office was invalid.
6. It follows that the respondent has no legal right to exercise any of the powers or functions of road commissioner and the State should have judgment of ouster.

Information in the nature of quo warranto. Heard upon bill, answer and amended information. Judgment in accordance with opinion.

Case stated in opinion.

R. J. McGarrigle, for plaintiff.

Reed V. Jewett, and M. J. Kennedy, for defendant.

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

CORNISH, C. J. This information in the nature of quo warranto involves the title to the office of road commissioner in the town of Baileyville, and comes to this court on report. The contest lies between the relator Leo J. Malloy, who claims to have been chosen by a majority of the selectmen by written appointment on March 29, 1916, for a term of three years, in compliance with R. S., Chap. 4, Sec. 16, and the respondent, Robert H. McLellan, who claims that Malloy was removed from office by the then selectmen on May 24, 1917, and that he was chosen by a majority of the selectmen by written appointment on the same day for the remainder of the current municipal year.

The legality of the appointment of Malloy cannot be seriously resisted. It was made by the proper authorities in the statutory

method, and while only two of the selectmen signed the written appointment, all three were present at the meeting and the signatures of a majority were sufficient. R. S., Chap. 1, Sec. 6, paragraph III. *Jay* v. *Carthage*, 48 Maine, 353-358; *Webber* v. *Stover*, 62 Maine, 512-519; *Deming* v. *Houlton*, 64 Maine, 254-262; *Acton* v. *Co. Comm'rs*, 77 Maine, 128; *Bryant* v. *Co. Comm'rs*, 79 Maine, 128.

The controversy centers upon the validity of Malloy's removal by the selectmen on May 24, 1917. The facts connected with that proceeding are as follows: Malloy had served through the municipal year of 1916-17. At the annual town meeting held on March 29, 1917, a change was made in the personnel of the board of selectmen, a change not favorable to Malloy. On April 6, 1917, a majority of the new board sent him a letter asking him to resign, and giving as a reason that the selectmen would act as road commissioners during the current year. On April 12, 1917, Malloy replied, declining to comply with their request. The relations continued strained and on one occasion, about the middle of May, when two of the selectmen were present, one of them told Malloy that he was discharged. This of course was of no effect and Malloy continued in service. Finally after several interviews, a written notice dated May 23, 1917, was served upon him, requesting him to appear before the board on Thursday, May 24, 1917, at 7 o'clock P. M. at their office "to answer to a complaint of incompetency and neglect of official duty in your office as road commissioner." The evidence is conflicting as to when this notice was delivered to the relator. He testifies that it was at about ten o'clock in the forenoon of the day of the hearing; the selectmen say it was the day before the hearing; but we do not deem the slight difference in time of much consequence in this case.

Mr. Malloy appeared with his counsel at the appointed time and place. Because of the tardiness of witnesses for the prosecution the hearing was not begun until eight o'clock. Counsel for the relator then asked for a continuance in order that he might have time to secure witnesses and prepare his defense. This request was refused on the ground that he had had as much time to prepare as had the prosecution. The selectmen had in their possession at the time the petition of R. H. McLellan, the respondent, and eleven others, which read as follows: "To the selectmen of Baileyville: We the undersigned voters and tax payers of this town are not satisfied with the present road commissioner Leo J. Malloy, believing him incompetent

and we would like to have him removed." Counsel for the relator then filed with the board a request for written specifications of the acts of incompetency or neglect of duty, claimed to have been committed by him, and after consultation two of the selectmen drew up and presented the following charges, the remaining selectmen not acting with them:

"1st. Disobeying orders from selectmen May 21, 1917.
2nd. May 10, 1917, standing bossing one man, getting his time in.
3rd. Too extravagant during whole term.
4th. Poor judgment during whole term."

Several witnesses were then examined in support of the charges, and at the close of their testimony counsel for Mr. Malloy renewed his motion for a continuance. This was denied, the town clerk's record of the meeting stating the reason to be that "the road commissioner had had time enough to prepare his defence." This second denial of a continuance occurred at 9.20 P. M. The two selectmen then retired and soon after announced their finding of incompetency on the part of Malloy and his removal from office. In this summary manner was the alleged removal effected.

The authority for removal is found in the following statutory provision: "Any road commissioner may be removed from office by the selectmen for incompetency or neglect to perform his official duties." R. S., Chap. 4, Sec. 16.

The manner in which that authority shall be exercised and the principles governing proceedings of this nature are well settled. The incumbent of a public office should not be deprived of it "but by the judgment of his peers or by the law of the land." The leading case of *Andrews* v. *King*, 77 Maine, 224, in a learned and illuminating opinion, covers the entire ground and is accepted as a guide by which the legality or the illegality of an attempted removal of a public official is to be tested. The essentials for a valid removal and the various steps to be taken in order that the rights of the accused on the one hand and of the public on the other may be properly safeguarded are there considered with great care.

Studied in the light of the rules laid down in *Andrews* v. *King*, the proceedings here are perforated with irregularities and illegalities, with errors of omission and errors of commission. The tribunal which

hears the cause is judicial in its nature. The selectmen do not sit as municipal officers but for the time being, as judges. They should therefore hear the evidence and pass upon the facts, deliberately, without bias or prejudice and with no preconceived opinion or judgment. The proceedings before this tribunal are not regulated by statute, and therefore must be according to the common law which is the "law of the land." They necessitate the specification of charges, reasonable notice, impartial hearing, separate adjudication on each charge, and adjudication on the order of removal. In the case at bar every one of these elements was disregarded.

SPECIFICATION OF CHARGES.

The rule is this: "Specifications of the alleged causes should be formulated with such reasonable detail and precision as shall inform the people and the incumbent of what dereliction is urged against him. The charges should be specifically stated with substantial certainty, though the technical nicety required in indictments is not necessary." *Andrews* v. *King*, 77 Maine, 234. The notice served upon the relator here requested him to answer "to a complaint of incompetency and neglect of official duty." Such general language, although it is practically the language of the statute, was wholly inadequate. It gave the incumbent no information whatever as to the charges which he would be called upon to meet. As well accuse a man of larceny without alleging what was stolen, or when, or where, or from whom.

After the hearing opened counsel for the incumbent asked for specifications, and four were then drawn up by the selectmen, but they can hardly rise to the dignity of that term. The first and second while attempting to state specific acts, the one of disobedience and the other of laziness, are inconsequential and trivial. It does not appear what the orders from the selectmen were, nor whether they were of such a character as to be within their power to issue. The third and fourth are but indefinite allegations of extravagance and poor judgment during the whole term. Not only do they lack the detail and precision required but they apparently are intended to cover the conduct of Malloy as road commissioner during the previous municipal year when another board of selectmen was in power. Clearly the board in office in 1917 could not remove an officer for

alleged acts of misfeasance or nonfeasance in 1916. The commissioner is responsible to the board of each year for the acts of that year alone.

REASONABLE NOTICE.

This is an elastic term, and whether a notice is or is not reasonable must depend upon the facts and conditions surrounding each particular case.

Here the relator was obviously deprived of his common law rights. The written notice of the hearing was served upon him only one day or a portion of a day prior thereto, and it was so general in its terms as to preclude the possibility of preparation for defense. After the specifications were filed no time was allowed in which to meet them. Two requests for continuance were promptly denied, so that virtually no notice whatever of the charges upon which the hearing proceeded was given to the relator.

IMPARTIAL HEARING.

The character of the hearing is apparent from what has already been said. It was in effect as close to an ex parte proceeding as could be well conceived. True, the accused and his counsel were present, and his counsel was allowed to cross-examine the witnesses for the prosecution. But it was an idle task. The minds of the judges had already been made up, and the rights of the relator, even as to an opportunity to be heard, were ignored.

SEPARATE ADJUDICATION ON EACH CHARGE.

The truth or falsity of each separate charge must be passed upon before passing sentence. They cannot be grouped together in the decision. "This must needs be the course, otherwise the court might pronounce sentence, when no one charge was believed by a majority of the court. There might be as many charges as there were members of the court and no one receive the assent of more than one member, yet that member vote to sentence, on account of his belief in the truth of that one charge, which all his associates believed to be false." *Andrews* v. *King*, 77 Maine, 235. The town records contain only this finding: "The selectmen retired to the ante room and returned with a decision that Leo J. Malloy was an incompetent man for road commissioner, and removed him from office." They state in their testimony that they found each charge substantiated, but the record, unamended, governs, and cannot be contradicted by parol evidence.

Crommett v. *Pearson*, 18 Maine, 345; *State* v. *Bailey*, 21 Maine, 66. This record shows a clear violation of the established rules of procedure.

ADJUDICATION ON THE ORDER OF REMOVAL.

The adjudication upon the facts and upon the order of removal must be distinct acts on the part of the tribunal. "The latter cannot precede nor be coincident with the former but must follow it." *Andrews* v. *King*, 77 Maine, 236. According to the record, the acts here were coincident, and as bearing upon the impartiality of the two sitting members of the board the final sentence in the record is significant: "Then Robert H. McLellan was appointed road commissioner for the remainder of the term." Mr. McLellan headed the petition for the removal of Malloy and was one of the witnesses in its support.

The record contains a large mass of evidence taken out before the sitting Justice, and relating to the competency or the incompetency of Mr. Malloy during his entire term of office. All that evidence is immaterial here. In a proceeding of this nature this court does not act as a Court of Appeal upon the merits of the cause. It cannot re-try the facts nor review the evidence taken out before the municipal officers, nor reverse any decision within their discretion. It has power to examine the course of procedure and to determine whether the municipal officers kept within their jurisdiction, and proceeded according to law. "Whether the inferior court is legally constituted; whether the allegations made to it are sufficient in form and substance to authorize it to proceed, whether its procedure is correct and whether its sentence is lawful, are questions for this Court to determine." *Andrews* v. *King*, at 238.

In the exercise of this superintending power we have no hesitation in saying that for the reasons above given the proceedings in this case were illegal and the attempted removal of Mr. Malloy from his office was invalid. It follows that the respondent has no right to exercise any of the powers or functions of road commissioner and the State should have judgment of ouster.

So ordered.

JOSEPH MYERS and L. B. WALDRON, Petitioners,

vs.

ARTHUR LEVENSELLER, HARRY W. THOMPSON, LEWIS M. THOMPSON, HARRY W. BRAWN and GEORGE A. BRAWN.

Penobscot. Opinion January 29, 1918.

General power of Supreme Judicial Court over its own docket. Rule where final judgment has been entered in a case. Meaning of entry "neither party." Right of presiding Justice to grant a petition bringing forward an action not gone to judgment. As to the right being a discretionary one. Rule as to exception being allowed to exercising that discretion.

In a petition to bring forward and restore an action to the docket and to strike off the entry of "neither party" therein, on the ground that the entry was made by fraud and collusion between the nominal party plaintiff and the defendant in derogation of the rights of the real parties in interest, it is,

Held:

1. The Supreme Judicial Court, being a court of record, has inherent power over its own docket until a valid judgment is entered in a given case. Until that time it can amend, enlarge or vacate entries erroneously, improvidently or fraudulently made. And this can be done at a subsequent term as well as at the term when the erroneous or fraudulent entries are made.
2. The entry of "neither party" means that neither party appears further in the cause. It is made by agreement of the parties and no judgment of the court follows.
3. The status of this action was therefore such that the court at a subsequent term had power to bring it forward if in its discretion justice required it.
4. The determination of the question of fraud in this case was for the presiding Justice to whom this petition was presented, and his ruling in dismissing the petition "upon the evidence presented" is sustained by the proof. The charges are groundless.
5. The nominal plaintiff had the right to ask indemnity against costs and upon that request being refused, he had a legal right to adjust the suit provided he exercised good faith in so doing.

Petition asking that an entry of "neither party" be stricken off and the action brought forward and restored to the docket of the court. After due hearing, presiding Justice ruled that the prayer of petitioner

ought not be granted upon the evidence presented and that the entry should be "petition denied;" to which ruling petitioners filed exceptions. Exceptions overruled.

Case stated in opinion.

L. B. Waldron, for plaintiffs.

Hudson & Hudson, for defendants.

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

CORNISH, C. J. On February 28, 1911, one Joseph W. Myers of Boston, Massachusetts, brought suit against Lewis M. Thompson of Corinna in this State, returnable at the April term, 1911, of the Supreme Judicial Court for Penobscot County. The deputy sheriff, Arthur R. Levenseller, in whose hands the writ was placed, attached a certain horse as the property of Lewis M. Thompson the defendant, and took the animal into his possession. On March 8, 1911, Harry W. Thompson, the son of Lewis M., brought an action of replevin against the attaching officer Levenseller, and took the horse thereon, claiming title in himself. A replevin bond in the usual form was given to Levenseller signed by Harry W. Thompson as principal and by two sureties. The question of title to the horse was tried out in the replevin suit and a verdict rendered in favor of the defendant Levenseller, at the October term, 1911, the judgment being for the return of the property and costs.

On December 20, 1911, without the consent or knowledge of Levenseller, a suit was brought in his name against the principal and sureties on the replevin bond, by L. B. Waldron, as attorney for Mr. Myers, and was entered at the April term, 1912. When Levenseller discovered the pendency of this suit he employed counsel to represent him and also requested of Mr. Waldron who had brought the suit, either a bond or some other form of indemnity against costs. No indemnity of any sort was given. The case remained on the docket until the April term, 1915, a period of three years, when by an arrangement between the attorney employed by Mr. Levenseller, and the attorney for the defendants, a settlement was effected, the sum of seventy-six dollars was paid to Levenseller and the action was entered "Neither party."

At the January term, 1916, Joseph Myers and his attorney Mr. Waldron brought this petition, asking that the entry of "neither

party" be stricken off and the action be brought forward and restored to the docket of the court. The ground alleged was that Levenseller, without the consent or knowledge of either Myers or his attorney, the parties in interest in the suit, "secretly, collusively and in fraud or by mistake and in derogation of the rights of said Myers and Waldron caused the entry to be made." After hearing at the January term, 1917, the presiding Justice ruled that "the prayer of the petition ought not to be granted upon the evidence presented," and the petition was thereupon denied. Upon exceptions to this ruling the case is before the Law Court.

The exceptions must be overruled and for the following reasons.

We entertain no doubt that the Supreme Judicial Court of this State, being a court of record, has inherent power over its own docket until a valid final judgment is entered in a given case. Until that time it can amend, enlarge or vacate entries erroneously, improvidently or falsely made. Mistakes may be corrected and false or fraudulent entries rectified and made to conform to the truth. And this can be done at a subsequent term as well as at the term when the erroneous or false entries were made. Until the rendition of a final valid judgment, all actions whether on the docket of the existing or of a former term are regarded as within the jurisdiction and control of the court. *Low's Case*, 4 Maine, 439; *Lothrop* v. *Page*, 26 Maine, 119; *Woodcock* v. *Parker*, 35 Maine, 138; *Cross* v. *Clement*, 70 Maine, 502. When a final and valid judgment has been entered and the parties are out of court, the judicial power of the court ceases, and it does not lie within the power or discretion of the presiding Judge at a subsequent term to bring the action forward. Judicial authority has then been exhausted. *Shepherd* v. *Rand*, 48 Maine, 244; *Priest* v. *Axon*, 93 Maine, 34. If however it appears that the judgment rendered was not valid, but was entered irregularly or improvidently, even then the court can bring the case forward and correct the error. That was done in *West* v. *Jordan*, 62 Maine, 484. So much for the power of the court over its own records.

Here the action on the bond had not gone to final judgment and the entry was not made by authority of the court, but by the agreement of the parties independently of the court, an agreement which the parties had a right to make. No judgment of the court followed. The entry of "neither party" simply means that neither party appears further; that both disappear from legal vision. *Means* v. *Hoar*, 110 Maine, 409.

The status of the action on this bond, when this petition was filed, was therefore such that the court at a subsequent term had power to bring it forward if in its discretion justice required it. The determination of that question was within the discretionary power of the Justice hearing the petition, and unless there was a clear abuse of discretion, exceptions do not lie to its exercise.

The evidence as presented on this petition justified the ruling. Granting, for the sake of argument, the contention of the petitioners that they were the real parties in interest and that Levenseller was only a nominal party, even then he had some rights. He could demand indemnity, if his name was used as the plaintiff in the writ, because he, not they, would be subjected to costs in case he did not prevail. *Webb* v. *Steele*, 13 N. H., 230. Such indemnity in some form the presiding Justice must have found he did demand and, although the case remained in court three years, none was furnished. Under those circumstances we do not think Levenseller was obliged to submit to the contingent liability longer. He had a right to adjust the suit provided he exercised good faith in so doing. The net proceeds of the settlement he would of course hold in trust for those entitled thereto. The good faith of the settlement is challenged by the petitioners and charges of fraud are strongly urged. The existence of fraud was a question of fact for the presiding Justice. He has found that the charges were groundless, and after a careful study of the evidence we think the finding was correct. Both Levenseller and his attorney seem to have acted in the utmost good faith.

It is therefore the opinion of the court that the ruling of the presiding Justice was clearly within his power in the exercise of a sound discretion, and that the exceptions are without merit.

Exceptions overruled.

FRED T. STEWART, et als., *vs.* STEWART DRUG COMPANY.

Washington. Opinion February 5, 1918.

Dissolution of corporations. Rights of receivers. Effect of appointing receivers in relation to pending actions. General rule of law as to liability of "receiptors."

Upon the dissolution of a corporation and the appointment of receivers to distribute its funds, the provisions of R. S., Chap. 47, Sec. 77, (R. S. 1916, Chap. 51, Sec. 81), extending the existence of a corporation after the termination of its charter are inapplicable and the corporation is thereafter incapacitated to sue or be sued in a court of law, otherwise than to promote the object confided to the receivers.

The giving of a receipt in the alternative dissolves an attachment as regards third parties, whether bona fide purchasers or creditors, making subsequent attachments, but as between the attaching creditor, the receiptors and the debtor, the liability of the attaching officer remains in force until dissolved by operation of law and the liability of the receiptors depends upon the existence of the liability of the officer and ceases with it.

Proceedings in equity asking that the receiver of a corporation be ordered to appear and defend an action at law brought against a corporation and pending at the time of the dissolution of the corporation. At the hearing before single Justice it was ruled pro forma that the receiver be ordered to appear and defend the pending suit; to which ruling exceptions were filed. The petition of receiver was dismissed pro forma; to which ruling exceptions were also filed. Judgment in accordance with opinion.

Case stated in opinion.

C. B. & E. C. Donworth, for plaintiffs.

H. H. Gray, for defendants.

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

BIRD, J. Following the announcement of the opinion in *Carter, Carter and Meigs Company* v. *Stewart Drug Company* 115 Maine, 289, the receiver of defendant corporation filed his petition in this cause, a

proceeding in equity under Public Laws 1905, Chap. 85, (R. S., 1916, Chap. 51, Secs. 82-87), asking leave to appear and defend the aforementioned suit at law of *Carter, Carter and Meigs Company* against *Stewart Drug Company,* the defendant in this case, and to move that it be dismissed. A petition was also filed by Carter, Carter and Meigs Company, the plaintiff in the suit at law, asking that the receiver be ordered to appear and answer the suit at law and take such action therein as may be determined by the equity court. Ruling pro forma in each instance, the sitting Justice entered a decree dismissing the petition of the receiver and upon the petition of Carter, Carter and Meigs Company, decreed that the receiver "appear and answer to said suit at law, and defend the same." The case is now here upon the exceptions of the receiver both to the dismissal of his petition and also to the decree entered upon the petition of Carter, Carter and Meigs Company.

In the former opinion already referred to, 115 Maine, 289, it is held that upon the dissolution of a corporation and the appointment of receivers to distribute its funds, the provisions of R. S., Chap. 47, Sec. 77, (R. S. 1916, Chap. 51, Sec. 81), extending the existence of a corporation for three years after the termination of its charter are inapplicable and that the corporation is thereafter incapacitated to sue or be sued in a court of law, otherwise than to promote the object confided to the receiver. See *Whitman* v. *Cox*, 26 Maine, 335, 340.

How will compliance on the part of the receiver with the decree of the Equity Court requiring him to appear, answer and defend the suit at law promote the object confided to the receiver? Upon the writ in the suit at law an attachment of personal property was made on the eleventh day of September, 1915, the officer took a receipt in the alternative for the goods attached executed by the defendant and two others and on the first day of October, 1915, the bill of complaint in the instant cause was filed. See 115 Maine, at page 290.

The petition of Carter, Carter and Meigs Company, after reciting the facts concerning the attachment and the filing of the present bill in equity and the various interlocutory decrees thereunder, alleges;

"That petitioner believes that said several decrees in equity have not absolved said receiptors from the obligation and that both law and equity require that they answer to their understanding as stated in said suit at law.

"That the time when said receiptors' liability shall become absolute is thirty days after judgment against said corporation and your petitioner believes it necessary and proper that judgment be obtained against said corporation in said action at law, and that the same is impossible unless said receiver appears and answers to said suit.

"That by a judgment of the Supreme Judicial Court of this State in a rescript sent down therefrom and on file in said Court for said county in said suit at law said receiver may be ordered and required by the Chancellor to appear and answer to said action at law, and to take whatever action therein that the Chancellor determines.

"That said petitioner avers and believes that the appearance of said receiver in said suit at law and an order of said Equity Court that said receiver appear and answer to said suit at law, and to defend said action or to be defaulted therein, cannot injure or prejudice said receiver nor the winding up of the affairs of said Stewart Drug Company, nor interfere with the decrees or injunctions of the Equity Court in the matter of said Stewart Drug Company."

These paragraphs contain all the allegations showing why the petition should be granted. Among them we find none indicating that the granting of the petition will "promote the object confided to the receivers," which by statute is declared to be "to wind up the affairs of the company," R. S., 1916, Chap. 51, Sec. 83, that is, among other things, to pay the debts of the corporation, in full when the funds are sufficient, and when not, ratably to those creditors who prove their debts and the balance to distribute among the stockholders according to interest. R. S., 1916, Chap. 51, Sec. 88.

The giving of the receipt in the alternative dissolves the attachment as regards third parties, whether bona fide purchasers or creditors making subsequent attachments, *Perry* v. *Somerby*, 57 Maine, 557, but as between the attaching creditor, the receiptors and the debtor the liability of the attaching officer for the goods attached remains in force until dissolved by operation of law and the liability of the receiptors depends upon the existence of the liability of the officer and ceases with it. *Butterfield* v. *Converse*, 10 Cush., 317, 319.

If judgment in the suit at law should be obtained against defendant and the officer make demand upon the receiptors, for the goods attached, their refusal to deliver would be justified by reason of the dissolution of the attachment by virtue of the statute providing therefor when made within thirty days of the filing of the bill of com-

plaint. R. S., 1916, Chap. 51, Sec. 83. The liability of the receiptor is limited to and determined by that of the officer. As the officer is not liable to the plaintiff in the action at law wherein the attachment was made, and the goods attached were delivered to the receiptors, the principal of whom was the debtor, the receiptor is not liable to the officer. Judgment therefor, if obtainable could not avail the petitioner, the plaintiff in the suit at law. See *Mitchell* v. *Gooch*, 60 Maine, 110, 113; *Gary* v. *Graham*, 112 Maine, 452, 454, 455; *Plaisted* v. *Hoar*, 45 Maine, 380, 384; *Butterfield* v. *Converse*, 10 Cush., 317, 319; See also *Sprague* v. *Wheatland*, 3 Met., 416.

The exceptions are sustained. The decree dismissing the petition of the receiver is reversed and a decree will be entered therein directing him to appear, defend and move the dismissal of the action at law. The decree entered upon petition of Carter, Carter and Meigs Company is reversed and a decree will be entered therein dismissing said petition with costs.

JOHN MURINELLI *vs.* T. STUART & SON COMPANY.

Cumberland. Opinion February 12, 1918.

Negligence. Assumption of risk. General rule of law relative to the duty of principal or master to warn his servants and employees of risks connected with their work.

1. It is the duty of the master to instruct the inexperienced servant of risks and dangers of the employment which the servant did not know and appreciate, or which he cannot reasonably be held to have known and appreciated; but to cast this responsibility upon the master it must appear that he himself knew or ought to have known of such risks and dangers and also that he knew that the servant was inexperienced and thus excusably ignorant of the risks and dangers and that the servant in the performance of his employment would be reasonably likely to be exposed to those risks and dangers.
2. The plaintiff was bound to use his senses, and to apply his intelligence and understanding to discern obvious risks and dangers incident to his employment, and to apprehend such risks and dangers as are likely to attend known conditions and circumstances.

3. If there was a risk that the stick of timber in the process employed in moving it along over the top of the crossbeams would swerve to or from the plaintiff to such an extent as to throw him down, nevertheless there is no evidence that the defendant knew or ought to have known any more concerning that risk than the plaintiff himself who had been working for several hours moving similar sticks by the same process.
4. If the plaintiffs fall was caused by the stick swerving against him, it does not appear that such swerving was not the fault of the plaintiff himself or the fault of his fellow workmen.
5. Considering the place where the plaintiff was working at the time of the accident, the work he was then assisting in doing, the length of time he had been so employed, his age and experience, and giving him the benefit of every doubt that might be entertained as to the facts, as he claims them to be, which tend to disclose the cause of his fall from the top of the trestle on which he was standing, the court is fully persuaded that plaintiffs alleged cause of action against the defendant was not sustained by the evidence, and that the order of non-suit was rightly made.

Action on the case to recover damages on account of injuries received by plaintiff through alleged negligence of defendant company. Plea of general issue filed. At close of plaintiff's testimony, on motion of defendant, a nonsuit was granted; to which ruling plaintiff filed exceptions. Exceptions overruled.

Case stated in opinion.

Woodman & Whitehouse, and John B. Thomes, and Raymond S. Oakes, for plaintiff.

William H. Gulliver, and Clement F. Robinson, for defendant.

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

KING, J. This is an action to recover damages for personal injuries sustained by the plaintiff while in the defendant's employ, and it comes before this court on the plaintiff's exceptions to an order of nonsuit.

The defendant was engaged in constructing the new cement bridge across Portland Harbor between Portland and South Portland. The plaintiff had been in its service for about three years as a general laborer. At the date of the plaintiff's injuries the work on the bridge had progressed to a point requiring heavy staging, called falsework, upon which to place the molds for the cement of the bridge at the required height above the ground. Upon a secure foundation trestles

or "bents", so called, made of heavy timbers were erected parallel to each other and to the course of the bridge; they were twenty-five to forty feet long, and as several of the bents were required to cover the necessary space lengthwise, the end of one bent was lapped by the end of another two or three feet, instead of being butted against the end of the other. The top timber of the bent had a ten inch face. Across the tops of the bents, at right angles with them and with the course of the bridge, crossbeams were laid. At the point where the injury occurred, slightly to the east of Commercial Street, the top of the crossbeams was about thirty feet above the ground. The upper part or top of the falsework on which the crew were working at the time of the injury consisted solely of the top timbers of the bents or trestles, extending lengthwise of the bridge, and the crossbeams laid thereon and at right angles thereto.

On the morning of the day of the accident the plaintiff was working, with others, on the ground preparing some of the heavy timbers for use in the construction of the falsework. These timbers were raised to the top of the falsework by a crane, and a crew of four men moved the timbers along the top of the falsework to points varying from two to three hundred feet from the crane. In so moving the timbers the men stood on, and as necessity required walked along on, the ten inch timbers which formed the top part of the bents or trestles, and in their progress they had to step over the crossbeams as they came to them, and also to step to the right, or to the left, where the bents lapped by each other. The timbers were moved along on the top of the crossbeams by the joint effort of the four men sliding each timber along to its proper place. The four men stood on the top timber of the bent with the stick of timber to be moved resting near them on the crossbeams and parallel with the bent on which they stood. They all faced the way the stick was to be moved, bent over and grasped it with their hands, one hand on top and the other underneath it, and when the word was given by the man at the rear end of the stick they pushed the stick forward as far as convenient in the direction they were facing, and then stepping forward a step or two on the bent they repeated the act.

On the day of the accident the defendant's superintendent directed the plaintiff to assist three other workmen in moving the timbers along the top of the falsework. He obeyed and had worked some hours when the accident occurred. The plaintiff was at the forward

end of the stick of timber being moved, another man was at the rear end, and the other two were stationed between at about equal distances from the ends. In his direct examination the plaintiff stated that they moved the stick of timber along until he came to the end of the trestle or bent on which he was walking and to where the next trestle lapped by to his right; that he stepped on to that next trestle and, to quote his words, "we got hold of it again. . . . Then when we was a little way, the beam come my way and throwed me down." He further stated that he had moved forward some little distance on the trestle from which he fell, pushing the timber along, and had stepped over one crossbeam resting on that trestle, before he fell. In his fall he received the injuries complained of.

The gist of the plaintiff's alleged cause of action is that the defendant was negligent in not warning him of the risks of injury incident to the work he was directed to assist in carrying on, that is, moving timbers along the top of the falsework. And his particular allegation of the defendant's duty to warn him, and which it failed to perform, is thus stated in his declaration: "that it was the duty of the defendant company to have warned and advised the plaintiff against the peculiar danger of not being able to maintain his footing and balance in case the beam of which he held the extreme westerly end should suddenly swerve to one side or the other thus destroying the plaintiff's balance and push or sweep him off the girder on which he was standing, of which special danger the plaintiff was then and there ignorant and did not appreciate, perceive or comprehend the same but the said dangerous conditions were all well known to the defendant company."

Clearly the plaintiff does not allege or contend, as we understand him, that he needed to be warned that the place where he was directed to work—on the top of the timber framework, was attended with a risk of his falling therefrom not incident to similar work on the ground or on a platform. He frankly stated that he knew if he missed his step while moving along on the tops of the bents he would fall and be hurt. Any person of reasonable intelligence is presumed to know that. That is a risk incident to the work, and plainly an obvious risk. The plaintiff's claim therefore is, as he has alleged, that he should have been warned of the risk that the sticks of timber he was directed to assist in moving were likely to swerve and cause him to lose his balance and fall from the top of the falsework.

The universally acknowledged rule of law involved in the question of the master's duty to warn or instruct his servant as to risks of the employment has been variously expressed in judicial decisions and by text writers, but to the same import. In *Wormell* v. *Railroad Co.*, 79 Maine, page 405, our court said, that "the law implies that where there are special risks in an employment of which the servant is not cognizant, or which are not patent in the work, it is the duty of the master to notify him of such risks; and on failure of such notice, if the servant, being in the exercise of due care himself, receives injury by exposure to such risks, he is entitled to recover from the master whenever the master knew or ought to have known of such risks."

Prof. Thompson in his work on Negligence states the rule thus: "If the master knew or ought to have known, and the servant did not know, and was not bound to know of its existence, the liability of the master—the servant having been otherwise in the exercise of due care—is fixed. And it is equally true in every case, that unless the master knew of the defect (risk) which subsequently produced the injury, or was under a duty of knowing it, he cannot be held liable." 2 Thomp. Neg., 992-3.

And in Labatt on Master and Servant, 2nd ed. Sec. 1141 (235) the author states the propositions which an employee must establish to maintain an action against his employer for non-performance of the duty to instruct or warn him of the risks of the employment, to be: (1) that the master was chargeable with knowledge, actual or constructive, of the existence of the risk; (2) that the servant himself did not appreciate the risk and that his non-appreciation thereof was excusable; and (3) that the master knew, or ought to have known, that the plaintiff was thus excusably ignorant of the risk, and was by reason of such ignorance exposed to an abnormal hazard, over and above those which he was presumed to contemplate as incidents of his employment. To the same effect, in the recent case of *Colfer* v. *Best*, 110 Maine, 465, 466, this court said: "It is the duty of the master to instruct the inexperienced servant of dangers of the employment which he did not know and appreciate or which he cannot reasonably be held to have known and appreciated. But to throw this responsibility upon the master, it must appear that the master knew or ought to have known that the servant was inexperienced and thus excusably

ignorant of the danger, and that the act of the servant which exposed him to the danger was reasonably likely to be expected by the master."

Applying these well recognized principles of law to the plaintiff's alleged cause of action, it becomes clearly apparent that to maintain his action it was incumbent upon him to establish these propositions: first, that his fall was caused by the swerving of the stick of timber against him without any contributory negligence on his part, or negligence on the part of his fellow-servants in that work; second, that he did not know and appreciate and cannot reasonably be held to have known and appreciated that in the process of sliding the stick of timber along on the crossbeams by the joint effort of the four men it might swerve against him; third, that the defendant knew, or ought to have known, of that risk that the stick of timber in the process of moving it along on the crossbeams was likely to swerve against the plaintiff and throw him from the trestle; and fourth, that the defendant knew, or ought to have known, that the plaintiff was excusably ignorant of that risk, and was therefore exposed to a hazard over and above those which he was presumed to contemplate and appreciate as incident to his employment.

From a careful study of the record we are fully convinced that the plaintiff has not established those propositions.

He says in direct examination, that "the beam come my way and throwed me down," and, in cross-examination, that "when they shoved her again that timber come my way and knocked me down right there (indicating)." He also says that they had moved three or four timbers that morning before the accident, that this stick of timber was being moved by the same process as the others were moved, and, when asked if the timbers could be moved straight along without being swerved, he replied, "Well, of course." He says he does not know what made that stick swerve. One of his fellow-workers, a Mr. Perkins, was called by him and testified that he was the second man from the plaintiff, that they had just given the stick a move along when he heard the statement "man overboard," that he did not know how the accident happened, and that so far as he could recollect the timber did not swerve. "Did you notice whether it went away from you at all? A. Not enough to notice." If the stick of timber swerved against the plaintiff, as he says it did, what caused it to do so? That is left to conjecture. It may have been

because of his fault, or that of his fellow-servants. There is no evidence that the stick was crooked, or that the crossbeams were uneven, on the other hand, the plaintiff says the timber could be moved along straight without swerving, as the others evidently had been.

But if it could be properly held that the jury would have been justified by the evidence in finding that the stick of timber swerved against the plaintiff and threw him down, without any negligence of himself or of his fellow-workers, it certainly cannot be held that the evidence was sufficient to justify a finding by the jury that the plaintiff has established the other propositions essential to the maintenance of his action.

The plaintiff was 40 years of age and had been in this country 26 years.

Briefly stated, he had worked "firing" stationary engines for contractors building railroads and bridges, had worked at what he called "rigging" and called himself a "rigger", had helped build retaining walls and the staging connected therewith, had helped put up derricks and move timber from one place to another, had worked at loading and unloading cars of lumber, and, at one time, helped build some high steel towers. Such is only a partial summary of the kinds of work in which the plaintiff had been employed for twenty-five years, but it is sufficient we think to indicate that he is a man of at least average intelligence, and of experience in taking care of himself under the circumstances usually attending laborers while engaged in ordinary building and construction work. And we think the defendant was justified in considering him qualified to assist in moving the timbers along on the top of the falsework.

There was no defect in the falsework. As a place to work it cannot be considered as containing undisclosed risks or dangers. The danger of one falling on account of losing his balance while working thereon was obvious to any reasonably intelligent person. After the plaintiff had worked thereon for some hours and had assisted in moving three or four of the sticks of timber, he must be held to have known and to have appreciated such risks of his falling, either as the result of a misstep or of the swerving of the stick of timber against him, as were incident to the process of moving the stick along as he and his fellows were doing it. Certainly he then knew, or ought to have known, as much concerning any such risks as the defendant can be presumed to have known. He was bound to use his senses, intelligence and under-

standing to discern obvious risks and dangers incident to his employment, and to apprehend such risks and dangers as are likely to attend known conditions and circumstances.

If there was a risk that the stick of timber, in the process employed in moving it along over the crossbeams from the crane to its proper place, would swerve to or from the plaintiff to such an extent as to throw him down, and that risk was not an obvious one incident to the work, nevertheless, there is no evidence that the defendant knew of the existence of that risk; and we can perceive no reasonable ground for a finding that the defendant ought to have known of any such risk, and also that it ought to have known that the plaintiff was excusably ignorant of such a risk.

Considering the place where the plaintiff was working at the time of the accident, the work he was then assisting in doing, his age and experience, and giving him the benefit of every doubt that might be entertained as to the facts, as he claims them to be, which tend to disclose the cause of his fall from the top of the trestle or bent on which he was standing, the court is fully persuaded that the plaintiff's alleged cause of action against the defendant was not sustained, and that the order of nonsuit was rightly made.

Exceptions overruled.

Mr. JUSTICE HANSON does not concur.

DELAVAL SEPARATOR COMPANY

vs.

LAWRENCE V. JONES, et als.

Trustees in Bankruptcy of Maine Creamery Association.

Penobscot. Opinion February 18, 1918.

Conditional sales. Mortgages of personal property. Recording of mortgages and conditional sales. Holmes notes. Right of bona fide purchaser of mortgaged property without notice and bona fide purchaser of property sold under contract of conditional sale.

This case comes up on the following agreed statement of facts:

Trover for the conversion of a DeLaval Cream Separator. July 13, 1915, plaintiff delivered to said Maine Creamery Association the separator in question upon a conditional sale agreement embodied in three several conditional sale notes payable respectively October 1, 1915, December 1, 1915 and February 1, 1916.

The last two notes were properly recorded January 3, 1916. On January 13, 1916 the creamery association filed a petition in bankruptcy and the defendants in due course of time were appointed and qualified as trustees.

The question is, are these co-called Holmes notes within the purview of the statute which provides that any mortgage of personal property executed after the United States Bankruptcy Law should go into effect should not be valid against a trustee unless the mortgage is recorded within ten days after the date thereof?

Held:

(1) The provisions of this statute was not intended and does not apply to the recording of a Holmes note.

(2) The plaintiff's sale is not invalid for want of record under the ten day provision.

Action of trover to recover the value of a cream separator delivered the company of which the defendants were trustees in bankruptcy. The separator was delivered to the company under an agreement that the title was not to pass until notes representing the purchase price had been paid. The case was reported to the Law Court upon certain agreed statements and stipulations. Judgment for plaintiff in accordance with opinion.

Case stated in opinion.
Ryder & Simpson, for plaintiff.
Morse & Cook, for defendants.

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

SPEAR, J. This case comes up on the following agreed statement of facts.

Trover for the conversion of a DeLaval Cream Separator. July 13, 1915, plaintiff delivered to said Maine Creamery Association the separator in question upon a conditional sale agreement embodied in three several conditional sale notes payable respectively October 1, 1915, Dec. 1, 1915 and Feb. 1, 1916, of like tenor with the following:

"$200.00 Bangor, Maine, July 13, 1915.

On the 1st day of October, 1915 for value received, I promise to pay to the order of the DeLaval Separator Company two hundred and no-100 Dollars, with 6 per cent interest, at the (bank) Eastern Trust and Banking Co. of Bangor, Maine. This note is given for DeLaval Cream Separator, Style No. 60 Serial No. 1,587,850.

"The express condition of the sale and purchase of said machine and the giving of this note (or notes) to secure the full payment therefor is that the title, ownership or possession does not pass from the said payee or his (or their) assigns, to the maker of this note (or notes) or his (or their) assigns, until all notes have been fully paid and satisfied; and the drawers and endorsers severally waive presentment, protest and notice of protest and non-payment of this note.

No. 1. MAINE CREAMERY ASS'N
P. O. Address..... By J. D. MCEDWARD, Treas."

The note last due was never recorded and is not in issue in this case. The other two notes were recorded in the City Clerk's office in Bangor, Maine, where by law they were required to be recorded, Jan. 3, 1916 at 2.15 P. M. On Jan. 13, 1916, said Maine Creamery Association duly filed in the U. S. District Court for the District of Maine its petition to be adjudicated a bankrupt, and defendants were in due course duly appointed and qualified as trustees of its estate in bankruptcy.

The first question to determine is whether the instrument showing the transaction between these parties is a personal mortgage or a conditional sale. This question was specifically considered in *Campbell* v. *Atherton*, 92 Maine, 69, in this language: "We are of the opinion that the transaction in question cannot be regarded as a mortgage. By the terms of the contract the title remained in the Atkinson Company. Kelley was to have no title to the property until he should have paid the full amount stipulated in the contract. *Having no title to the property, Kelley could give no mortgage to the party owning the same.*" Accordingly, whatever the language of the decision of our court, holding that a sale, manifested by what is usually termed a Holmes note, is in the nature of a personal mortgage, the conclusion is nevertheless inevitable that in the whole course of our law upon this question is found a fundamental distinction which differentiates a mortgage, as security, from the Holmes note, as security. The mortgage conveys title to the vendee which may be defeated by payment by the vendor: the Holmes note retains title in the vendor, which may be defeated by payment by the vendee. This distinction has been emphasized by legislation, at least, since 1839, when personal mortgages were required to be recorded to be valid, except as between the parties thereto. In 1839 by the Public Laws, Chapter 398, Section 5, personal mortgages were required to be recorded to be valid except as between the parties thereto. But conditional sales were not regarded as coming within the purview of this statute. The fundamental difference continued, as is shown by the repeated construction of our court, holding the title of personal property, under an unrecorded mortgage, upon sale by the mortgagor, vested title in a bona fide purchaser, without notice; while the title to personal property upon a sale by the terms of which the vendor retained title in himself, does not vest in a bona fide purchaser, without notice. Up to 1874 this class of sales, to be valid against all parties, was not required to be recorded. But this year the legislature passed an act found in the Public Laws of 1874, Chap. 181, Sec. 5, by the provisions of which, at that time, only a note of more than thirty dollars was required to be recorded.

In the Public Laws of 1891, Chapter 11, a further amendment was made to R. S., Chapter 111, the language of which is significant in its apparent purpose to note the difference between a personal mortgage and conditional sale, namely: "No agreement that personal

property, bargained and delivered to another, for which a note is given, shall remain the property of the payee until the note is paid, is valid unless it is made and signed as a part of the note;" and then not valid except between the original parties, "unless it is recorded like mortgages of personal property."

It is not because these amendments are made to Chapter 111, instead of the chapter relating to personal property, which is important as showing the legislative intent to continue the distinction between personal mortgages and conditional sales, but the design of the language employed to give expression to the amendment found in Chapter 111 of the laws of 1891. It does not say that "no sale of personal property," but "no agreement" of sale, shall be valid unless recorded. A mortgage is a sale, to the extent of carrying title, not an agreement to sell. A Holmes note is an agreement to sell, and conveys no title. This is a fundamental distinction and has always been so regarded by the courts. The legislature in its recording statutes, undoubtedly intended to maintain this distinction; hence the recording statute applying to mortgages was not intended and does not apply to the recording of a Holmes note, nor any other instrument of a similar nature. The plaintiff's sale, therefore, is not invalid for want of record, under the ten day provision.

The statute relating to the record of personal mortgages, with all amendments incorporated, is now found in R. S., Chapter 96; while the statute relating to the record of agreements to sell personal property, with all amendments incorporated, is found in R. S., Chapter 114. The former statute, among other things, provides that any mortgage of personal property executed after the United States Bankruptcy Law should go into effect, should not be valid against a trustee unless and until possession was taken, or a mortgage recorded within ten days after the date thereof. But, as already seen, this statute does not apply to the recording of a Holmes note. Hence the trustee in bankruptcy in this case gains no advantage of title to the personal property involved by failure of the plaintiff claiming title therein to record his notes within ten days.

The notes in question, however, were recorded before the creamery Association was adjudicated bankrupt. Hence the question, was the sale manifested by these notes, in any other respect, in violation of the United States Bankruptcy Act? The sale was made and these notes dated July 13, 1915. The Creamery Association was adjudi-

cated a bankrupt January 13, 1916. The transaction was six months before the adjudication of bankruptcy, and the notes recorded before the adjudication.

1. These notes, having been recorded prior to the filing of the petition in bankruptcy, are valid as against these defendants as trustees in bankruptcy. U. S. Bankruptcy Act, Section 47a, as amended in 1910. *In re Kuse*, 234 F., 470. *In re Marriner*, 220 F., 542, (Dist. of Maine). *In re Farmers' Co-Operative Co.*, 202 F., 1005.

2. Neither are they voidable preferences under the bankruptcy act. U. S. Bankruptcy Act, Section 60, as amended in 1903 and 1910. *Carey* v. *Donohue*, 240 U. S., 430, 437. *Hawkins* v. *Dannenbury Co.*, 234 F., 752. *Debus* v. *Yates*, 193 F., 427. (a) Because these Holmes notes do not constitute a transfer by the bankrupt of any of his property. *Campbell* v. *Atherton*, 92 Maine, 69. *Lane* v. *Borland*, 14 Maine, 81. *Motor Car Co.* v. *Hamilton*, 113 Maine, 63. *Guth Piano Co.* v. *Adams*, 114 Maine, 390. *Nichols* v. *Ashton*, 155 Mass., 205. *In re Farmers' Co-Operative Co.*, 202 F., 1005. *Big Four Implement Co.* v. *Wright*, 207 F., 536. *Baker Ice Machine Co.* v. *Bailey*, 209 F., 603. *Kebbee* v. *John Deere Plow Co.*, 190 F., 1019. *Claridge* v. *Evans*, (Wis.) 118 N. W., 198. *John Deere Plow Co.* v. *Edgar Farmer Store Co.*, (Wis.) 143 N. W., 194. *Bailey* v. *Baker Ice Machine Co.*, 239 U. S., 268. (b) Because there is nothing to show that the Maine Creamery Association was insolvent on January 3rd, 1916, when these notes were recorded. *In re Chappell*, 113 F., 545. *Kimball* v. *Dresser*, 98 Maine, 519.

While the decision of this case undoubtedly depends upon whether the notes here involved should have been recorded under R. S., Chapter 96, relating to the record of personal mortgages, or under R. S., Chapter 114, relating to agreements of sale, and is discussed only upon this ground by the defendants in their brief, we have, nevertheless, briefly alluded to the reasons why the notes as recorded are not rendered invalid by any of the provisions of the bankruptcy act. In accordance with the stipulation in the agreed statement, the entry must be,

Judgment for the plaintiff for $400 and costs.

CHARLES S. HALL AND JOHN O. HALL,
Appellants from Decree of Judge of Probate.

Knox. Opinion February 18, 1918.

Rules 4 and 6 of Chap. 80, Sec. 1, R. S., 1916, interpreted.

This is an appeal from the decree of the Judge of Probate of Knox County, making a partial distribution of the personal property of the estate of Lavinia M. Snow among the eighteen nephews and nieces of said intestate as her next of kin, each having an equal share.

The decedent was more than eighty years old when she died, and she was never married. Her grandparents, father, mother and all her sisters and brothers died before she did. Eighteen nephews and nieces survived her.

Besides these nephews and nieces she left several grandnephews and grandnieces who claim to inherit as heirs of the intestate by right of representation. Hence arises the question whether this estate descends under Rule 4 or Rule 6, R. S., Chap. 80, Sec. 1.

Held:

The language of Rule 6 is so clear and unequivocal that its meaning will admit of no interpretation. This rule expressly declares that the estate shall descend to the next of kin and accordingly must be distributed per capita, and not per stirpes, as the nephews and nieces are next of kin and the grandnephews and grandnieces are not.

Appeal from decree of Judge of Probate, Knox County, Supreme Court of Probate. The case was reported to the Law Court upon certain agreed statement of facts, upon which the Law Court was to determine the legal heirs of Lavinia M. Snow, and their respective shares in her estate. Judgment in accordance with opinion.

Case stated in opinion.

Frank B. Miller, and William T. Hall, for appellants.

Edward K. Gould, for appellee.

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

SPEAR, J. This is an appeal from the decree of the Judge of Probate of Knox County making a partial distribution of the personal

property of the estate of Lavinia M. Snow among the eighteen nephews and nieces of said intestate as her next of kin, each having an equal share.

Lavinia M. Snow was more than eighty years old when she died, and she was never married. Her grandparents, father, mother and all her sisters and brothers died before she did. Eighteen nephews and nieces the issue of her four deceased sisters and one deceased brother survived.

Besides eighteen nephews and nieces, the intestate left several grandnephews and grandnieces who claim to inherit as heirs of the intestate by right of representation. Hence arises the question whether this estate descends under Rule 4 or Rule 6, R. S., Chap. 80, Sec. 1. Rule 4 reads as follows: "If no such issue or father, it descends one-half to his mother. If no such issue or mother, it descends one-half to his father. In either case, the remainder, or, if no such issue, father or mother, the whole descends in equal shares to his brothers and sisters, and when a brother or sister has died, to his or her children or grandchildren by right of representation."

The facts upon which this rule is predicated are (a) that the intestate leaves no such issue or father; (b) no such issue or mother; (c) no such issue father or mother. Under (c) the children of a deceased brother or sister inherit by right of representation. True clause (c) does not specifically state that it is to be applied, only when a brother or sister of the deceased brother or sister is living, at the time of the intestate's death, but it must be construed in connection with Rule 6, which does expressly state: "If no such issue, father, mother, brother or sister, it descends to his next of kin in equal degree; when they claim through different ancestors to those claiming through a nearer ancestor in preference to those claiming through an ancestor more remote." The facts upon which this rule is predicated are (d) that the intestate leaves no such father, mother, brother or sister. And the necessary implication from (d), Rule 6, is that (c), Rule 4, contemplates a living brother or sister. *Doane* v. *Freeman*, 45 Maine, 113, cited by the plaintiff was, by necessary implication, overruled by *Davis* v. *Stinson*, 53 Maine, 493. We think the later decision gives the proper construction of the statute. The language of Rule 6 is so clear and unequivocal that its meaning will admit of no interpretation. This rule expressly declares that the estate shall descend to the next of kin and accordingly must be distributed per capita, and not

per stirpes, as the nephews and nieces are next of kin and the grandnephews and grandnieces are not. *Davis* v. *Stinson*, supra. *Fairbank's Appeal*, 104 Maine, 333-337.

Appeal denied.
Decree of Judge of Probate affirmed with costs.

STATE *vs.* BERT GOOGIN.

Sagadahoc. Opinion February 18, 1918.

R. S., Chap. 130, Sec. 18, interpreted. Lotteries and games of chance. Rule to be applied in determining whether a device is a gambling one.

The respondent is the proprietor of an automatic machine installed in his store for the purpose of vending packages of chewing gum to the public and operates as follows:

In the face of the machine is a window opposite which, with a hand pointing towards it, is inserted a placard which reads: "Anybody depositing a nickel in the above slot will receive a package of chewing gum together with a number of trade checks shown and indicated here." The "trade checks" referred to are metal discs which have a trade value in the store of five cents each. Before the nickel is deposited, in any case, the window is either empty or shows a certain number of trade checks, the exact number being also stated by an indicator at the side of the window. The number of trade checks so shown and indicated varies from time to time, but the customer always knows before he deposits his nickel whether he will receive gum only or both gum and trade checks; and if he is to receive trade checks, he knows in advance exactly how many.

The value of each of these trade checks is the same; to wit, five cents in trade, and the proportion of the profit from the sales of each thousand packages of gum thereby returned to the customers is constant and known in advance by the owner of the machine. It is also agreed that each package of gum vended is of the retail value of five cents.

Held:

This machine constitutes a gambling device within the provisions of our statute.

Complaint and warrant in which respondent is charged with maintaining and operating a certain automatic gum vending machine contrary to R. S., 1916, Chap. 130, Sec. 18, known as the lottery or gambling statute. Respondent was adjudged guilty in the Municipal Court and appealed to Supreme Judicial Court, where case was reported to Law Court upon certain agreed statements. Judgment in accordance with opinion.

Case stated in opinion.

Edward W. Bridgham, for State.

William C. Eaton, for respondent.

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

SPEAR, J. This case comes up on an agreed statement. The respondent is the proprietor of an automatic machine installed in his store for the purpose of vending packages of chewing gum to the public and operated as follows: Upon the deposit in a slot of a five cent piece, or nickel, and the operation of a lever on the side, the machine will automatically deliver to the customers a package of chewing gum. In addition to this purely vending mechanism the machine also contains a device by means of which a certain proportion of the profits resulting from the sales made by the machine is automatically returned to the patrons thereof. This device operates as follows: In the face of the machine is a window opposite which, with a hand pointing towards it, is inserted a placard which reads "Anybody depositing a nickel in the above slot will receive a package of chewing gum together with a number of trade checks shown and indicated here." The "trade checks" referred to are metal discs which have a trade value in the store of five cents each. Before the nickel is deposited, in any case, the window is either empty or shows a certain number of trade checks, the exact number being also stated by an indicator at the side of the window. The number of trade checks so shown and indicated varies from time to time, but the customer always knows before he deposits his nickel whether he will receive gum only or both gum and trade checks; and if he is to receive trade checks, he knows in advance exactly how many.

The value of each of these trade checks is the same; to wit, five cents in trade and the proportion of the profit from the sales of each thousand packages of gum thereby returned to the customers is con-

stant and known in advance by the owner of the machine. It is also agreed that each package of gum vended is of the retail value of five cents.

The question, does this machine constitute a gambling device under our statute?

R. S., 1916, Chap. 130, Sec. 18, provides as follows: "Every lottery, policy, policy lottery, policy shop, scheme or device of chance, of whatever name or description, whether at fairs or public gatherings, or elsewhere, and whether in the interests of churches, benevolent objects or otherwise, is prohibited; and whoever is concerned therein, directly or indirectly, by making, writing, printing, advertising, purchasing, receiving, selling, offering for sale, giving away, disposing of, or having in possession with intent to sell or dispose of, any ticket, certificate, share or interest therein, slip, bill, token or other device purporting or designed to guarantee or assure to any person or to entitle any person to a chance of drawing or obtaining any prize or thing of value to be drawn by any lottery, policy, policy lottery, policy shop, scheme or device of chance of whatever name or description. . . . . shall be punished by fine," etc.

In *Lang* v. *Merwin*, 99 Maine, 486, an interpretation has been given to this statute in this language: "It would seem from these to have been the intention of the legislature to prohibit every pecuniary transaction in which pure chance has any place. There are no words of limitation or exception. To give effect to this intention it would seem necessary to hold that the legislature has used the term "gambling" in its broadest, most generic sense, as comprehending every species of game or device of chance."

The case upon which this interpretation was given involved a slot machine in which the player deposited a nickel in the slot and in any event was entitled to a five cent cigar, and in addition thereto upon the appearance of certain cards, two, four, six or eight additional cigars, depending upon the arrangement of the cards upon the turn of the lever. Upon this state of facts the court further says: "In the case before us it is idle to assume, or concede, that the person putting his five cents into the machine may be doing so merely as a means or mode of buying a five cent cigar. It is idle to deny that the impelling motive is the hope of getting other cigars for nothing. If the machine did not afford that chance it would not be used."

The language of the statute and the interpretation given it in the opinion quoted, show that the legislature intended to place an inhibition upon every possible conception or device, the use of which involved the possibility of chance.

But respondent says the gum machine involves no element of chance; that each play of the machine is a completed transaction, and shows precisely what the player is to receive, and what the machine is to give; that there is no contract express or implied that the player shall have a second or third play to avail himself of the opportunity of obtaining the trade checks; that, this being so, there is no element of chance. But the fallacy of this contention is found in the assumption that the machine deals with the individual, whereas by its method of operation, of necessity, it deals with the public. It is an automatic device, the operation of which is planned in every detail before it is put in use. It is then placed in public places, to be automatically worked. It is the dumb agent of its owner, inviting the public to operate it, as often, and as many times, as any one of the public may please. We find no limitation upon the right of the same person to operate over and over again. It is undoubtedly this unlimited right that allures the patronage that makes the operation of the machine profitable. If the player does not win the first time, he knows he can repeat till he does win. It is, therefore, quite apparent that it is the prize, and not the gum, that invites the public. Accordingly, while each play is a completed act, it may be only preliminary to the future play, by the same person, which will bring forth the coveted prize, the chance in this operation being, not in the visible play, which may show only a package of gum, but in the invisible play by which the machine may turn up a visible prize to be captured on the next play. If a play turns up no premium, neither party loses. If it does turn up a premium, then the machine loses on that particular play.

But it is said there is no loss to the machine in the end, and consequently no chance, because the machine has calculated the profits and losses beforehand, and set apart a certain part of the profits to be allowed its customers. True, but not to all customers alike. Some get something; some get nothing; some more; some less. In this lies the test of what this device means, and the theory upon which it is conceived and worked, namely, to induce customers to play the machine with the expectation of getting something for nothing—it

matters not what customer is successful—as it is perfectly obvious that one part of the public pays, in money, for what another part of the public gets, in prizes. In other words, this machine is a device designed to play one part of the public against another part of the public, for the purpose of inducing the whole public to take the chance of gain, which in the end results in producing to its owner the predetermined profits.

It is also claimed that this device is in the nature of a profit sharing enterprise, or similar, in its purpose, to the practice of department stores in offering premiums to the departments showing the largest increase of profits. But a department store does not take profits from one part of its customers or employes with which to pay premiums to another part. No one set of customers is predestined to pay an extra price for the purpose of contributing funds for the payment of awards. But the owner of this machine, *in advance*, takes money out of one part of the public and gives it to another part, whose winnings depend upon the chance, *arranged in advance*, of just when and just how much, a certain play of the machine will produce to the player who is lucky enough to approach it at the moment of the predestined play. If he, then, draws twenty checks valued at five cents each, he wins, in addition to his gum, one dollar. Another may win ten checks; another, five; an inequality of value probably running through the whole list of prizes.

This transaction cannot be regarded as a "profit sharing" enterprize, as we understand the phrase, nor a legitimate distribution of premiums for services rendered, as in the case of department stores. This interpretation of the inception and purpose of this machine is fully sustained by several well reasoned opinions, while none are cited against it. *Ferguson* v. *State*, 178 Ind., 569, 99 N. E., 806, is a case precisely in point, involving a machine identical with the one under consideration respecting commodity, operation and purpose. Quoting from a New York case the court say: "The chief element of gambling is the chance or uncertainty of the hazard. The chance may be in winning at all, or in the amount to be won or lost. In using the present machine we may assume that the player cannot lose. By far the greater majority of the checks called in trade for the precise sum deposited in the slot. If every ticket represented five cents, the machine would not be patronized. The bait or inducement is that the player may get one of the checks for a sum in excess of the nickel

he ventures, and that is the vice of the scheme. If he wins more than he pays, the proprietor must lose on that discharge of the ticket. To constitute gambling it is not important who may be the loser."

Upon the point that the machine indicates the exact amount of the award for which it is played, it is further said: "In the present case, the fact that the machine would indicate the reward before it was played makes no difference. The inducement of each play was the chance that by that play the machine would be set to indicate that it would pay checks on the following play. The thing that attracted the player was the chance that ultimately he would receive something for nothing. The machine appealed to the player's propensity to gamble, and that is the vice at which section 2474 is directed. The inventor of the machine has endeavored "to adhere to the letter of the law while violating its spirit, "and, as always must be the results, has failed." *State* v. *McTear*, 129 Tenn., 535, 167 S. W., 121, is another case precisely in point, holding the same view.

Without attempting to answer the other grounds upon which the defendant contends this machine may be regarded as an innocent device, we think it sufficiently appears from what we have already discovered, that the operation of this machine is in violation of the intention of the legislature, as expressed in the unlimited inhibition found in the statute.

In accordance with the agreed statement, the entry must be,

Case to stand for trial.

EDWARD W. PENLEY *vs.* GEORGE N. EMMONS.

Oxford. Opinion February 19, 1918.

Cardinal rule to be applied in interpretation of deeds. Meaning of word "timber." Where a licensee has the right to cut and remove timber without limitation as to time, what shall be considered a reasonable time in which to remove same.

This is an action of trover brought to recover the value of eighteen cords of poplar pulp-wood cut and piled on a tract of land situate in the town of Greenwood. On report, such judgment to be directed as the law and facts require. The defendant admits the taking and conversion, but denies the plaintiff's title to the property in question. The case involves the construction of a deed and the rights of the plaintiff thereunder.

Held:

1. The cardinal rule for the interpretation of deeds is the expressed intention of the parties, gathered from all parts of the instrument, giving each word its due force, and read in the light of existing conditions and circumstances. It is the intention effectually expressed, not merely surmised. This rule controls all others. Technical rules of construction of deeds may be resorted to as an aid in getting at the intention. And technical rules may be controlling, when nothing to the contrary is shown by the deed. The ancient rigidity of technical rules has given way in modern times to the more sensible and practical rule of actual expressed intention.
2. The grant of trees or timber, or particular kinds of timber trees, is a grant of the growth standing at the time of the grant. If the grant limit itself by size of tree, age or adaptability for specified uses, then the particular described tree would pass and none other. But where there is no limitation of that character, and the grant is of standing timber, to be taken off in the future, the common understanding is that the grantee may cut timber from the lot until the present growth, suitable for the purpose, shall have been exhausted, or until the right to cut shall have expired by limitation, either express or implied.
3. This rule is two-fold in its nature, viz: what may be cut under the grant and when the right to cut may expire. The time limit for cutting may be expressed in the deed. When not so expressed the cutting is limited to such as may be done within a reasonable time.
4. The court is of opinion that a period of more than twenty years is not a reasonable time within which to cut sixty dollars worth of growth, that the time within which this plaintiff might cut had long since expired, and hence his right to cut had also expired.

Action of trover. At nisi prius a special verdict was returned in favor of the plaintiff, and case was thereupon reported to Law Court upon certain agreed statements. Judgment in accordance with opinion.

Case stated in opinion.

James S. Wright, for plaintiff.

Charles O. Small, for defendant.

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

PHILBROOK, J. This is an action of trover brought to recover the value of eighteen cords of poplar pulp-wood cut and piled on a tract of land situate in the town of Greenwood. The case is before us on report, such judgment to be directed as the law and facts require.

The defendant admits the taking and conversion, but denies the plaintiff's title to the property in question.

The plaintiff claims title by virtue of certain deeds. On June 20, 1893, in consideration of sixty dollars, Joseph R. Emmons conveyed by deed to Justin E. McIntire and Ira Johnson "a certain lot or parcel of poplar, bass-wood and white birch timber, and all of said timber" on two tracts of land, and in the same deed gave the grantees "the right to enter and remove the same at their convenience." McIntire and Johnson conveyed to Fred C. Verrill, and Verrill to the plaintiff, their respective right, title and interest to the property described in the deed from Emmons to McIntire and Johnson.

According to the report, the plaintiff claims that these deeds conveyed all poplars which were standing and growing at the date of the deed, while the defendant claims that the deed conveyed only such poplars as were, at the date of the deed, sufficient in size to be suitable for pulp-wood, or for commercial or manufacturing purposes. In his brief the plaintiff further contended that the grantees in the deed of June 20, 1893, were to have all the time necessary for removing the poplar, bass-wood and white birch, until it was all removed, that they had a right to convey, with right of removal, whatever growth they did not see fit to remove at the time they first removed such growth as they claimed, and that as long as there was any pulp-wood suitable to be removed, which was in existence of any size at the date of the

deed, the right of removal might be exercised whenever it became of suitable size to use. It will be noted that the poplar wood is the only kind which is the subject of controversy in this suit.

In addition to the claim made by the defendant as above set forth in the report, he further claimed in his brief that the right of removal was given only to the grantees named in the deed of June 20, 1893, and not to their heirs and assigns; also that the right of removal should have been exercised within a reasonable time, and that a period of twenty years, or more, is not a reasonable time.

The decision as to the rights of the parties in this case requires an interpretation of the deed and an examination of the law governing transactions properly growing out of the deed.

This court has well said that the cardinal rule for the interpretation of deeds is the expressed intention of the parties, gathered from all parts of the instrument, giving each word its due force, and read in the light of existing conditions and circumstances. It is the intention effectually expressed, not merely surmised. This rule controls all others. Technical rules of construction of deeds may be resorted to as an aid in getting at the intention. And technical rules may be controlling, when nothing to the contrary is shown by the deed. The ancient rigidity of technical rules has given way in modern times to the more sensible and practical rule of actual expressed intention. *Perry* v. *Buswell*, 113 Maine, 399, and cases there cited.

The parties to this suit differ diametrically as to the meaning of the word "timber" used in the deed of June 20, 1893. Bouvier says that the term now seems to include all sorts of wood from which any useful articles can be made, or which may be used to advantage in any class of manufacture or construction.

In *Nash* v. *Drisco*, 51 Maine, 417, our court said that the word timber, in its etymological sense, might embrace nothing but materials for building or manufacturing purposes, and held that in a permit to cut timber and bark the permittee could not cut trees which were not suitable for any purpose but for firewood.

In *Sands* v. *Sands*, 74 Maine, 239, our court, in a lien case, quoted with approval the ruling of the Wisconsin court that the expression "logs and timber" would include railroad ties.

In *Bearce* v. *Dudley*, 88 Maine, 410, an action to recover compensation, under the statute, for driving timber so intermixed with logs that it cannot be conveniently separated, it was said that the trend

of all the authorities is to construe the word timber, in a statute like the one under consideration, in a sense comprehensive enough to work the purposes of the enactment.

The case of *Donworth* v. *Sawyer*, 94 Maine, 242, is confidently relied upon by the plaintiff as fully sustaining his interpretation of the word timber. That, like the case at bar, was an action of trover to recover for conversion of logs. It is there said that the grant of trees or timber, or particular kinds of timber trees, should be held a grant of the growth standing at the time of the grant. If the grant limit itself by size of tree, age, or adaptability for specified uses, then of course the particular described tree would pass and none other. But where there is no limitation of that character, and the grant is of standing timber, to be taken off in the future, the common understanding would be that the grantee might cut timber from the lot until the present growth, suitable for the purpose, shall have been exhausted, or until the right to cut shall have expired by limitation, either express or implied.

We have cited these few cases from the decisions of our own courts to show the gradually and properly broadening views in this jurisdiction regarding the use of terms in a business which forms one of the important elements of the prosperity of our State. And we sustain the rules laid down in *Donworth* v. *Sawyer*, supra, but call attention to the two-fold character of those rules, viz, what may be cut under the grant and when the right to cut may expire.

In *Webber* v. *Proctor*, 89 Maine, 404, a grantor conveyed all hemlock bark and one-half the hemlock trees on a certain tract of land, with right to enter upon the land at any and all times to cut trees and remove bark and trees during a term of ten years. It was there held that the words limiting the time were designed also to limit the grant to such bark and trees as should be taken off within the time and that no more than that was granted. This doctrine is sustained in *Erskine* v. *Sawyer*, 96 Maine, 57, and several cases there cited, as well as in *Noyes* v. *Gooding*, 104 Maine, 453.

A more ancient case, quoted with approval many times in this state, as well as by other courts, is *Pease* v. *Gibson*, 6 Maine, 81. In that case the defendant, in trespass for cutting timber trees, relied upon a deed under seal conveying "the pine trees fit for mill logs" on certain land, with privilege of two years to remove the same. He argued that this was an absolute sale of all such timber on the land,

and not merely such as the vendee could remove in two years; that the limitation of time was only an indication of the period within which he might enter and carry away timber without payment of damages; that after its expiration he might still take away his timber, subject to any reasonable claim of the owner of the soil for damages occasioned thereby. In reply to this contention, speaking through Chief Justice MELLEN, the court said; "To admit the construction given by the defendant's counsel, and consider such a permission as a sale of the trees, to be cut and carried away at the good pleasure of the purchaser, and without any reference to the limitation, in point of time specified in the permit, would be highly injurious in its consequences. It would deprive the owner of the land of the privilege of cultivating it and rendering it productive, thus occasioning public inconvenience and injury; and, in fact, it would amount to an indefinite possession. The purchaser, on this principle, might, by gradually cutting the trees and clearing them away, make room for a succeeding growth, and before he would have removed the trees standing on the land at the time of receiving such a license or sale, others would grow to a sufficient size to be useful and valuable; and thus the owner of the land would be completely deprived of all use of it. Principles leading to such consequences as we have mentioned cannot receive the sanction of this court."

But it may be urged that in the cases cited there was a definite time fixed for cutting and removing the growth, while in the case at bar the grantees were to "enter and remove at their convenience." We do not overlook the fact that the original purchase price was only sixty dollars and could not have been payment for a very large amount of growth. The principle is too elementary to need the support of authorities that when a time is not specified for the performance of a contract it should be performed within a reasonable time. We are therefore inclined to the claim of the defendant that twenty years or more in which to remove sixty dollars worth of standing growth is not a reasonable time, and that the time for removing the growth intended by the parties to the deed of June 20, 1893, had long ago expired.

This being so the plaintiff's rights to cut from the lots in question have ceased and with it his title to standing trees has expired.

The mandate must accordingly be,

Judgment for the defendant.

STATE OF MAINE, By Complaint, *vs.* ROBERT H. BENNETT.

Hancock. Opinion February 19, 1918.

Duty of County Attorneys. Right of court to appoint attorneys to assist State's Attorney in the prosecution of any case.

This cause originated by complaint and warrant issued from the Ellsworth Municipal Court, came by appeal to the Supreme Judicial Court, was there tried before a jury, and the respondent found guilty.

Thereupon exceptions were filed and allowed. Those exceptions were two in number, the first being based upon the allowance, by the presiding Justice, of an attorney other than the County Attorney "to take part in the trial of said cause, to cross examine the respondent's witnesses, and to argue the cause to the jury;" and the second being based upon the admission of the testimony of a certain witness.

Held:

1. When it appears to the court that such facts and circumstances exist that the public interest requires that the State's Attorney have the aid of some counsellor of the court in the trial of the cause, the court will appoint such persons as may seem to them best fitted under the circumstances to aid in the promotion of justice. The selection and appointment of such persons lies in the discretion of the presiding Judge—The exercise of this power is not the subject of exception unless it infringes some rule of law. The needs and exigencies of the case are for his consideration and cannot be reviewed upon exceptions.
2. While the bill of exceptions states that it does not appear from the docket entries who employed the assisting counsel, nor that assisting counsel was especially appointed by the court, yet it does appear in the bill that assisting counsel was allowed to appear as counsel for the State at the request of the County Attorney, that objections were formally made by respondent and were overruled, all of which must be equivalent in effect to an appointment by the court.
3. In a complaint for indecent exposure of the person, evidence of other acts of the respondent, of the same kind as that charged in the complaint, are admissible for the purpose of showing intent.

Complaint and warrant charging respondent with indecent exposure. Respondent was found guilty in Municipal Court and entered his appeal to the Supreme Judicial Court, where after trial a verdict of guilty was rendered. Respondent filed exceptions to the admissi-

bility of certain testimony, and also as to the ruling of the Justice presiding permitting counsel to assist the State's Attorney in the prosecution of the case. Exceptions overruled. Judgment for State.

Case stated in opinion.

Fred L. Mason, County Attorney, and Deasy & Lyman, for State.

P. H. Gillin, D. E. Hurley, and E. N. Benson, for respondent.

SITTING: CORNISH, C. J., SPEAR, KING, PHILBROOK, MADIGAN, JJ.

PHILBROOK, J. This cause originated by complaint and warrant issued from the Ellsworth Municipal Court, came by appeal to the Supreme Judicial Court, was there tried before a jury, and the respondent found guilty.

Thereupon exceptions were filed and allowed. Those exceptions were two in number, the first being based upon the allowance, by the presiding Justice, of an attorney other than the County Attorney "to take part in the trial of said cause, to cross examine the respondent's witnesses, and to argue the cause to the jury;" and the second being based upon the admission of the testimony of a certain witness.

The bill of exceptions claims that the other attorney was "allowed to appear as counsel for the State" at the request of the County Attorney.

R. S., Chap. 84, Sec. 18, provides that "The county attorney shall attend all criminal terms held in his county, and act for the state in all cases in which the state or county is a party or interested. . . ." Section 21 of the same chapter provides that "When he does not attend a criminal session, or the office is vacant, the court may appoint an attorney to perform his duties during the session."

The evidence discloses that the County Attorney, for the County in which the cause was tried, was present taking an active part in the trial.

The respondent cites *State* v. *Reed,* 67 Maine, 127, but that case was decisive only of the necessity, or otherwise of signature of an indictment by the County Attorney, and has no bearing here. He also cites *State* v. *Clough,* 49 Maine, 573, which related only to the validity of an indictment returned by a grand jury, some of the members of which it was found were not legally drawn, and is equally inapplicable. The only other case cited in respondent's brief is *Rounds, Petitioner,* v. *Smart,* 71 Maine, 380, but that can have no bearing upon this case as

it was a discussion of the act of 1880 which provided to persons, claiming to be elected to the office of County Attorney, a more summary and inexpensive remedy to try title to the office than those provided by quo warranto and mandamus.

On the other hand the precise point in controversy was settled by this court half a century ago, and the rule then established has not been reversed. In *State* v. *Bartlett*, 55 Maine, 200, that rule was thus stated, "When it appears to the court that such facts and circumstances exist that the public interest requires that the state's attorney have the aid of some counsellor of the court in the trial of the cause, the court will appoint such person as may seem to them best fitted under the circumstances to aid in the promotion of justice." In the same opinion the court further says, "The selection and appointment of such persons lies in the discretion of the presiding judge. . . . . The exercise of this power is not the subject of exception unless it infringes some rule of law. The needs and exigencies of the case are for his consideration and cannot be reviewed upon exceptions." Again quoting from the same opinion, "The great end to be attained is a just conclusion and a true verdict in the case. Whether or not this can best and most securely be attained by the aid of others in conjunction with the prosecuting officer, must, when such aid is requested by such officer, be determined by the presiding Judge. Who is best adapted to accomplish those ends, must also be decided by him, and those decisions are not subject to revision here unless the person appointed be disqualified by some rule of law." Many citations might be made from the courts of other states, in harmony with this rule but we consider such citations unnecessary. While the bill of exceptions states that it does not appear from the docket entries who employed the assisting counsel, nor that assisting counsel was especially appointed by the court, yet it does appear in the bill that assisting counsel was allowed to appear as counsel for the State at the request of the County Attorney, that objections were formally made by respondent and were overruled, all of which must be equivalent in effect to an appointment by the court.

The second exception is to the admission of the testimony of a witness, other than the complainant, who related other acts of the same kind charged against the respondent. The complaint charges the offense to have been committed in the presence of divers persons between the first day of November, A. D. 1916, and the twenty-first

day of February, A. D. 1917. In his bill of exceptions the respondent complains that the "evidence was offered in the trial of said cause, to establish the commission of the misdemeanor charged in the complaint and warrant, that similar acts had been committed by the respondent at different times, in the presence of different persons, other than the person against whom it is alleged in the complaint and warrant he committed the particular act for which he was then on trial." The State claims that the testimony was properly offered to show intent and not for the purpose claimed by the respondent. Under the rule enunciated by this court in *State* v. *Acheson*, 91 Maine, 240, this being a complaint for indecent exposure, the testimony objected to was clearly admissible for the purpose of showing intent.

As to the merits of the case, it might be added, that the entire evidence, which respondent incorporates into the bill of exceptions, shows the guilt of the respondent beyond any reasonable doubt, and these exceptions cannot afford an avenue of escape from the results of his criminal conduct.

Exceptions overruled.
Judgment for the State.

CHARLES H. LYONS *vs.* WALTER W. JORDAN.

Cumberland. Opinion February 21, 1918.

Rule of proof where defendant would avoid liability on the ground of violation of law on part of plaintiff. Presumption as to illegality.

Action of tort to recover damages for injuries sustained by the plaintiff, a passenger in a car owned by one Morgan and driven by one Richardson, in a collision with a car owned and driven by the defendant. The verdict was for the plaintiff.

Held:

1. That the evidence was squarely contradictory as to the manner in which the accident happened, and the blame therefor, and the court is not convinced that the verdict is palpably wrong.
2. That the evidence being silent upon the registration of the car in which the plaintiff was riding, the burden was on the defendant to introduce evidence of its non-registration if he relied upon that fact as a defense. He who charges another with moral turpitude or legal delinquency must prove it.

The court therefore did not err in refusing to direct a verdict for the defendant on this ground.

3. This conclusion renders it unnecessary to consider the question whether if the car was in fact unregistered the plaintiff, a passenger, was precluded from recovering of the defendant in this common law action of tort.

Action on the case to recover damages on account of injuries received by plaintiff through the alleged negligence of defendant in operating an automobile. Defendant filed plea of general issue. At the conclusion of the evidence defendant requested the court to direct a verdict, which request was denied; to which ruling defendant filed exceptions and also motion for new trial. Motion and exceptions overruled.

Case stated in opinion.

Arthur D. Welch, for plaintiff.

Harry E. Nixon, for defendant.

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

CORNISH, C. J. On the morning of December 4, 1916, a collision occurred between an automobile owned by one Morgan, and driven by one Richardson, in which the plaintiff was riding as a passenger, and another automobile owned and driven by the defendant. The accident happened near the junction of Market and Congress Streets in the City of Portland. The car in which the plaintiff was riding was proceeding northerly on Congress Street toward Munjoy Hill. The car of the defendant was moving westerly from Market Street into Congress Street. The cars collided and the plaintiff was thrown out and injured. He recovered a verdict of one hundred dollars. The case is before the Law Court on a general motion to set aside the verdict and also on exceptions to the ruling of the presiding Justice declining to direct a verdict for the defendant.

So far as the general motion is concerned, it is sufficient to say that the evidence was flatly contradictory on the vital points. As usual in this class of cases growing out of automobile accidents, the plaintiff and his witnesses testified that he was traveling at a moderate rate of speed, seven or eight miles an hour, and observed all the necessary precautions to avoid trouble, and the defendant was driving rapidly and somewhat recklessly; while the defendant and his witnesses reversed the picture and threw all blame upon the plaintiff's driver. It was for the jury to decide between the antagonistic contentions, and their conclusion we are not disposed in this case to overturn. It is not so clearly wrong as to warrant reversal.

The motion for a directed verdict was based upon the fact that the plaintiff had failed to prove that the car in which he was riding was registered in accordance with the requirements of the statute, R. S., Chap. 26, Secs. 23, 28. The evidence is silent upon that point. The defendant contends that the burden was on the plaintiff to prove as a fact the registration of the car and in the absence of such evidence the action cannot be maintained.

Such is not the law. When the defendant would avoid liability on the ground of a violation of law on the part of the plaintiff, he, the defendant, must introduce affirmative evidence to prove the violation. It is for one who asserts the illegality of an act on the part of another to first introduce the evidence tending to prove his assertion. Wrong doing is not to be presumed. Illegality is not to be presumed.

Affirmative evidence must be introduced to prove it. "He who charges another with moral turpitude or legal delinquency must prove it." *Baxter* v. *Ellis*, 57 Maine, 178; *Scottish Com. Ins. Co.* v. *Plummer*, 70 Maine, 540-544. Shaw, C. J., in *Hatch* v. *Bagley*, 12 Cush., 27. This is settled law. *Timson* v. *Moulton*, 3 Cush., 269; *Wilson* v. *Melvin*, 13 Gray, 73; *Trott* v. *Irish*, 1 Allen, 481; 2 Chamberlayne Ev., Secs. 1222-1223; 10 R. C. L., page 881.

In *Doherty* v. *Ayer*, 197 Mass., 241, the precise question arose. No evidence was introduced either as to the registration of the plaintiff's car or the license of the driver. The contention of the defendant that therefore the plaintiff could not recover was overruled by the court in these words: "So far as appears, the automobile was duly registered and the plaintiff was duly licensed. The evidence tends to show that the plaintiff was a traveller lawfully using the way. Presumptions both of law and fact are always in favor of innocence. In cases somewhat analogous, when one would avoid liability on the ground of a violation of law by the plaintiff, he must prove the violation. *Goddard* v. *Rawson*, 130 Mass., 97, and cases there cited. See also *Temple* v. *Phelps*, 193 Mass., 297. In the present case the evidence introduced by the plaintiff made a prima facie case in his favor on this point."

The same is true in the case at bar. A prima facie case was made in favor of the plaintiff, and the motion to direct a verdict for the defendant was properly denied.

This conclusion renders it unnecessary to consider the question whether, if the car was in fact unregistered, the plaintiff, a passenger, could recover of the defendant in this common law action of tort. So far as the evidence shows here the car was registered and therefore this legal question does not arise. Its discussion would be in the nature of dictum.

Motion and exceptions overruled.

EDNA AVERY

vs.

ROBERT L. THOMPSON and RODNEY E. FEYLER, Admrs.,

and

A. FERDINAND AVERY

vs.

ROBERT L. THOMPSON and RODNEY E. FEYLER, Admrs.

Knox. Opinion February 21, 1918.

General rule as to duty of one having control of an automobile to a person invited to ride therein. Meaning of "negligence" and "due care."

In two actions of tort, brought the one by the wife, an invited guest in the automobile of the defendant's intestate, and the other by the husband, to recover damages arising from a collision at a grade crossing of a steam railroad when the automobile was struck by a locomotive, it is

Held:

1. The legal duty resting upon the intestate arose from a gratuitous undertaking on his part, and was assumed without consideration.
2. The true rule of liability on the part of such voluntary undertaker is that he be required to exercise that degree of care and caution which would be reasonable and proper from the character of the thing undertaken.
3. The thing undertaken here was the transportation of the guest in the intestate's automobile. The act itself involved some danger because the instrumentality is commonly known to be a machine of tremendous power, high speed and quick action. In a sense the guest may be said to have assumed the risks ordinarily arising from these elements, provided the machine is controlled and managed by a reasonably prudent man who will not, by his own want of due care, increase their danger or subject the guest to a newly created danger. The gratuitous undertaker should be mindful of the life and limb of his guest and should not unreasonably expose her to additional peril.
4. Tried by this test the verdict of the jury fastening liability upon the defendants' intestate is not so palpably wrong that it should be set aside.
5. The plaintiff herself under all the circumstances was not guilty of contributory negligence.

6. The damages awarded Mrs. Avery, $5,250., while large, do not impress the court as so extravagant or exorbitant, considering the nature and extent of her injuries, as to require reduction.
7. The damages awarded the husband having regard to the amount of his disbursements and all other elements are excessive. One thousand dollars would be ample compensation.
8. The court did not err in excluding this question put to a civil engineer: "Have you timed a train making the ordinary stop at the station in Thomaston to know whether it could make its ordinary stop at a rate of more than ten miles an hour on Knox Street?" At best the answer could only serve to contradict the locomotive engineer on an immaterial point, and the experimental observations which the witness was asked to narrate, were made at a subsequent date, were not confined to this particular train and were clearly within the excluding rule of res inter alios acta.

Action on the case to recover damages for injuries received through alleged negligence of defendants' intestate. Plea of general issue filed in each case. Verdict for plaintiff in first action in the sum of $5250, and in the second in the sum of $1483.33. Motion for new trial and exceptions filed in each case. Judgment in accordance with opinion.

Case stated in opinion.

Carl C. Jones, and F. W. Halliday, for plaintiff.

A. S. Littlefield, and R. I. Thompson, for defendants.

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

CORNISH, C. J. These cases are of novel impression in this State. They involve the degree of care which the owner and operator of an automobile owes to his invited guest.

N. Webb Thompson, the defendants' intestate, was a resident of Friendship and the owner and driver of an automobile. He invited four ladies to take a ride with him for pleasure from Friendship to Thomaston. The invitation was accepted and on the morning of September 2, 1915, they started on the journey. Miss Mitchell sat on the front seat with Mr. Thompson, the other three ladies on the rear seat, Mrs. Avery, the plaintiff, on the left, Miss Morse in the center and Mrs. Pillsbury on the right. They turned from the Friendship road on to Knox Street in Thomaston and in attempting to pass over a grade crossing about one hundred feet from the turn, the automobile was struck by an express train of the Maine Central

Railroad Company. Mr. Thompson was instantly killed, and Mrs. Avery was thrown out and seriously injured. These suits are brought, the one by Mrs. Avery and the other by her husband, against the estate of Mr. Thompson to recover the damages so sustained. The allegation in the writs is that Mr. Thompson "utterly heedless of the safety of the plaintiff, did then and there negligently, carelessly and recklessly attempt to cross said railroad company's tracks in front of said approaching train, by reason of which negligence, carelessness and recklessness," etc., the plaintiff was injured. Mrs. Avery recovered a verdict of $5,250. and Mr. Avery of $1,483.33. The cases are before this court on motion and a single exception.

MOTION.

1. *Defendant's Negligence.*

In order to determine whether these verdicts are so manifestly contrary to the law and the evidence that they should be set aside by this court, it is necessary to ascertain the measure of duty which Mr. Thompson, the invitor and the host, owed to Mrs. Avery, the invitee and guest, under the circumstances of this case, in other words the degree of care which he was in law bound to exercise for her protection and safety during this gratuitous transportation. We should first inquire what was the legal relation existing between the parties.

Ordinarily in personal actions the duty which is violated is one of two kinds. Either it is one imposed upon the defendant equally with all the world and independent of any act or volition on his part, as for instance the duty of a driver of an automobile toward other travelers on the highway; or it may arise out of contract, either under seal or given for good consideration in consequence of which the defendant has assumed a correlative duty, an illustration of which is the carriage of persons or property for hire. There is, however, a third way in which a legal duty may arise and that is from a gratuitous undertaking on the part of the defendant, a duty voluntarily assumed without consideration, and a duty owed to the plaintiff alone because of the peculiar relations of the parties. The most common instance of this third classification is a gratuitous bailment.

Within this zone, independent of either contract or tort in its larger sense, falls the defendant's duty and therefore the plaintiff's right of action in the case at bar. The defendant (using this term for the sake of convenience) had entered into no contract with the plaintiff

by the terms of which he had agreed to carry her safely from Friendship to Thomaston and return; nor was he obliged to invite her into his car to become his guest. He voluntarily undertook to transport her on this pleasure trip and his liability wholly grew out of this voluntary undertaking and was commensurate with the duty so assumed by him.

The next inquiry is this, to what degree of care and exertion should he be held under these circumstances? Was he bound to convey her safely as would a common carrier? Clearly not. Was he liable for injuries resulting from what has often been termed ordinary negligence, that is a failure to exercise the care of an ordinarily prudent person in the same situation? Or should he be held bound to exercise only a slight degree of care and be liable only in case of reckless and wilful misconduct, what has been often characterized as gross negligence?

There has been much controversy over the use of phrases expressing different degrees of negligence, as slight, ordinary and gross, but it seems to be largely a matter of terminology, and the later decisions while for the most part rejecting the arbitrary distinctions, acknowledge the existence of conditions that increase or diminish the degree of care to be exercised. In *Raymond* v. *Railroad Co.*, 100 Maine, 529, this court said: "It will be observed that the Courts in discussing the above propositions have used the word negligence, instead of the word care, to express the measure of duty. But confusion has arisen from regarding 'negligence' as a positive instead of a negative word. For this reason it is usual to express the duty owed in positive terms by stating what consitutes due care, rather than in negative terms by stating what constitutes negligence which is the unintentional failure to perform a duty required by law. 'Negligence' is the opposite of 'due care'. When due care is found there is no negligence. If there is a want of due care then there is negligence. We are inclined to agree with the great weight of judicial opinion that the attempt to divide negligence, or its opposite due care, into degrees will often lead to confusion and uncertainty. It seems to us therefore that the measure of duty owed by parties in the discharge of their mutual relations, would be better expressed by the use of the term negligence if one prefers a negative definition, or due, reasonable or ordinary care, always having reference to the circumstances and conditions with regard to which the terms are used."

On the other hand the Massachusetts Court in its latest discussion of the subject, closes an elaborate analysis of the authorities with the words: "We are of opinion . . . . that in this Commonwealth at any rate degrees of negligence are known to the law." *Massaletti* v. *Fitzroy*, 228 Mass., 487.

Notwithstanding these antagonistic statements as to definition we doubt not that the two courts from a given state of facts would be apt to reach the same conclusion as to liability. The difference is more verbal than real.

This is illustrated in the analogous doctrine of gratuitous bailments,—what the earlier writers termed a mandate. In *Storer* v. *Gowen*, 18 Maine, 174, this court, on the authority of Story on Bailments, stated the law in these words: "In such a case the bailee or mandatary is responsible only for gross negligence," but added "the care required in a bailment of this kind will depend much upon the nature of the goods delivered. If money is delivered, it is to receive more care than common property." Restated in *Dinsmore* v. *Abbott*, 89 Maine, 373, the doctrine appears as follows: "The burden was upon the plaintiff, whatever the form of action, to show a breach of the implied contract of the defendants as gratuitous bailees, viz: to use ordinary care in keeping the property and to deliver it upon demand, if after using due care, they should have it in their possession." The language is different in these two opinions but the essential elements of the self-imposed duty undoubtedly remain the same.

Adopting then the modern method of statement we think that the true rule of liability on the part of a voluntary undertaker should be this, that he be required to exercise that degree of care and caution which would seem reasonable and proper from the character of the thing undertaken.

The courts have had occasion to consider the governing rule in several instances as between invitor and invitee in case of gratuitous transportation.

In *Moffat* v. *Bateman*, L. R., 3 P. C., 115, the plaintiff was being conveyed by the defendant in his carriage to perform certain work on the defendant's house. The plaintiff claimed that because of negligent driving the king bolt of the carriage broke, the horses bolted, the carriage was overturned and he himself was injured. The court held that as there was no evidence of gross negligence the plaintiff could

not recover. This decision was later commented upon by Smith, L. J., in *Coughlin* v. *Gillison* (1899) 1 Q. B., 145, as follows: "What was there laid down was that if you undertake to drive a man in your carriage, you must not be guilty of gross negligence in driving, if you wish to escape liability for an accident to him while being driven;" and by Collins, L. J., in these words: "The plaintiff had intrusted himself to the defendant to be carried, and there was a clear duty on the part of the bailee towards the bailor not to be guilty of gross negligence causing injury to him."

In *Mayberry* v. *Sivey*, 18 Kan., 291, the plaintiff was an invited guest of the defendant who was driving the team. Against the protestations of the plaintiff and his request to alight, the defendant recklessly raced his horse and a collision ensued. The court held that the defendant was liable, all allegations being proved except a wilful intention on the part of the defendant to throw the plaintiff from the carriage.

In *Siegrist* v. *Arnot*, 10 Mo. App., 197, the plaintiff was an impliedly invited guest in the carriage owned by the defendant, a livery stable keeper, but driven by his servant. The court in holding the defendant liable for injuries caused by the horses running away, laid down the rule thus, through Judge Thompson, author of the learned treatise on negligence: "He (the defendant) was bound to bestow upon the undertaking which he had voluntarily assumed, that degree of care which a prudent man having regard to his social obligations would have bestowed upon it; which, escaping from all definition, simply means that degree of care which a jury may reasonably say he ought to have bestowed under the circumstances and considering that human life was in his keeping. . . . . The governing principle here is that whenever a person undertakes an employment which requires care and skill, whether he undertakes it for reward or gratuitously, a failure to exert the measure of care and skill appropriate to such employment is culpable negligence, and if damages result therefrom an action will lie."

In *Patnode* v. *Foote*, 153 N. Y. App. Div., 494, the plaintiff had been subpoenaed by defendant as a witness in an action in which defendant was a party, and was invited by the defendant to ride with him in his team to the place of trial. In sustaining a verdict for the plaintiff the court say: "There was also evidence, fully warranting the jury in finding that the defendant drove at a reckless speed, against plaintiff's protest, and the collision was due to defendant's carelessness. A

person thus invited to ride stands in the same situation as a bare licensee who enters upon real property which the licensor is under no obligation to make safe or keep so, but who is liable only for active negligence. The obligation of one who invites another to ride is not so great as that of the owner of real property who invites another thereon especially for the purposes of trade or commerce, because under such circumstances the one who gives the invitation is bound to exercise ordinary care to keep the property reasonably safe. Under the above principles therefore one who invites another to ride is not bound to furnish a sound structure or a safe horse. If he should have knowledge that the vehicle was unfit for transportation or the horse unsafe to drive, another element would arise and he might be liable for recklessly inducing another to enter upon danger. These latter elements however are not involved in the present action and the duty of the defendant toward the plaintiff only was to use ordinary care not to increase the danger of her riding with him or to create any new danger."

In *Pigeon* v. *Lane*, 80 Conn., 237, the trial court directed a verdict for the defendants on the ground that the plaintiff and the servant of the defendants through whose want of due care the plaintiff was injured, were fellow servants. The Supreme Court of Errors reversed this ruling and said, obiter, that if the plaintiff was injured while riding upon the sleigh as a mere licensee the defendants could be liable only for her active negligence in causing the injury by which the danger of riding upon the conveyance was increased or a new danger created.

In *Beard* v. *Klusmeier*, 158 Ky., 153, 164 S. W., 319 (314), the defendant was racing at midnight with another automobile. The plaintiff protested and begged to be allowed to alight. The defendant refused and the accident followed. The court held the defendant liable and declared it to be the defendant's duty upon inviting the plaintiff to ride as a guest in his automobile to use ordinary care not to increase the plaintiff's danger nor to create any new danger such as by fast and reckless driving.

In *Fitzjames* v. *Boyd*, 123 Md., 497, 91 At. 547 (1914), the accident was caused by the defendant, against the protest of the plaintiff, attempting to pass another automobile upon a slippery pavement at a rapid pace. The car skidded, struck a telegraph pole, and the plaintiff, an invited guest, was thrown out and injured. The action was

sustained and the doctrine of *Patnode* v. *Foote*, and *Beard* v. *Klusmeier*, before cited, was accepted as the true and correct rule.

In *Perkins, Admr.*, v. *Galloway*, 194 Ala., 265 (1915), 69 So., 875, the rule was expressed as follows: "The express or implied duty of the owner and driver to the occupant of the car is to exercise reasonable care in its operation not to unreasonably expose to danger and injury the occupant by increasing the hazard of that method of travel. He must exercise the care and diligence which a man of reasonable prudence, engaged in like business, would exercise for his own protection and the protection of his family and property, a care which must be reasonably commensurate with the nature and hazards attending this particular mode of travel. Failing in this duty he will be liable to the occupant or guest of the car for injuries the result of such carelessness or lack of diligence."

The last word in Massachusetts is to be found in *Massaletti* v. *Fitzroy*, 228 Mass., 487. The facts in that case were that while staying with the defendant as her guest the plaintiff went out with the defendant in her automobile driven by a chauffeur who was furnished by the owner of the garage where the car was kept. The machine was overturned and the plaintiff injured. The jury found that while driving the machine the chauffeur was the defendant's servant, that the accident was caused by his negligence, but the plaintiff did not contend that the chauffeur was guilty of gross negligence. Thereupon the presiding Justice directed a verdict for the defendant, and this ruling was sustained by the Law Court on the authority of *West* v. *Poor*, 196 Mass., 183, where it was held that a defendant who invites a plaintiff to ride gratis in his carriage is liable to the same extent that a gratuitous bailee is liable, that is only for so called gross negligence. The opinion most learnedly discusses the question of degrees of negligence, as we have before observed, and also the authorities both in England and this country upon the question of gratuitous bailments, overruling *Gill* v. *Middleton*, 105 Mass., 477, where it was held that a landlord who gratuitously undertook to make repairs could be held responsible for lack of ordinary care. In conclusion the court said: "Approaching the question apart from authority we are led to the same conclusion. Justice requires that the one who undertakes to perform a duty gratuitously should not be under the same measure of obligation as one who enters upon the same undertaking for pay. There is an inherent difficulty

in stating the measure of duty which is assumed in the two cases. But justice requires that to make out liability in case of a gratuitous undertaking the plaintiff ought to prove a materially greater degree of negligence than he has to prove where the defendant is to be paid for doing the same thing. It is a distinction which seventy-five to one hundred and ninety-five years practice in this Commonwealth has shown is not a too definite one to be drawn by the Judge and acted upon by the jury." Without adopting the terminology of this opinion as to degrees of negligence nor its reasoning which makes the degree of care depend upon the matter of compensation, yet we find in it in some respects a common ground of legal principle.

The foregoing decisions give expression in varying forms to substantially the same fundamental principle and lead here to the same essential inquiry, viz: did the defendant exercise toward his invited guest that degree of care and diligence which would seem reasonable and proper from the character of the thing undertaken? The thing undertaken was the transportation of the guest in the defendant's automobile. The act itself involved some danger because the instrumentality is commonly known to be a machine of tremendous power, high speed and quick action. All these elements may be supposed to have been within the contemplation of the guest when she accepted the invitation. In a sense she may be said to have assumed the risks ordinarily arising from these elements, provided the machine is controlled and managed by a reasonably prudent man who will not by his own want of due care increase their danger or subject the guest to a newly created danger. In other words we conceive the true rule to be that the gratuitous undertaker shall be mindful of the life and limb of his guest and shall not unreasonably expose her to additional peril. This would seem to be a sane, sound and workable rule, one consistent with established legal principles and just to both parties. It leaves the determination of the issue to the jury as a question of fact.

Tried by this test we are constrained to say that the verdict of the jury fastening liability upon the defendant in the case at bar is not so manifestly wrong that it should be set aside. His conduct bordered upon if it did not actually reach recklessness. It did not evince that regard for the safety of his passengers which is required. The jury were warranted in believing that he was familiar with the premises and knew that he was approaching a grade crossing, a place of acknowledged danger. The whistle had been blown and the automatic

bell was ringing. When within two or three rods of the crossing the plaintiff exclaimed, "the engine!" as the train came in sight around a bend in the road. Thereupon the defendant slowed the automobile a little, looked up and saw the train and then as he approached within twelve or fifteen feet of the crossing he increased the speed, attempted to cross in front of the oncoming train and the sad catastrophe instantly followed. His own life was sacrificed, Miss Mitchell lost both feet, and the plaintiff was seriously injured. We cannot say that the jury erred in finding, as they must have found, that the defendant unreasonably exposed the plaintiff to a terrible hazard, and created a new peril which she could be held neither to have anticipated nor to have assumed. Such conduct was a breach of duty on his part.

2. *Plaintiff's alleged contributory negligence.*

The plaintiff cannot be held guilty of contributory negligence, as is earnestly urged by the defendant. The negligence complained of was the act, not of the railroad company, but of the defendant in the management of the machine, and no act or failure to act on the part of the plaintiff can be deemed the proximate cause of the accident. She had neither direction nor control of its operation. That was absolutely within his power. She neither consented to nor acquiesced in the particular management or mismanagement that caused the tragedy. She was a stranger in the locality and was sitting quietly on the back seat, in full and justifiable reliance upon his capacity as a competent driver. She was not inattentive because she was apparently the first to perceive the train and at once gave warning. He heard her exclamation. Had he heeded it and stopped, as he might have done, all would have been well. Instead, he hesitated, then put on speed and plunged rashly into obvious peril, into the very jaws of death. She was powerless to prevent it. Clearly, no blame can be attached to the plaintiff.

3. *Damages.*

The damages awarded Mrs. Avery while large do not impress us as so extravagant or exorbitant as to require reduction by the court. Mrs. Avery was twenty-eight years old. Her injuries were serious. Objectively they consisted of a scalp wound on the head and a fractured pelvis. Subjectively they consisted of a nervous shock or collapse with its attendant ills which still remain with her. She is suffering from a retroverted uterus, and seven months after the

collision she had a miscarriage while three months in pregnancy. The plaintiff's physicians state that in their opinion she can never give birth to a child, because of the changed conditions due to the pelvic break. Her suffering was intense and her injuries are in a degree permanent. Under all these circumstances we cannot say that the finding of the jury must be deemed so excessive as to require action on our part.

Mr. Avery's verdict was $1,483.33. Considering the amount of his legitimate cash disbursements and all other elements, we think one thousand dollars would be ample compensation for all damages sustained by him.

EXCEPTIONS.

The plaintiff introduced the locomotive engineer who testified that at the time and place of accident the train was running at the rate of eight or ten miles an hour. He further testified that that was his usual speed on that train in approaching that crossing, and it was necessary that the train should not be running at a greater speed at that point in order to make its stop at the station which lies beyond. Another witness, a bystander testified that he did not think the train was going very fast, not faster than it usually did when it came into the station.

The defendant introduced as a witness, a civil engineer, who was asked this question, "Have you timed a train making the ordinary stop at the station in Thomaston to know whether it could make its ordinary stop at a rate of more than ten miles an hour on Knox Street?" To the exclusion of this interrogatory exception was taken.

There was no error in this ruling. At best the answer could only serve to contradict the locomotive engineer on an immaterial point, his opinion as to the limit of speed of his train at the crossing in order to make the stop at the station. It did not reach the actual speed at which the train was moving at the time of the accident and on that point whether the train was going ten miles an hour or faster, the act of the defendant in attempting to cross its path would have been equally reprehensible. Moreover the experimental observations which the witness was asked to narrate were made at a subsequent date, not confined to this particular train, and were clearly within the excluding rule of res inter alios acta.

Our conclusion therefore is as follows:

In the action brought by Edna Avery the motion and exception are overruled.

In the action brought by A. Ferdinand Avery, the exception is overruled and the motion sustained unless the plaintiff within thirty days from the filing of the certificate of decision files a remittitur of the amount of the verdict above $1,000. If such remittitur is filed, motion overruled.

So ordered.

INHABITANTS OF DURHAM,

Appellants from Decision of the County Commissioners of the Counties of Cumberland and Androscoggin, in re Location.

Cumberland. Opinion February 21, 1918.

Rule as to both Boards of County Commissioners signing a report of the laying out of a way. Number of Commissioners to be present at the hearings or sessions. Rule as to right of majority of County Commissioners deciding questions involved. Appeals, where filed and in what County subsequent proceedings thereon.

The Commissioners of Cumberland and Androscoggin Counties in joint session relocated an ancient way which lies partly in Pownal, Cumberland County, and partly in Durham in the County of Androscoggin. The inhabitants of Durham took an appeal from the location and the committee appointed by the Supreme Judicial Court sustained the commissioners. The presiding Justice ordered the acceptance of the report of the committee, and the Inhabitants of Durham have brought the matter up on exceptions, their contention being that the record is fatally defective because the report of their doings is signed by only the Cumberland Commissioners and not by both boards.

Held:

1. The laying out of a way is a judicial act, which is prima facie evidence at least of the doings therein recited though attested by but one of the boards engaged in the proceedings.

2. R. S., Chap. 24, Sec. 13, requires that a majority of each board must be present at the session and that a majority of those in attendance may decide the matter, but it does not require that all must sign the report.
3. The joint board is not a permanent board having records of its own, so that its proceedings must be recorded in a County Court. As Cumberland was the originating county the proceedings were properly recorded there and the rights of appeal were governed by and dependent on that record.

Appeal from the decision of County Commissioners in relocating a certain highway between the town of Pownal, County of Cumberland, and the town of Durham, Androscoggin County. After hearing and laying out by commissioners, an appeal was entered to Supreme Judicial Court by the inhabitants of the town of Durham. At the term of the Supreme Judicial Court a commission was appointed to pass upon the findings of the County Commissioners, and upon the filing of their report a motion was filed by the Inhabitants of the town of Durham, asking that the report of said Committee be set aside and that all proceedings be quashed. This motion was overruled by presiding Justice, to which ruling exceptions were filed. Exceptions overruled.

Case stated in opinion.

Henry E. Coolidge, and Oakes, Pulsifer & Ludden, for appellants.

W. G. & C. D. Chapman, for appellees.

SITTING: CORNISH, C. J., SPEAR, KING, HANSON, MADIGAN, JJ.

MADIGAN, J. The commissioners of Cumberland and Androscoggin Counties in joint session relocated an ancient way which lies partly in Pownal, Cumberland County and partly in Durham, in the County of Androscoggin. The Inhabitants of Durham took an appeal from the location and the committee appointed by the Supreme Court sustained the commissioners. The presiding Justice ordered the acceptance of the report and refused to quash the proceedings of the commissioners and the inhabitants of Durham have brought the matter up on exceptions.

Appellants claim the record is fatally defective because the report of their doings is not signed by both boards but only by the Cumberland Commissioners. With this we do not agree. The laying out of a way is a judicial act, which is prima facie evidence, at least, of the doings therein recited, though attested by but one of the boards engaged in the proceedings. This is a true record in fact, because a

duplicate signed by the other board was later spread on the Androscoggin records and a certified copy of the same appears in the Cumberland record. Had the duplicates been filed simultaneously and seasonably in both counties, or even in Cumberland alone, it could not be claimed the record was defective, because all signatures were not on the same sheet of paper.

The judgment itself strictly complied with the statutes. Upon a proper petition respecting a way in the two counties a joint meeting was duly called on good and sufficient notice, at which a majority of both boards and all interested parties and their counsel were present, and ample time was given to procure and present evidence; the joint session adjudged and decreed that the prayer of the petition should be granted, laid out the way, marked the boundaries on the face of the earth, and assigned by metes and bounds two-thirds of the way to Pownal and one-third to Durham, for which portion said towns were made liable.

The statute requires that a majority of each board must be present at the session and that a majority of those in attendance may decide the whole matter. R. S., Chap. 24, Sec. 13; but it does not say that all must sign the report. No disgruntled minority, even if it represented an entire county, where three counties participated, can directly or indirectly defeat or annul the judgment of the majority. *Jones* v. *Oxford*, 45 Maine, 428. The boards are assembled to adjust and settle matters in which two or more counties are interested, and as soon as the joint problems are adjudicated the power of the joint body is exhausted, and it cannot change, amend or annul its own decision except on a new proceeding. *Jones* v. *Oxford*, supra.

The joint board is not a permanent court having records of its own, requiring its proceedings to be recorded in a County Court. The statutes, R. S., 1916, Chap. 24, Secs. 14 and 15, allowing appeals in these cases, something which was not provided for prior to 1891, requires that the appeals shall be filed and subsequent proceedings be had in the county where the proceedings originated, the commissioners of which county shall notify the other counties. As Cumberland was the orginating county, proceedings were properly recorded there and the rights of appeal were governed by and dependent on that record. It would make no difference when the report was filed or joint proceedings closed in Androscoggin, provided the record was correct in Cumberland. That in its workings the method followed zealously guarded the

rights of all is evident, because this case has been considered by the joint session, by a committee of eminent standing and by the court at nisi prius.

Statutory requirements for taking private property for the public welfare are to prevent injustice and ensure proper compensation, but not to needlessly delay what public convenience and necessity demand. As we find no merit in the objections raised by the appellants, all of which, so far as they apply to the judgment of the joint session, are included in the points above discussed, the entry will be,

Exceptions overruled.

THE INHABITANTS OF EAGLE LAKE

vs.

THE INHABITANTS OF FORT KENT.

Aroostook. Opinion February 23, 1918.

Pauper. Derivative settlement; when and how acquired. Burden of proving derivative settlement. Burden of proving acquired settlement. Rule where declarations of father are admissible in matters of family history.

In an action to recover for pauper supplies furnished M. and wife, on report, it is *Held:*

1. That the plaintiffs contention that M. had a derivative settlement in the defendant town is not proved.
2. The derivative settlement was fixed when the pauper attained his majority. At that time he took the settlement of his father if the latter had one in this State, and the burden was on the plaintiffs to prove that at that time the settlement of the father was in Fort Kent.
3. The actual knowledge of M. does not furnish this proof, and declarations of his father could not be received as to matters of family history because his father was still alive. They were merely hearsay testimony and not admissible.

4. The proof as to derivative settlement failing, this action fails; but it may be added that the facts are sufficient to prove that the pauper had acquired a settlement in Eagle Lake after he became twenty-one years of age.

There is therefore no liability on the part of the defendants.

Action on the case to recover for pauper supplies. At close of evidence case was reported to Law Court by agreement. Judgment in accordance with opinion.

Case stated in opinion.

Shaw & Thornton, for plaintiff.

A. S. Crawford, Jr., for defendant.

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

CORNISH, C. J. This is an action to recover for pauper supplies furnished one Dennis Michaud and wife, and comes to this court on report. Two issues of fact are presented. First, Did Dennis Michaud have a derivative settlement from his father, Baptiste Michaud, in the defendant town, as claimed by the plaintiffs? Second, If so, had he lost that derivative settlement and acquired one in his own right in the plaintiff town at the time the supplies were furnished, as claimed by the defendants?

The chronological facts are these. Dennis Michaud was born in Fort Kent in 1883 and lived there until he was twenty-four years of age. At that time he married, and after remaining in his father's family in Fort Kent two weeks, he moved to Eagle Lake with his wife on April 29, 1907. For the first year and a half in Eagle Lake they lived with the wife's father, who had gone with them and built a house there. Then Dennis built a home of his own and with his wife kept house until April 1, 1912, making a period of four years and eleven months since he had moved to Eagle Lake. They then returned to Fort Kent, and resided there until May 1, 1915, when they went back to their former home in Eagle Lake and were living there when they fell into distress in October, 1915.

1. *Derivative Settlement.*

The derivative settlement of Dennis Michaud was fixed when he became twenty-one years of age. At that time he took the settlement of his father, if the latter had one in this State, and he retained it until he subsequently might acquire one of his own by having his home in a

town for five successive years without receiving supplies as a pauper, directly or indirectly. R. S., Chap. 29, Sec. 1, paragraphs II and VI. The plaintiffs contend that when Dennis became twenty-one, his father's settlement was in Fort Kent and the burden was on them to sustain this proposition by a fair preponderance of the evidence. This they have failed to do. All the proof on this point comes from Dennis. His father, Baptiste, although living, was not called as a witness. He could have given the facts as to his residence during the minority of Dennis and from these his settlement when Dennis reached his majority could have been readily ascertained. Under these circumstances therefore, the scope of the son's admissible evidence on this point was limited to facts within his own knowledge. Declarations of his father could not be received as they lacked one element requisite to their admissibility on a matter of family history, that is, the death of the declarant before the trial, *Northrup* v. *Hale*, 76 Maine, 306; 4 Chamberlayne Ev., Sec. 2911, et seq.; or in the broader language of Wigmore, the nonavailability of the declarant at the time of trial. 2 Wig. Ev. Sec. 1481. The declarations offered were therefore not an exception to the ordinary rule governing the exclusion of hearsay testimony.

Reviewing the testimony in the light of this evidentiary rule we find that it consists merely of two statements by Dennis, first that his father was born in Fort Kent, and second that his father was brought up in Fort Kent. He admits, as he must, that his only knowledge came from statements made to him by his father, and therefore this evidence cannot be considered, his father being still alive. The report contains no other facts touching this issue.

It is therefore impossible for this court to find, under the established rules of evidence, that the pauper had a derivative settlement in the defendant town and the plaintiffs fail on this vital point.

2. *Acquired Settlement.*

Having reached this conclusion on the first point, it is not strictly necessary to consider the second, that is the acquiring of a settlement by the pauper in Eagle Lake. The burden is on the plaintiffs to prove the settlement in Fort Kent, not on the defendants to prove it in Eagle Lake, unless the pauper had a derivative settlement in Fort Kent.

It can do no harm, however, to add that in our opinion the facts are sufficient to establish the settlement in Eagle Lake. The pauper went there with his wife, April 29, 1907, and established his home, at first in the house of his father-in-law and then in his own. This house he has never sold and this home he has never abandoned. One month before the expiration of five years he moved back to Fort Kent with his wife, taking nearly all his personal property with him, but as he himself testifies, he went only for a temporary purpose and with the intention of returning to Eagle Lake which he still regarded as his home. After staying in Fort Kent about three years he returned to his own house in Eagle Lake, which during his absence he had leased, and he has since remained there. His acts coincide with his intention.

There was some evidence to the effect that Dennis at one time attempted to sell his home in Eagle Lake and with the proceeds to purchase other property in Fort Kent. But this was shortly prior to his return to Eagle Lake and the selling and purchasing were mere contingent possibilities that never materialized. They did not constitute a well formed intention to give up the Eagle Lake home, and at the time the possibilities were under consideration the five year period since first going to Eagle Lake had long since elapsed.

The pauper once having established his home in Eagle Lake, by the concurrence of intention and personal presence, his personal presence in that town for five successive years was not essential to his acquiring a settlement therein if his intention continued unchanged during that period.

Judgment for defendants.

FRED L. MARTIN *vs.* J. FRANK GREEN.

Penobscot. Opinion February 23, 1918.

Sales. Passing of title where vendee represents himself to be another. Rule as to the contract of sale being void or voidable where there is fraud or fraudulent representations. When the sale must be rescinded. Title of innocent purchaser buying from fraudulent purchaser

In an action of trover to recover the value of a horse, it appeared that R., a stranger fraudulently assuming the name of another and representing that he was a resident of Winn, purchased the horse from the defendant giving in payment therefor two notes signed under the assumed name and secured by a mortgage upon this horse and another. The mortgage was duly recorded in the town clerk's office in Winn. R sold the horse three days later to C, and four weeks thereafter C sold it to the plaintiff. About three months later the defendant took the horse from plaintiff's possession and retained it.

Upon defendant's motion to set aside a verdict in favor of the plaintiff, it is

Held:

1. The fact that the seller was induced to sell by fraud of the buyer made the sale not void but voidable. There was a de facto contract of sale by which the vendor at the time intended to convey and did convey the property to the vendee on his own responsibility.
2. Upon discovery of the fraud the vendor could have rescinded the contract and have recovered the property from the fraudulent vendee or from a purchaser from the vendee having knowledge of the infirmity.
3. The jury have found that the plaintiff here was a bona fide purchaser for value without notice of the fraud and the evidence warrants the verdict.
4. An innocent purchaser of goods for a valuable consideration, even from a vendee who has obtained them by fraud, obtains a good title as against the original vendor. He has the superior equity. The defendant therefore cannot successfully set up the fraudulent sale in defense to this action.
5. The defendant cannot hold the horse under his mortgage. As R. was not a resident of Winn the record was not constructive notice of the existence of the mortgage. It was a mere nullity as against a bona fide purchaser for value without notice.

Action of trover. Plea, general issue with brief statement claiming title in defendant. Verdict for plaintiff in the sum of $339.60. Motion for new trial filed by defendant. Motion overruled.

Case stated in opinion.
Mayo & Snare, for plaintiff.
B. W. Blanchard, for defendant.

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

CORNISH, C. J. Action of trover to recover the value of a certain horse. Title is the issue. The defendant is a resident of Bangor and a dealer in horses. On August 7, 1915, a man came to his place of business and represented himself to be Frank E. Towle of Winn. He looked over the horses in the stable and finally purchased from the defendant the one in question, for an agreed price of $325. giving in consideration one note for $100. on one month and one note for $225. on four months, both notes being secured by a mortgage on this horse and on one other alleged to be in the mortgagor's possession. The notes and mortgage were signed "Frank E. Towle," and the mortgage was recorded in the office of the town clerk of Winn on August 9, 1915. It is admitted that the vendee was not Frank E. Towle but a man by the name of Roche, and that Roche was not a resident of Winn, where the mortgage was recorded.

Roche sold the horse three days later, on August 10, 1915, to one Costly of Silver Ridge Plantation, taking in exchange another horse, a carriage and a certain amount of money, all of an estimated value of $150. Costly says that Roche, who was a stranger to him, told him that he lived in Lincoln and that he had purchased the horse two or three days before from a farmer in that town. He knew nothing more in regard to the source of title. Costly kept the horse about four weeks and sold it to the plaintiff in exchange for other horses. The plaintiff took the horse to his own home in Springfield and kept him until November 5, 1915, when he was taken by the defendant from the plaintiff's possession. The jury in this action of trover found in the plaintiff's favor in the sum of $339.60, and the case is before the Law Court on defendant's motion for new trial.

The material facts are really not in controversy, and they raise a question of law, novel in this State. The primary question to be decided is whether the title to the horse passed to Roche under the transaction between Green and him. The defendant claims that the sale was absolutely void, a mere nullity; that in consequence of the

deception and fraud practiced upon Green no title passed from him; that it was the same as if Roche had stolen the horse and carried him away. The plaintiff contends, on the other hand, that under the facts of this case the sale was not absolutely void, but merely voidable, that as between Green and Roche, Green could have rescinded the contract and recovered his horse, but that until that was done, the title remained in Roche and Green could not hold the horse as against a bona fide purchaser for value from Roche. We think the plaintiff's contention is correct, and supported by both reason and authority.

All the elements of a sale were present and the minds of the parties met. They agreed upon the article to be sold, and the price and the terms of payment. Nor was there any doubt as to who was the vendor and who was the vendee. Green intended to sell to the identical man before him, with whom he was dealing, whatever his name might be, and to take back a mortgage from that man. That actual intent governs. "Presentia corporis tollit errorem nominis." Identification by the senses overrides description. The act followed the intent and the horse was delivered to the intended vendee. It was what is termed a de facto contract of sale and title thereby passed, to be defeated because of fraud only as between vendor and vendee, or as between vendor and a purchaser having knowledge of the infirmity. *Edmunds, et als.*, v. *Merchants Despatch Transportation Co.*, 135 Mass., 283, a group of cases tried together, is directly in point. In two of those cases a swindler representing himself to be Edward Pape of Dayton, Ohio, who was a reputable merchant, appeared personally in Boston and bought of the plaintiffs the goods in controversy, and they were delivered to the defendant for transportation to Dayton, where they were delivered to the consignee, the man who had purchased them in Boston. It was held that an action against the carrier could not be maintained, the title having passed to the purchaser and the carrier having delivered them to the party who owned them. The ground of the decision is stated in part as follows: "The fact that the seller was induced to sell by fraud of the buyer made the sale voidable but not void. He could not have supposed that he was selling to any other person; his intention was to sell to the person present and identified by sight and hearing; it does not defeat the sale because the buyer assumed a false name or practiced any other deceit to induce the vendor to sell." . . . . "There was a de

facto contract, purporting, and by which the plaintiffs intended to pass the property and the possession of the goods to the person buying them; and we are of opinion that the property did pass to the swindler who bought the goods. The sale was voidable by the plaintiffs; but the defendant, the carrier by whom they were forwarded, had no duty to inquire into its validity. The person who bought them and who called himself Edward Pape, owned the goods, and upon their arrival in Dayton had the right to demand them of the carrier." This doctrine has been affirmed in *Emery* v. *Seavey*, 148 Mass., 566-569, and *Harrison* v. *Dolan*, 172 Mass., 395-396.

The principle of the passing of title under a de facto contract is not to be confused with a line of cases where the swindling vendee acts not for himself but represents that he is the agent of or is acting for a third party. In such a case it has been held that no title passes because the vendor does not intend to sell to the party with whom he is personally dealing, but with the third party, for whom the swindler claims to be acting but is not. The third case considered in *Edmunds, et als.*, v. *Merchants Despatch Transportation Co.*, 135 Mass., 283, belongs to this class, and on this point the opinion says: "The third case differs materially from the others. In that case the contract did not purport, nor the plaintiffs intend to sell to the person who was present and ordered the goods. The swindler introduced himself as a brother of Edward Pape of Dayton, Ohio, buying for him. By referring to the Mercantile Agency he tacitly represented that he was buying for the Edward Pape who was there recorded as a man of means. The plaintiffs understood that they were selling, and intended to sell to the real Edward Pape. There was no contract made with him, because the swindler who acted as his agent had no authority, but there was no contract of sale made with anyone else. The relation of vendor and vendee never existed between the plaintiffs and the swindler. The property in the goods therefore did not pass to the swindler; and the defendant cannot defend, as in the other cases, upon the ground that it has delivered the goods to the real owner."

The English cases observe the same distinction and recognize the force of a de facto contract of sale. Whether the sale was intended to be to the identical person with whom the dealings are had or to an another for whom he is acting is a question of fact, and upon the decision of that fact depends the principle of law to be applied. In

Hardman v. *Booth*, 1 H. & C., 803, no contract of sale was held to exist because the court found that the plaintiff believed he was contracting with the firm of Gandell and Co. and not with Edward Gandell personally, who made the trade and falsely represented himself to be a member of that firm and to be acting for them.

In *Lindsay* v. *Cundy*, 1 Q. B., Div. 348, the court, including Blackburn and Mellor, JJ., held that upon the facts disclosed, the intention of the vendors was to contract with the person who was the fraudulent vendee and not with another party whose name he had simulated. Accordingly title was held to pass. On appeal to the House of Lords this finding was reversed, not because the principle of law had not been well stated, but because the court found as a fact that there was no contract between the vendors and the fraudulent vendee, and the vendors intended to contract with and believed they were contracting with the third party for whom the vendee falsely claimed to be acting. It was a reversal of a finding of fact and not of a ruling of law. *Cundy* v. *Lindsay*, L. R., 3 App. Cas., 459.

In the case at bar the verdict of the jury establishes the fact that the sale was made to the vendee as an individual on his own responsibility, and therefore the fraudulent misrepresentation as to name had the same effect as a fraudulent misrepresentation as to the amount of property he possessed. It rendered the sale not void but voidable. The evidence justifies the finding.

Having settled this primary question, as to the nature of the sale, it follows that the vendor gave the vendee an apparent or implied right to dispose of the property, and that a bona fide purchaser for value from the vendee should be protected in his purchase. The innocent purchaser of goods for a valuable consideration, even from a vendee who has obtained them by fraud, obtains a good title as against the original vendor. "He has the superior equity." *Neal* v. *Williams*, 18 Maine, 391; *Dilson* v. *Randall*, 33 Maine, 202; *Titcomb* v. *Wood*, 38 Maine, 561; *Tourtellott* v. *Pollard*, 74 Maine, 418. The good faith of the plaintiff here is abundantly proved. He is second removed from Roche the defrauding purchaser, and there is no evidence tending to charge either Costly, the first purchaser from Roche, or the plaintiff who bought from Costly, with knowledge of the infirmity of the title.

Had Roche been a resident of Winn, where the mortgage was recorded, Green would have been justified in taking the horse under

the mortgage, R. S., Chap. 96, Sec. 1. But as Roche was not a resident of that town the record was not constructive notice of the existence of the mortgage, and was a mere nullity as against a bona fide purchaser without notice. *Horton* v. *Wright,* 113 Maine, 439.

Motion overruled.

CARRIE LEMBO *vs.* CHARLES K. DONNELL.

Androscoggin. Opinion March 11, 1918.

Rule as to right to recover damages where party claiming the damages consented and was a voluntary party to the illegal act.

Consent by one person to allow another to perform an unlawful act upon such person does not constitute a defense to an action to recover the actual damages which such person thereby received.

Action on the case to recover damages for alleged malpractice in performing an illegal operation upon plaintiff and for negligent treatment thereafter. Defendant filed general demurrer, in which plaintiff joined. Presiding Justice overruled demurrer; to which ruling defendant filed exceptions. Exceptions overruled.

Case stated in opinion.

Newell & Woodside, for plaintiff.

Tascus Atwood, for defendant.

SITTING: CORNISH, C. J., SPEAR, HANSON, PHILBROOK, JJ.

PHILBROOK, J. This is an action on the case brought to recover damages against the defendant, a physician, for malpractice while performing an operation to procure an abortion on the plaintiff, and for unskilled treatment subsequent to the operation. The defendant filed a general demurrer which was overruled and the case comes to us upon exceptions to that ruling.

The basis of defendant's exceptions lies in his position that as the plaintiff consented to the operation she cannot recover because the operation is an illegal one.

In a similar case, *Miller* v. *Bayer*, 94 Wis., 123; 68 N. W., 869, the court said: "It is further contended that plaintiff cannot recover, because she submitted to the operation performed upon her. Such is not the law. Consent by one person to allow another to perform an unlawful act upon such person does not constitute a defense to an action to recover the actual damages which such person thereby received;" citing 2 *Greenleaf Ev.*, Sec. 85; *Shay* v. *Thompson*, 59 Wis., 540, 18 N. W., 473; *Fitzgerald* v. *Calvin*, 110 Mass., 153; *Adams* v. *Waggoner*, 33 Ind., 531; *Com.* v. *Colberg*, 119 Mass., 350; *Grotton* v. *Glidden*, 84 Maine, 589.

We agree that this statement of the law is correct.

Exceptions overruled.

LEVI BRANN *vs.* N. M. LEAVITT.

Lincoln. Opinion March 11, 1918.

General rule of law as to recovery of punitive damages.

When an assault is wanton, unprovoked, causeless, with a desire to hurt, to gratify anger or malice, if the jury think the actual damages awarded are not sufficient they are warranted in adding to the actual damages such a sum as smart money or punitive damages which, taken together with the actual damage, will afford a sufficient punishment to the person who has done the wrong.

Action on the case to recover damages for an alleged assault and battery on the person of the plaintiff. Defendant filed plea of general issue, and also a brief statement setting forth that whatever acts were done by him were done in self-defense. Verdict for the plaintiff in the sum of eight hundred dollars. Defendant filed a motion for a new trial and also exceptions to certain rulings of the presiding Justice. Motion overruled. Exceptions overruled.

The case is stated in the opinion.

L. M. Staples, and A. S. Littlefield, for plaintiff.

George A. Cowan, and Harold R. Smith, for defendant.

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

HANSON, J. This is an action of trespass for assault and battery. The plaintiff recovered a verdict in the sum of $800. and the case is before the court on exceptions and motion by the defendant.

The defense was the general issue, with a brief statement alleging self-defense. At the conclusion of the charge of the presiding Justice, the defendant requested certain instructions, all of which were refused, except as given in the charge.

The first five related to punitive damages, and in urging that the same should have been given, the defendant's attorney in his brief, quotes as the law that, "unless the assault was intentional, reckless, wanton, or malicious, there should be no punitive damages." And that is the law in this State. *Robichaud* v. *Maheux,* 104 Maine, 524; *Webb* v. *Gilman,* 80 Maine, 177; *Lord* v. *Maine Central Railroad Co.,* 105 Maine, 258.

The Justice presiding in his charge upon the question of damages instructed the jury that, "the plaintiff is entitled, if he is entitled to anything, to actual compensation for his injuries," and in conclusion charged the jury as follows: "But the plaintiff invokes a further rule in this case, and it is a rule well recognized in law. He says that, under the circumstances, the defendant should be made to pay punitive damages, 'smart money,' not because the plaintiff is entitled to that as compensation, but because the common good requires that the defendant should be punished. And it is a rule in a case of this kind, that, when an assault is wanton, unprovoked, causeless, with a desire to hurt, to gratify anger or malice, the jury, if they think the actual damages awarded are not sufficient punishment, are warranted in adding to the actual damages such a sum as smart money, or punitive damages which, taken together with the actual damages, will afford a sufficient punishment to the person who has done the wrong; juries are not compelled to do this; they are not required to do it; they are allowed to do it. Whether they will add punitive damages or not is left solely to the discretion of the jury. You have a right in this case, if you find that this was a wanton, wicked assault, not

provoked by the plaintiff himself, to add to the actual damages a sufficient sum of money as punitive damages to afford sufficient punishment, provided the actual damages themselves are not sufficient. Otherwise not."

The charge was explicit and more favorable to the defendant than the instructions sought in the requests. The defendant was not injured by the refusal, and can take nothing by these exceptions.

The sixth and seventh requests relate to the question of self-defense raised by the pleadings, and much of the charge was devoted to the subject, fully covering the points urged and the law correctly stated. The defendant was not aggrieved, and can take nothing by these exceptions.

THE MOTION.

The record discloses an assault of unusual severity when the physical condition of the parties is taken into consideration; the plaintiff, incapacitated by physical defects, the defendant in perfect health and strength. It discloses that the assault was unprovoked and malicious, that the verdict was fully justified, and the amount manifestly not excessive.

Exceptions overruled.
Motion overruled.

AMOS N. WALKER *vs.* WALTER A. BRADFORD.

Franklin. Opinion March 11, 1918.

Bills of exceptions where the only question involved is one of fact. General rule as to the court having full power and control over its conduct and proceedings.

This was an action for breach of warranty in the sale of a horse. A jury trial was had and a verdict returned for the plaintiff. The motion to set aside the verdict states the case as follows:

"That the plaintiff was entertained by and occupied the house of a juryman on the panel which rendered a verdict in the cause, prior to and during the trial of the action.

The motion was addressed to the presiding Justice who ruled as follows: "After hearing the testimony of the above named juryman, I grant the motion and set the verdict aside."

To this finding the plaintiff filed exceptions.

Held:

(1) From inspection, it is evident that the motion presented no question of law.

(2) The finding of the presiding Justice was upon a pure question of fact.

(3) The plaintiff's exceptions, therefore, raise no question of law and for this reason bring nothing to the Law Court and should be dismissed.

(4) The motion involved a proceeding that may be instituted independent of any statute.

(5) From time immemorial, courts of record have been vested with inherent powers to compel obedience, or remove unwarranted interference with, the administration of Justice, and to protect their proceedings against imposition, fraud, or any other conduct involving contempt.

(6) It is a power inherent in the constitution of a court and necessary not only to the exercise of its functions, but its very existence.

(7) The common law, independent of any statute, vests the courts with plenary power over the conduct of its own proceedings.

Action on the case to recover damages for alleged breach of warranty in the sale of a horse. Verdict for plaintiff in the sum of sixty-five dollars. After verdict, defendant filed a motion to set aside the verdict, and after hearing, the presiding Justice granted the motion; to which ruling plaintiff filed exceptions. Exceptions overruled.

Case stated in opinion.

Currier C. Holman, for plaintiff.

K. A. Rollins, and Thomas D. Austin, for defendant.

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

SPEAR, J. This was an action for breach of warranty in the sale of a horse. A jury trial was had and a verdict returned for the plaintiff for $65. The motion to set aside the verdict sufficiently states the case: "And now comes the defendant in the above entitled action after verdict and before judgment, and moves that the verdict may be set aside, and a new trial ordered for the following reasons, to wit:—

1. That the plaintiff, Amos N. Walker, was entertained by and occupied the house of H A. Compton, a juryman on the panel which rendered the verdict in the above entitled cause, prior to and during the trial of said action, and while the said H. A. Compton was also occupying and living in said house, all without the knowledge of the said defendant, Walter A. Bradford, or of his attorneys, prior to said verdict."

This motion was addressed to the presiding Justice who made the following finding: "After hearing the testimony of H. A. Compton, the above named juryman, I grant the motion and set the verdict aside. The plaintiff has 30 days in which to file exceptions."

To this finding, setting aside the verdict,—the plaintiff filed exceptions. From inspection, it is evident that the motion presented no question of law. The finding of the presiding Justice was upon a pure question of fact. The plaintiff's exceptions, therefore, raise no question of law and for this reason bring nothing to the Law Court and should be dismissed.

But, inasmuch as it is claimed that a motion to set aside a verdict for misconduct of a juror should be based on Sec. 109, Chap. 87, R. S., it may be regarded as proper to add, that in the opinion of the court it is unnecessary to inquire, whether the proceedings herein considered were authorized or in accordance with any provision of the statute. It is a proceeding that may be instituted independent of any statute.

It has been held, from time immemorial, that courts of record, during term time, at least, are vested with inherent powers to compel obedience to, or remove unwarranted interference with, the administration of justice, and to protect their proceedings against imposition,

fraud, or any other conduct involving contempt. Such is the rule in all common Law Courts, at least. It is a power inherent in the constitution of a court and necessary not only to the exercise of its functions, but to its very existence. See note in *Clark* v. *The People*, 12 Am. Dec., 178.

Accordingly the common law, independent of any statute, vests the court with plenary power over the conduct of its own proceedings, including improper interference with, or conduct of, its jurors, the very essence of contempt.

It will moreover be conceded that the presiding Justice has the most satisfactory information upon which to act in so delicate and intimate a matter, as an inquiry into the facts, alleged to have had an improper influence upon the mind of a juror. During the trial of a cause, he is in touch with the spirit and atmosphere of the case, understands the parties and witnesses, is without bias and adverse to any form of procedure tending to result in delay or expense. The defendant's motion presented a matter entirely within the judicial discretion of the presiding Justice. In the proper exercise of this discretion, having ordered the verdict set aside, his decision is final.

Exceptions overruled.

CHARLES P. WEBBER, et als., *vs.* GRANVILLE CHASE COMPANY.

Washington. Opinion March 11, 1918.

R. S., Chap. 114, Sec. 8, interpreted. Rule as to necessity of recording a permit to cut logs.

The plaintiffs in the winter of 1913 gave a written permit to one Allen of Dennysville to enter upon their lands and cut and haul therefrom the logs and lumber described in the plaintiff's writ. Allen sold the logs and lumber cut under the permit to the defendant to be delivered at their mill in Baring, and they were fully paid for. The defendant had no knowledge of the permit or its terms and conditions when it purchased the logs.

The only question here involved is whether this permit should have been recorded so as to give notice to innocent third parties, intending to purchase, that the timber and lumber made therefrom were subject to a lien.

Held:

(1) No claim could be made in favor of such record prior to the enactment of Chapter 32 of the Public Laws of 1895.

(2) The letter of this statute now found in Sec. 8, Chap. 114, R. S., 1916, does not apply.

(3) Nor was it the intention of the legislature that it should apply to a permit.

Action of trover to recover the value of certain logs and the lumber manufactured therefrom cut on land of the plaintiffs. Defendants filed plea of general issue and also brief statement. By agreement of counsel case was reported to Law Court upon certain agreed statement of facts, the court to render final judgment upon so much of the evidence as legally admissible. Judgment in accordance with opinion.

Case stated in opinion.

C. B. & E. C. Donworth, for plaintiffs.

Reed V. Jewett, and J. H. Gray, for defendant.

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

SPEAR, J. The plaintiffs in 1894 were the owners of Hinckley township in Washington County. Herbert E. Allen, Dennysville, in

the winter of 1913-14 entered upon the land, under a written permit from the plaintiffs, and cut and hauled therefrom the logs and lumber described in the plaintiff's writ.

On June 30, 1913, the defendants made a contract with Allen to purchase from him these logs and lumber, to be delivered, properly boomed, at the mouth of Musquash stream in said township. The logs were received by the defendants at their mill in Baring and paid for in full on May 16, 1914.

On May 18, 1914, the plaintiffs wrote and advised the defendant that Allen had not paid the stumpage due on the logs. The defendants had no knowledge of a permit or its terms and conditions, when it purchased the logs. The action is a suit in trover for the value of the logs and lumber. The permit in the case was in the ordinary form, containing a clause in which it is agreed that the grantor shall reserve and retain full and complete ownership and control of all lumber cut from the premises, until all matters in connection with the license are settled, and the sum due for the stumpage, and all paper given therefor, shall be fully paid.

The only question here involved is whether this permit, either before the severing of the timber began, or from time to time after it began, should have been recorded so as to give notice to innocent third parties, intending to purchase, that the timber, and lumber made therefrom, were subject to a lien. No claim could be made in favor of such record prior to the act of 1895, now found as Sec. 8, Chap. 114, R. S., 1916. Prior to the enactment of this statute, it had been clearly established in this State, that a permit need not be recorded, to enable the permittor to retain title to the lumber until the stumpage was paid and the conditions performed. *Fisher* v. *Sawyer*, 32 Maine, 28; *Crosby* v. *Redman, et al.*, 70 Maine, 56. See also *Putman* v. *White*, 76 Maine, 55, where the matter is fully discussed. Does Chap. 32 of the Public Laws of 1895 require the recording of a permit to give it validity against innocent third purchasers? The letter of the statute does not. A permit is not an agreement for the bargain and delivery of personal property. It is a license authorizing the permittee to convert real property into personal property. But the letter of the statute does not always control. Was it, then, the intention of the legislature that it should apply to a permit? This depends upon the construction of the statute. The Act of 1895 amended Sec. 5, Chap. 111, R. S., 1883. The provision found in 1883

was taken from 1871. Reference is made to R. S., 1871, as this statute has been construed. Sec. 5, Chap. 11, R. S., 1883, reads as follows: "No agreement that personal property bargained and delivered to another, for which a note is given, shall remain the property of the payee until the note is paid, is valid, unless it is made and signed as a part of the note; and no such agreement, although so made and signed in a note for more than thirty dollars, is valid, except as between the original parties to such agreement, unless it is recorded like mortgages of personal property." The statute of 1895 now found in R. S., Chap. 114, Sec. 8, reads as follows: "No agreement that personal property bargained and delivered to another, shall remain the property of the seller till paid for is valid unless the same is in writing and signed by the person to be bound thereby. And when so made . . . . it shall not be valid except as between the original parties thereto unless it is recorded," etc. By a comparison of these statutes it will be seen that the subject matter is precisely the same in each, namely, "no agreement that personal property bargained and delivered to another," etc., and expressed in exactly the same words. The amendment did not change the subject matter. Nothing touching the "agreement" is found in the amendment which was not embraced in the original statute. But the original has been specifically construed. In *Crosby* v. *Redman*, 70 Maine, 56, the exact point here raised was specifically put in issue, in argument, and expressly considered by the court, who said: "Here is no 'bargain nor delivery' of personal property within R. S., (1871), Chap. 111, Sec. 5." If the permit did not come within the purview of "bargain and delivery" under the old statute, it does not come within the purview of "bargain and delivery" under the new statute, for, as above shown, the meaning of "bargain and delivery," the subject matter of each statute is precisely the same in the one as in the other. The subject matter was not enlarged; that the agreement of bargain and delivery, should be recorded, to give it effect against innocent purchasers, was all that was sought to be accomplished by the amendment.

Nor do we think the legislature intended the amendment of 1895 to apply to a permit. The decisions which specifically exclude the application of the old statute to a permit were promulgated before the new statute was enacted. The legislature is presumed to have in mind the decisions of the court. If, therefore, the legislature in the

amendment had intended to change the application of these decisions, touching the recording of permits, they would have done so by the use of some apt language rather than to have left their intention to the uncertainty of implication.

Judgment for plaintiffs for $1467.33 and interest from June 1, 1914.

PORTLAND SEBAGO ICE COMPANY *vs.* CHARLES G. PHINNEY.

Cumberland. Opinion March 11, 1918.

Rights of riparian owners. Rule in Maine as to prescriptive ownership in water rights. Rule of law as to gaining prescriptive rights by flowage. Right of riparian owner to construct a dam. Rule under common law and how same has been modified by statute. Meaning of reasonable use in constructing and maintaining a dam.

This is an action on the case for damages for an alleged interference by the defendant with the riparian rights of the plaintiff.

The interference complained of is the erection by the defendant, upon his own land, of a dam about 3000 feet above the lower dam, and some 1200 feet below the reservoir dam of plaintiff.

The plaintiff's contention is that the erection of the defendant's dam is a violation of its water rights upon these ponds and stream, first, as specified and defined in the respective deeds from which it derives its title, and, second, if not by the deeds as aforesaid, by prescriptive occupation.

Held:

(1) The grant in the deeds is limited to flowage to the height of the dam.

(2) The riparian rights, if conveyed in the deed, are limited by the flowage.

(3) As the flowage does not reach the site of the dam, the riparian rights did not reach it, and were not interfered with.

(4) No riparian rights were granted, such supposed rights being limited to flowage only.

(5) A prescriptive title to flowage cannot be acquired without proof of actual damage.

(6) No such proof being found, no prescriptive rights were acquired.

(7) The erection of the defendant's dam was a reasonable use of the stream.

(8) Being a reasonable use the defendant had a right to erect a dam upon his own land when he might see fit, provided he did the work in a prudent and reasonable manner.

(9) He would be liable to the plaintiff for interference with its ice privilege, only for injury caused by his negligence.

(10) It is admitted there was no negligence.

(11) The defendant cannot, therefore, be held responsible for the incidental damage done the plaintiff.

Action on the case to recover damages for alleged injuries to water rights of plaintiff. Case was reported to Law Court upon certain agreed statement of facts, the Law Court to dispose of the case in accordance with stipulation of the parties. Judgment for defendant.

Case stated in opinion.

Frederic J. Laughlin, and David E. Moulton, for plaintiff.

Reynolds & Sanborn, for defendant.

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

SPEAR, J. This is an action on the case for damages for an alleged interference by the defendant with the riparian rights of the plaintiff. The facts may be briefly stated as follows: At the date of the plaintiff's writ it was the owner in the town of South Portland of an ancient mill privilege, dam, and the land upon which it was erected, used for the purpose of creating a pond for cutting ice and operating a mill. This will be hereafter referred to as the lower pond. The plaintiff was also the owner of another piece of land about half a mile from the above named dam, up a small stream which flowed down into the mill pond and tended to supply it with water for ice and mill purposes. Up this stream about 4800 feet as the stream flows, the plaintiff had also erected another dam across the stream, on his own land, for the purpose of storing water for use, when necessary, for supplying water for its ice field and for power. This is called the Pollywonkee dam, and will be hereafter referred to as the reservoir dam.

The interference complained of is the erection by the defendant, upon his own land, of a dam about 3000 feet above the lower dam, and some 1200 feet below the reservoir dam, These distances are approximately estimated by measurements made upon a plan of the locus, made upon scale.

The plaintiff's contention is that the erection of the defendant's dam is a violation of its water rights upon these ponds and stream, first, as specified and defined in the respective deeds from which it derives its title, and, second, if not by the deeds by prescriptive occupation. In 1854, prior to any of the rights acquired by plaintiff, Silas Skillins was the owner of all the land and all the water rights, now in controversy. The rights of each party were carved out of this ownership by the language of their deeds, and a proper construction thereof. Neither party had any rights prior to this date, and now have only what was granted, barring prescription. The plaintiff's title and privileges are derived from the following deeds: September 7, 1854 Skillins conveyed the town privilege to Joseph R. Mathews, conveying the right of flowage, only, by the use of this language: "and the right of flowage as I have improved the same." The grantor also reserved the privilege of cutting the ice on the pond jointly with the grantee. But this reservation is of no consequence in the decision of this case.

On June 26, 1863, Mathews conveyed to Dennis W. Clark in the identical language of the above conveyance. These premises have passed by mesne conveyances from Clark to the plaintiff. This completes the plaintiff's rights in the lower dam, by this first deed. At this time it is agreed that Clark owned all rights of flowage and all riparian rights on both sides of the brook up to the point where the defendant's easterly or northeasterly boundary now is, that is, the plaintiff's lower dam and privileges of flowage and riparian rights run up the brook to the defendant's land. At this time, however, Skillins owned all the land on both sides of the stream above the lower privilege up to and "a considerable distance" beyond the Pollywonkee dam.

In 1866 Clark raised the lower dam and thereby flowed the land of Skillins up the stream above the lower dam, from which a controversy arose, resulting in an adjustment, which involved the following deed, under which the plaintiff claims to have been granted the right not only to flow but control the water of the streams tributory to the lower pond. Bear in mind, Skillins at this time owned all the land on both sides of the stream, between the land of the lower pond up to and beyond the reservoir dam. This deed is important and we insert the description entire: "All my right, title and interest in and to the following described premises and rights. The right of flowing

and covering with water, so much of my land situated along both sides of Long Creek, so called, and all the gullies and streams and water emptying into said creek, and upon both sides of said creek, streams and gullies, as is required to make a pond for the use of said Clark's mill, and of cleaning and taking out the ice from said pond. Also conveying all my rights and privileges as reserved by me in conveyance to Joseph R. Matthews, September 7th, 1854, by deed recorded in the Cumberland Registry of Deeds, Book 257, Page 263. Together with all claims for damages caused by the overflowing of my land to make said pond of water, and all the riparian rights in law or equity, for the purpose specified, provided said water shall not be raised any higher than it is by said dam as now built."

The increased height of the dam remains the same. In 1870, Skillins conveyed to Clark the land at and for some 50 rods above the site of the Pollywonkee dam, which, with Skillins' consent, had been erected some five years before. This deed was a straight conveyance of land by metes and bounds, granting no privileges whatever. It should, therefore, be observed that the plaintiff gained no water or riparian rights by this grant except what went with the land, and these were all above the dam and immaterial to the decision of this case, so far as any grant of the deed is concerned. All these properties have merged, sooner or later, in the title of the plaintiff. The title of the defendant appears from the agreed statement as follows: "The land between the Pollywonkee and lower pond and mill privilege has passed from Silas Skillins by mesne conveyances to the defendant, and on this land so acquired, the defendant, in the fall of 1914, constructed a dam not far from his easterly line. This dam is constructed across the stream running from the upper to the lower pond, but is above the point affected by flowage caused by the plaintiff's lower dam." All the other facts embraced in the agreed statement are immaterial.

From these deeds, title, and privileges as agreed upon, what are the respective rights of these parties? The rights of these parties so far as the deeds are concerned, are located between the lower pond, and the defendant's dam. The Pollywonkee dam received no privileges whatever on the stream, below the land on which the dam set. Accordingly, in construing the deeds we may eliminate this conveyance from consideration. Nor need we consider the first deed, conveying only the right of flowage, as this original right was fully

superceded by the adjustment deed of March 17, 1866, which has been fully quoted. This deed contains but two grants pertinent to the decision of this case. (1) The right of flowing and covering with water, (the latter phrase meaning permanently) all the lands of the grantor bordering on any of the water courses which contribute to supply the lower pond with water for producing an ice field. (2) A grant of "all the riparian rights in law or in equity." If the provisions of this deed stopped here, it would be a grant of very broad rights. But it does not stop there. Grant (2) contains two most important limitations, both upon grants (1) and (2). It grants "all riparian rights" (a) "for the purpose specified;" (b) provided said water "shall not be raised any higher than it is by the dam, as now built."

Upon the construction of this deed depends the rights of the parties. Let us therefore apply its provisions to the face of the earth, representing the stream, and location of these dams, in connection with the circumstances, and agreed facts, and note the deductions that reasonably follow.

It is no longer debatable that the intention of the parties control the construction of a deed, if it can be discovered. Nor is it longer questioned that every word in the instrument may be scanned in finding that intention.

The deed before us, in clause (1) grants an unlimited right to flow and cover the land with water. But we find important and material limitations upon this right. Taken out of order, the words of limitation (b) in express terms confined the right of flowage to the height of the dam as it stood March 17, 1866. It requires no interpretation to show that the right of flowage broadly conveyed by grant (1) was limited by proviso (b) to the height of the dam, as it was in 1866.

Coming now to the grant in clause (2) "and all the riparian rights in law and equity" we find this twice limited in the deed, itself. First, by the words found in limitation (a) "for the purpose specified." What is the purpose specified? Beyond cavil, the right of flowing or covering the land with water,—nothing else. Second, by the words found in limitation (b) confining the flowage to the height of the dam,—nothing else. It would seem, therefore, that these limiting clauses were undoubtedly intended to reduce these broad grants expressed in the language of "flowage" and "riparian rights" to the sole purpose of flowage.

Moreover, riparian ownership carries with it valuable advantages. The words "riparian owner" have a fixed meaning in law, and when used, convey the information that such owner has title or proprietorship to land bordering on some stream or lake, with certain incidental rights annexed by law, depending upon the character of the stream or lake. But it cannot be contended in this case that the grantor in this deed ever intended to convey any land to the grantee, nor do we understand any such claim ever has been made. We refer to this definition, however, to show in what sense the words, "riparian rights" were used, as limited by the phrase, "for the purpose specified."

It is accordingly evident that the grantor by the words "riparian rights" acquired nothing beyond the right to flow the grantee's land, to the height of the dam. We do not understand the plaintiff complains of any interference with its right of flowage. It is to the right of the defendant to erect a dam, at all. There is another ground upon which the riparian right of the plaintiff, assuming it to contain the elements of such a right, is eliminated from the case. It is conceded in the agreed statement, that the defendant's dam is "above the point affected by the flowage, caused by the plaintiff's lower dam." But the deed limits the riparian right "for the purposes specified," flowage, not to be "raised any higher than it is by the dam as now built." Accordingly, under this statement, in no way does the plaintiff have any rights, riparian or otherwise, beyond the flowage, and the flowage does not reach the defendant's dam. It has already been seen that the plaintiff acquired no rights, by his deed, below the reservoir dam.

Therefore, the plaintiff's deeds, taken in connection with the admission as to the extent of flowage, when the deeds are applied to the face of the earth, do not reach, at all, the location of the defendant's dam. By a fair construction, they are eliminated, so far as his right to construct and operate his dam is concerned. He had the right that every riparian owner has to erect a dam upon his own land.

The plaintiff contends, even though the deeds do not give the plaintiff the exclusive right to the stream from its reservoir to its lower dam, it has gained such right by prescription. We are unable to find anything in the agreed statement that warrants the affirmative of this contention. First, the case does not show that the use made of the stream between the two dams, owned by the plaintiff, ever caused any injury to any of the riparian proprietors along the stream. What-

ever the rule in Massachusetts, it is well settled law in this State, that a use or occupancy of water rights, for twenty years, which does no appreciable injury to the possession, or rights of the owner, does not ripen into a prescriptive title. Prescription not presumed unless damage is sustained. *Tinkham* v. *Arnold*, 3 Maine, 12; *Hathorn* v. *Stinson*, 17 Maine, 123. No prescriptive right gained when flowage causes no damage. *Nelson* v. *Butterfield*, 21 Maine, 220; *Underwood* v. *North Wayne Scythe Co.*, 4 Maine, 291. To establish, there must be proof of yearly damage, continued for twenty years. *Wood* v. *Kelley*, 30 Maine, 42. To establish the right there must be a perceptible amount of injury throughout the period necessary to gain such right. *Lockwood Co.* v. *Lawrence*, 77 Maine, 229; it takes twenty consecutive years of flowing with some appreciable damage. *Foster* v. *Sebago Imp. Co.*, 100 Maine, 196; Until damaged by flowing, owner not presumed to have relinquished rights. id. Moreover the agreed statement shows that the use of this stream was not continuous for any consecutive twenty years. The continuity is therefore conceded to be broken. The facts, both as to lack of damage, and break of continuity, fail to show any such occupancy or use, as is required to establish a prescriptive title to the easement claimed.

The agreed statement contains this stipulation: "It is agreed that if on the foregoing statement, or so much thereof as is relevant to the issue, the court shall find that the plaintiff under the deeds from said Skillin of March 17, 1866, and September 30th, 1870, or by a prescriptive use of the flowage and riparian rights of said brook, has acquired the right to operate its dams and control the flow of the water between them without interference in the manner in which it and its predecessors in title have been accustomed to for more than forty years, and that the dam built and operated as aforesaid by the defendant is an illegal interference with the rights of the plaintiff, or if the court shall determine that the defendant is liable for the damage caused by the dirt and other impurities in the plaintiff's ice in the fall of 1914, due to the construction of defendant's new dam as above set forth, judgment shall be entered for the plaintiff and the cause remanded for the determination of damages. If otherwise, judgment shall be entered for the defendant."

This raises the question of reasonable use.

Because, as seen, the erection of the defendant's dam was not an interference with any of plaintiff's rights unless it was an unreasonable

use of the stream. If we understand the plaintiff's contention it is, that, in view of the facts and circumstances, the erection, itself, of the dam is an unreasonable use of this stream. Here should be noted a distinction between the reasonable use of a water course, in the erection of a dam, and a reasonable use of it in operating a dam. A dam may be reasonable, and the use of it unreasonable. We are not concerned with the latter.

At common law no person could maintain a dam even upon his own land and thereby flow out an upper riparian owner. This rule has been modified by statute but the chief change is the exemption of the dam from being a nuisance and subject to destruction, and giving it the right to flow by paying the damages caused thereby. Accordingly, the proposition is fundamental that the long continued occupation by an upper or lower proprietor, without granted or prescriptive rights, does not in the least affect the question of reasonable use. If it is a reasonable use, it is just as lawful today as it ever was, and would be just as lawful forty years hence as it is today, if any riparian owner should choose to wait that long before putting it into operation. The length of time a proprietor has abstained from interrupting the flow of the stream, during which the owner down stream has enjoyed a privilege, of which the upper proprietor now proposes to deprive him, has no bearing whatever upon the question of reasonable use. Legally the rights of each proprietor are exactly the same as if the one had just built his dam and the one below was just about to build his dam. *Fibre Co.* v. *Electric Co.*, 95 Maine, 318. Wherefore the plaintiff's long uses gave him no advantages in this regard.

Hence the issue resolves itself into the question of fact, whether the erection of the defendant's dam was an unreasonable use of this stream?

Reasonable use, as applied to the appropriation of a water course, is as undefinable as reasonable doubt, as applied to criminal evidence. The final arbiter in each case, is not so much the law as the exercise of good sound judgment. In each particular case it is primarily a question of fact. The agreed statement contains the following facts: The pond thus formed is a little more than one-fourth the capacity of the lower pond and about one-fifth that of the Pollywonkee and would be filled by the natural flow of the stream in about one-half the time required to fill the lower pond. If the pond formed by the

defendant's dam is filled, it would not prevent the flow of water from the plaintiff's upper dam to his lower pond except by the amount of evaporation and absorption caused by ponding the water, but if, at any time, the water were below the surface of the defendant's dam, it would prevent the flow of water for such time as might be necessary to raise the water in the defendant's pond to the point of overflowing his said dam. Defendant's engineers have estimated and it is agreed that the approximate capacity of the three ponds is as follows:

Pollywonkee or Upper Pond	4,950,000 cubic feet.
Middle Pond	1,115,500 cubic feet.
Lower Pond	3,950,000 cubic feet.

Without further comment, we are of the opinion that the above statement of facts fails to show an unreasonable use of this stream by the defendant in the erection of his dam.

The only remaining question is, whether the defendant took an opportune time for the building of his dam, considering the use made of the pond below. Upon this question it must be borne in mind that the plaintiff was entitled only to a reasonable use of the stream; that is, the natural flow of the stream subject to interruption by a reasonable use by other riparian owners. Therefore, the question here is, had the defendant, in view of the time and manner he constructed his dam, unnecessarily interferred with the ice fields of the plaintiff, inasmuch as he had a perfect right to build his dam at a proper season and in a proper manner. The writ shows that the defendant began the erection of his dam about the 15th of October, 1914, and had continued in the construction of it to the date of the writ,—December 4, 1914. In the agreed statement it is said: "During the process of construction of said dam by the defendant, soil, gravel and other materials were dumped in and across the stream and the waters thereof, thereby carrying loam, silt, sticks and rubbish down the stream into the plaintiff's pond, where it froze into the ice and caused the damage set forth in the plaintiff's writ. It is admitted that no more loam, silt, sticks and rubbish were thrown into the stream than was reasonably incident to the construction of a dam of the type and style adopted."

Upon this statement of facts and upon the assumption that the defendant had a legal right to erect his dam where he did, as a riparian

owner, we are unable to discover any violation of the plaintiff's rights. We think the defendant had a right to begin the erection of his dam at any time he saw fit. It was upon his own land and was a legal structure. He had the further right to do all these things which were incidental to the erection of his dam provided he did them in a reasonable and prudent manner, and the proprietor below would have a right to complain only of the injuries caused by the negligence of the defendant. It scarcely happens that one can build a house, especially in close proximity to his neighbor, without causing a good deal of annoyance and perhaps inconvenience, but such annoyance and inconvenience cannot be considered a legal interference.

The plan also shows by measurement that the distance from the defendant's dam to the plaintiff's lower dam is approximately 3000 feet or three-fifths of a mile. We doubt if the defendant could be held to reasonably anticipate, that the debris incident to building his dam, which went into the stream, would go so far in such quantities as to materially injure the ice field below.

This case is entirely different in principle from those cases, with which the books are full, relating to the sluicing of waste material from mills to be carried down upon the proprietor below. These are not legal acts. They are not regarded in law as "reasonably incident" to the operation of a mill as is admitted to have been the dumping of waste materials by the defendant in the erection of his dam.

We are of the opinion that the plaintiff has failed to sustain the burden of proof showing liability on the part of the defendant upon any of the issues raised. According to the stipulation

Judgment for the defendant.

GROVE MANUFACTURING COMPANY *vs.* FRANK JACOBS.

Lincoln. Opinion March 11, 1918.

R. S., Chap. 130, Sec. 18, interpreted.

Action on the case brought by plaintiff to recover for the sale and delivery of an assortment of goods containing various kinds of articles to the amount of forty-nine dollars. In addition to the assortment of goods, the sale included a device for the distribution of the goods, called a punch board.

Held:

From the evidence presented, there can be no question of doubt but that the device described and sold to defendant comes fully within the ban of the statutes of the State of Maine as a gambling device, and that no recovery can be had for the price of same.

Action on the case to recover the value of certain articles sold defendant. Defendant filed plea of general issue and also brief statement, which read as follows: "That the goods described in plaintiff's writ constituted a gambling device; that at the time of the contract and sale of said goods to the defendant, the said plaintiff well knew that said goods constituted a gambling device; that said plaintiff sold said goods to said defendant with the intent and knowledge that the same should be used as a gambling device." Case was returnable to the Municipal Court, and upon certain agreed statement of facts was reported directly to the Law Court. Judgment for defendant.

Case stated in opinion.

George A. Cowan, for plaintiff.

Weston M. Hilton, for defendant.

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

SPEAR, J. This is an action on the case brought by the plaintiff to recover for the sale and delivery of an assortment of goods containing various kinds of articles to the amount of forty-nine dollars. But in addition to the assortment of goods the sale included a device

for the distribution of the goods, called a punch board. The defense is, that this combination, as a whole, constituted a gambling device, within the law. The agreed statement contains the following description of the sale:

"The assortment described in plaintiff's writ consisted of a board containing seven hundred holes in each of which was a slip of paper with a number printed thereon. The board was covered with a paper upon which were spots indicating where each hole was located. A list of premiums, so called, was printed on the paper cover.

"The collar buttons did not exceed in retail value the sum of five cents, and the premiums, consisting of seventy articles, varied in value from fifty cents to two dollars, except the one designated as "last punch," which was in this case a meerchaum pipe of the retail value of about five dollars. "Upon the purchase of a collar button for ten cents, a person was entitled to the further right to punch out the slip of paper in any hole which he might choose. If the number upon the slip of paper in the hole punched by him corresponded with the number placed opposite any premium described on said board, such premium became the property of such person.

"That the intention of the plaintiff was that the said assortment should be used according to the specifications of said board."

The construction of our statute in its application to the decision of what constitutes a gambling device has been fully declared several times in this State and recently reviewed in the case of *State* v. *Googin*, 117 Maine, 102. In this case the statute is fully quoted and analyzed in the light of the decisions in this and other jurisdictions. An extended opinion, therefore, upon this question would be but a repetition of the interpretation already given our statute. Under this recent decision there can be no question of doubt that the device here described comes fully within the ban of the statute as a gambling device.

In accordance with the stipulation,

Judgment for the defendant.

EVELYN MURRAY

vs.

CUMBERLAND COUNTY POWER AND LIGHT COMPANY.

Cumberland. Opinion March 11, 1918.

Duty of persons attempting to enter electric cars.

This is an action for the recovery of damages for personal injuries alleged to have been received through the negligence of the defendant. At the close of the testimony a non-suit was ordered.

The plaintiff was passing around the front end of the car thence back to the rear door to enter the car. In so doing she stepped into the snow and to save herself from falling, put her arm against a front sliding door, just as the motorman operated the lever to open the door, and the plaintiff's hand and arm were caught by the motion of the door and injured.

Held:

(1) The plaintiff was not a passenger.

(2) The defendant was responsible for only such care as required it to refrain from any act which it might be reasonably held to anticipate might injure the plaintiff.

(3) The defendant could not be held to reasonably anticipate that an accident of this kind might occur.

(4) The non-suit was properly ordered.

Action on the case to recover damages for personal injuries sustained through the alleged negligence of defendant. Defendant filed plea of general issue. At close of plaintiff's case, after motion by defendant, presiding Justice ordered nonsuit; to which ruling plaintiff filed exceptions. Exceptions not sustained.

Case stated in opinion.

William A. Connellan, and Harry H. Cannell, for plaintiff.

Bradley & Linnell, and William Lyons, for defendant.

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

SPEAR, J. This is an action for the recovery of damages for personal injuries alleged to have been received through the negligence of the defendant. At the close of the testimony for the plaintiff, the defendant moved for a nonsuit, which was granted by the presiding Justice. The case comes up on exceptions to this order. The issue: Was there evidence upon which a verdict in favor of the plaintiff might be sustained?

The facts. The car by the operation of which the plaintiff was injured, upon her signal had stopped, at the junction of Brackett and Wilson streets, at a regular stopping place indicated by a white post. The snow was deep on each side of the track. The car was what may be called a "pay as you enter car." The entrance is at the rear of the car; the exit at the front, on the right-hand side, from a door operated by a lever, and sliding back in line with the side of the car in a closed casing. A path had been shoveled from a house leading into the street near the front end of the car. On account of the depth of the snow it was more convenient for the plaintiff to take the path and pass around the front end of the car, and thence back to the entry door. In so doing she stepped in the snow, lost her balance, and to prevent herself from falling, put her arm against the side of the sliding door just as the motorman operated the lever to open the door, the result of which was, that the plaintiff's hand and wrist were caught by the motion of the door and injured.

Under this state of facts, the question of the defendant's negligence rests upon the inquiry, whether the defendant should be held to reasonably anticipate that an accident of this kind might occur? If not, it owed no duty to the plaintiff.

This case should be differentiated from those where accidents analogous to the one in question have caused injuries to parties who are regarded as passengers. The plaintiff in this case could not be regarded as a passenger. For her own convenience she was going around the front end of the car, and while moving along the street toward the entrance of the car, was injured by accidently, not intentionally, placing her hand and arm against the front door of the car. The relation of carrier and passenger, therefore, had not intervened. *Duchemin* v. *Springfield St. Ry. Co.*, 186 Mass., 353; *Payne* v. *Same*, 203 Mass., 425.

The defendant, therefore, to meet the standard of ordinary care, owed the plaintiff the duty of refraining from any act which it might be reasonably held to anticipate would do her harm. The opening of the front car door, per se, was not a negligent act. It was necessary to let passengers off. To open it for any other purpose was not a negligent act, per se, as all passengers are assumed to be charged with knowledge that the rear door only is used for boarding the car. It is therefore difficult to conceive of any occasion upon which a prospective passenger, or other person, should approach the front door of this car from the outside. But, only for the approach to this door, of such persons as might be expected to come to it for some legitimate purpose, can the defendant be held responsible. Mere accidental contact with the door would seem too remote, as an expectation, even, with which to charge the defendant with any duty to the party approaching. No knowledge on the part of the defendant of such accidental contact can be presumed. We are, therefore, unable to discover any legal ground upon which the defendant can be charged with a failure of duty toward the plaintiff, in this case. This conclusion is fortified by authority as well as reason.

Hannon v. *Boston Elevated Ry. Co.*, 182 Mass., 425, is a case in point, except that the defendant was under the greater duty arising from the relation of carrier to passenger. The court held: "Ordinarily there is no reason to anticipate danger from beginning to get ready the places of exit while the train is in the last part of its movement before coming to a full stop. Passengers are not excepted to have their fingers in such a position as to be endangered by the opening of the doors at such times. . . . . In the present case there is nothing to show that he (the guard) knew that the plaintiff's fingers were on the glass." To the same effect is *Hines* v. *Boston Elevated Ry. Co.*, 198 Mass., 346; *Benston* v. *Same*, 202 Mass., 577

The nonsuit was properly ordered.

Exceptions overruled.

KATIE S. WORCESTER *vs.* MAMIE P. SMITH.

Washington. Opinion March 11, 1918.

Deeds. Exceptions and reservations. Difference between an exception and a reservation. General rule to be applied in determining whether a clause should be deemed an exception or a reservation.

This is an action of assumpsit on account annexed to recover certain sums alleged to be due for one-half rent for gravel sold from a gravel pit on the land of defendant, to which defendant pleads the general issue.

The deed from Foster to French contains the following language: "E. A. Foster has half the income of the gravel in said lots where now opened."

The only question here raised is an interpretation of the reservation clause found in the deed from Foster to French. Is it a reservation or an exception?

Held:

(1) Under the facts and circumstances the reserving clause must be construed as an exception.

(2) Though not containing words of inheritance, yet the clause is operative as an exception, the effect of an exception being, that the grantor has never parted with his title.

(3) The language, "Foster has half the income of the gravel in said lots where now opened" excepts the gravel in the lot in which the gravel pit was located, and not the hole or pit that was opened on the lot.

(4) The modifying phrase "Where now opened" is used to designate the excepted lot, not the pit.

Action of assumpsit. Defendant filed plea of general issue. At close of evidence, by agreement of parties, case was reported to Law Court to enter final judgment according to the rights of the parties. Judgment in accordance with opinion.

Case stated in opinion.

A. D. McFaul, for plaintiff.

Gray & Sawyer, and G. G. Freeman, for defendant.

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

SPEAR, J. This is an action of assumpsit on account annexed to recover certain sums alleged to be due for one-half rent for gravel sold

from a gravel pit on the land of defendant, to which defendant pleads the general issue. Eliot A. Foster and Talbot S. French in 1878 were the owners in common and undivided of a farm in Columbia, called the John Puffer farm. They divided the farm July 31, 1879, and passed division deeds, and the determination of the rights of the parties depends upon the construction of those deeds, particularly the deed of Foster to French. The plaintiff is the daughter of Foster, and owns under his division deed; the defendant is the daughter of French, and holds under his division deed. The deed from Foster to French contains the following language: "Reserving the apple and plum trees on said land undivided E. A. Foster has half the income of the gravel in said lots where now opened and one-half the house as it now stands with the privilege to use as his own so far as one-half is owned," and interlined are the following words:—"the land on which it stands belongs to the said T. S. French."

The only question raised is an interpretation of the reservation clause found in the deed from Foster to French. Is it a reservation or an exception? An "exception" is a part of the thing granted and of a thing in being at the time of the grant. A "reservation" vests in the grantor some new right or interest that did not exist in him before, and operates by way of an implied grant. *Hall* v. *Hall*, 106 Maine, 389.

In *King* v. *Walker*, 87 Maine, 550, it is said: The distinction between an 'exception' and a 'reservation' is frequently obscure and uncertain, and has not always been observed, and the two expressions have to a great extent been indiscriminately employed. Moreover, a reservation is often construed as an exception in order that the obvious intention of the parties may be subserved. *Winthrop* v. *Fairbanks*, 41 Maine, 307; *Smith* v. *Ladd*, Id., 316; *Bowen* v. *Conner*, 6 Cush., 132. Whether a particular provision is intended to operate as an exception or reservation is to be determined by the character, rather than by the particular words used. *Perkins* v. *Stockwell*, 131 Mass., 529, 530."

Accordingly, not only from the language of the reserving clause in this deed, but from all the circumstances surrounding the transaction, is the intention of the parties to be discovered. In 13 Cyc., 677, under e. Intention, is found this rule of construction: "A reasonable construction should be given to a reservation or exception according to the intention of the parties, ascertained from the entire instrument.

There should be considered, when necessary and proper, the force of the language used, the ordinary meaning of words, the meaning of specific words, the context, the recitals, the subject-matter, the object, purpose, and nature of the reservation or exception and the attendant facts and surrounding circumstances before the parties at the time of making the deed. This rule is applicable to the construction of reservations or exceptions of property generally." Determined by these rules, we are of the opinion that the parties, by the reserving clause in their deed, intended an exception rather than a reservation. Their wives were sisters; they owned the property in common; had developed the gravel pit together; had received the income from it jointly. It was an enterprise distinct from that of farming; it was in the nature of a mine of some kind of metal, found on the farm; it was a source of income separate from that derived from farming; it was a product of commerce, right where it lay, independent of farm labor; it was not essential to the operation of the rest of the land conveyed; it was an existing, distinct deposit, characteristic of that kind of soil well known as a gravel bank, having a well defined commercial value, depending upon its quality, access and availability.

The parties to this deed must be regarded as having understood the nature of their transaction. Accordingly it seems but natural and reasonable that the grantor intended to take out of this conveyance his interest in this gravel bank. It was not something created by the reserving words. It already existed. It was an entity far more distinct from the thing conveyed than any of the cases enumerated in *Hall* v. *Hall*, 106 Maine, 392. The language also supports the interpretation. It indicates the intention on the part of the grantor to take something out of the thing granted that would otherwise have passed by grant. This is the very essence of an exception as distinguished from a reservation.

Our conclusion, therefore, is that the reserving clause must be construed as an exception.

This reserving clause does not contain words of inheritance, yet, though the grantor be deceased, the clause is operative as an exception, the effect of an exception being, that the grantor has never parted with his title.

The remaining question is what the exception covered, on the face of the earth. While the language of description is not specific, yet the intention of the parties may be reasonably ascertained. The

evidence shows that at the time of the conveyance there was but one small gravel pit opened, and that was on lot 4. It also shows that the gravel sold, for one-half of the proceeds of which this suit is brought, was not taken from the pit opened at the time of the conveyance, but from another pit opened since, on the same lot, 4.

The defendant, therefore, contends that, even though the reserving clause be construed as an exception, the plaintiff cannot recover, as the exception applies only to the pit, or hole, open at the time of the conveyance. We cannot assent to this interpretation of the language of the reserving clause. "Foster has half the income of the gravel in said lots where now opened." This language is significant. It excepts in so many words "the gravel in said lots," and then adds the qualifying phrase "where now opened;" that is, the lot, in which the pit is now opened. It does not say "in said pits" or holes" where now opened." The modifying phrase "where now opened" is used to designate the excepted lots. It is half the income of gravel "in said lots,"—not "in said pits."

Moreover, taking into consideration the object and purpose of this exception, it seems evident that they were not thinking of a gravel hole or gravel pit, but of just what was expressed in the language which was used in the deed, "gravel in said lots." Otherwise the grantee might do just what would result in this case, whether by accident or design, we do not know, namely; leave this small pit or hole as it was and open other pits all around it, if need be, and thereby deprive the grantor of the very source of income which he undoubtedly thought he would derive from the sale of gravel from this lot; nay, more, by abandoning the pit then open, deprive the grantor of any income whatever, and at the same time make the pit worthless by the encroachment of other pits. In other words, if the defendant's contention is sound, the grantor, by the reserving words in his deed, obtained nothing whatever but the favor of the grantee, which is now denied him.

The exception must be confined to the lot in which the pit had been opened at the date of the conveyance. As only lot 4 was then opened, the exception applies only to the gravel that may be sold from lot 4.

We find for the plaintiff with interest from October 1, 1917, being the nearest approximate to the date of the writ.

Judgment for plaintiff for $46.55.

ABRAHAM SHAPIRO *vs.* MRS. HENRI SAMPSON.

Androscoggin. Opinion March 11, 1918.

General rule as to filing exceptions to the finding of fact by single Justice. Right to recover for rent when tenant has not been permitted to occupy the premises the entire rent period.

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. The party moved in on the 26th day of the same month. The controversy was whether this occupancy to 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.

This case was heard without the intervention of a jury, and the presiding Justice found in favor of the defendant. 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.

The presiding Justice in his judgment makes the following finding of facts and law: "But whatsoever his purpose may have been, I am of opinion that his letting in a new tenant with his goods and putting him into the actual possession of the tenement was such a dispossession of the defendant as bars the right to recover rent for the month of February."

The plaintiff's exceptions are based on the theory that there is no evidence to support the finding.

Held:

There was evidence to warrant the finding of fact, and, so far as this case is concerned, that the law was properly applied.

Action on the case to recover for one month's rent. Defendant filed plea of general issue, and the question raised by defendant was that plaintiff had really dispossessed the defendant during the month for which he was claiming a full month's rent. The case was heard before single Justice, without jury, and the findings were in favor of defendant; to which rulings and findings plaintiff filed exceptions. Exceptions not sustained.

Case stated in opinion.

J. G. Chabot, for plaintiff.

McGillicuddy & Morey, and Harry Manser, for defendant.

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

SPEAR, J. 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. The party moved in on the 26th day of the same month. The controversy was whether this occupancy to 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.

This case was heard without the intervention of a jury, and the presiding Justice found in favor of the defendant. 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.

The presiding Justice in his judgment makes the following finding of facts and law: "But whatsoever his purpose may have been, I am of opinion that his letting in a new tenant with his goods and putting him into the actual possession of the tenement was such a dispossession of the defendant as bars the right to recover rent for the month of February."

This finding involved both a question of law and of fact. The sitting Justice did not base his finding upon the "purpose" of the plaintiff in letting in the new tenant, but goes further and in effect says: "Whatsoever his purpose" when, as a matter of fact, he put in a new tenant with his goods into actual, exclusive possession of the tenement, he then dispossessed the tenant, and that, as a matter of law, such dispossession by the plaintiff was a bar to the right of the plaintiff to recover. The sitting Justice in effect held that, while the plaintiff had a right to put a person in his house to protect the water pipes from freezing, he had no right, in the execution of that purpose, to go so far as to take actual and exclusive possession of the tenement, to the prevention of the right of the tenant to resume possession had she chosen so to do. In other words, while the sitting Justice assumed that it may have been the "purpose" of the plaintiff to put a person into the house to protect it, he nevertheless holds that the "purpose" could not be carried so far as to exclude the tenant from an opportunity of returning.

The plaintiff's exceptions are based on the theory that there is no evidence to support the finding of such facts as must necessarily have formed the basis of the court's judgment; that only one inference could be drawn from the existing facts; that this inference does not support the judgment; and that consequently the decision is erroneous.

The plaintiff admits that he admitted a new tenant on the 25th of February. The defendant says that when she went there after a lamp, the 26th or 27th of February, the new tenants were then living there. The tenant himself says, in answer to interrogatories,—

"Q. Did you become a tenant in this house, Mr. Scholnik? A. Yes. Q. And what date? A. On the 26th of February, 1916. Q. And you have been living there ever since? A. Yes.

The sitting Justice found, as a matter of fact, upon this evidence, that the plaintiff let in a new tenant, with his goods, and put him into actual possession of the tenement. He saw and heard the parties and witnesses, and under the well established rules of law, his finding cannot be set aside. A finding of fact by the court, without the intervention of a jury, cannot be attacked upon exceptions unless only one conclusion could be drawn from the evidence, and that contrary to the finding. *American Sardine Co.* v. *Olsen*, 117 Maine, page 26.

Exceptions overruled.

BERTHA B. SIMMONS' CASE.

Kennebec. Opinion March 13, 1918.

Procedure on appeal from decision of commission. Rule as to notice of employer. General rule as to setting aside the findings of the commission upon questions of fact. Meaning of knowledge and notice under the statutes relating to compensation.

Under the provision of the Workmen's Compensation Act, R. S., Chap. 50, Sec. 20, declaring that "want of notice shall not be a bar to proceedings under this act, if it be shown that the employer or his agent had knowledge of the injury," the agents acquiring such knowledge are not limited, in case of corporations, to agents upon whom, by virtue of the preceding section, written notice of the injury may be served.

It being provided by section thirty-four of the Workmen's Compensation Act (R. S., Chap. 50, Sec. 34), that there shall be no appeal from a decree entered in equity, in accordance with an order or decision of the Industrial Accident Commission, from questions of fact found by the commission or its chairman, the only question presented upon appeal as to such questions is whether or not there was any evidence to support the finding.

Appeal from decree of single Justice sustaining the findings of the Industrial Accident Commission. Bill dismissed with costs.

Case stated in opinion.

Melvin H. Simmons, for applicant.

Emery and Waterhouse, for respondents.

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

BIRD, J. The petitioner, Bertha B. Simmons, filed with the Industrial Accident Commission, pursuant to the provisions of the Workmen's Compensation Act, (R. S., Chap. 50, Secs. 1-48), her petition for compensation alleging among other things, that while employed by the Commonwealth Shoe and Leather Company in its stitching room and in discharge of the duties of her employment, she injured her thumb; that the wound became infected and that the

thumb in consequence had become totally useless. The petition also alleges that the employer had knowledge or notice of the injury.

The decision of the commission was filed April 5, 1917, and the decree of the Equity Court in accordance therewith was entered April 14, 1917. From this decree the insurance companies appeal.

The appellants make no objection to the form of the findings or decree, but contend that the commission erred (1) in holding that the employer, the petitioner having failed to give the written notice required by the act, had knowledge of the injury and (2) in finding total incapacity.

The commission finds as matters of fact that one Penwarden was foreman of the room in which petitioner was injured; that it was his duty to report all accidents to the office of the employer and that on the day of the accident, petitioner informed him of her injury. The evidence is uncontradicted that Penwarden, as foreman, had complete superintendence of the employees in the room and their work.

The decision of the commission does not, we think, carefully distinguish between findings of fact and rehearsals of evidence, nor between notice and knowledge. Knowledge is not the notice required by the statute. Oral notice is not the statutory notice and although the employer may obtain from the former, knowledge of the injury, it is not necessarily knowledge within the meaning of the statute. We conclude, however, that the decision contains sufficient to show that the commission finds that the foreman, Penwarden, had seasonable knowledge of the injury and that the discussion as to notice may be separated from such finding and treated as reflections by the way. See *Murphy's case*, 226 Mass., 60, 62, 63; See also *Diskon* v. *Bubb*, 88 N. J. L., 513, 515: 96 Atl., 660, and *Allen* v. *Millville*, 87 N. J. L., 356.

The appellants, however, urge that the foreman was not such agent as was intended by R. S., Chap. 50, Sec. 20, declaring that "want of notice shall not be a bar to proceedings under this act, if it be shown that the employer or his agent had knowledge of the injury," but that knowledge, within the meaning of this provision, can be had to be effective in case of a corporation, only by an agent upon whom, by virtue of the immediately preceding section, written notice can be served. "Such notice shall be served * * * if the employer is a corporation, upon any officer or agent upon whom process may be served." R. S., Chap. 50, Sec. 19. This section provides with great particularity how the written notice shall be served upon the various classes of

employers. But section 20 makes no attempt to particularize. The same expression—employer or his agent—is used in an earlier section—7—of the same chapter but it can hardly be contended that it there has the meaning which respondent would ascribe to it, and our interpretation is not without authority. In *Bloom's case,* under a statute not dissimilar, it is held that a foreman having duties substantially those of the foreman in the present case is an agent whose knowledge binds the principal. 222 Mass., 434, 436, 437. And so in *McLane's case,* 223 Mass., 342, 344; *Murphy's case,* 226 Mass., 60, 63, 64. An instructive case to like effect is *State Ex. rel. Crookston Lumber Co.* v. *District Court, etc.,* 132 Minn., 251; also *Reese* v. *Yale, etc., Co.,* 1 Conn., Comp., Dec. 154. The act is to be construed liberally and with a view to carrying out its general purpose. R. S., Chap. 50, Sec. 37. The Workmen's Compensation Act is a remedial statute and should be given a broad interpretation "for the purpose of carrying out its manifest purpose." *Sullivan's case,* 218 Mass., 141, 143. *Panasuk's case,* 217 Mass., 589, 592. *Young's case,* 218 Mass., 346, 349.

Under the second ground upon which appellants seek to sustain their appeal, they address this question to the court, "was there any evidence to sustain the finding that the incapacity for work resulting from the injury was total within the meaning of Section 14, chapter 50 of the Revised Statutes?"

The section of the statutes referred to by appellants provides that "while the incapacity for work resulting from the injury is total, the employer shall pay the injured employee a weekly compensation. . . ." The act provides that the decree entered in accordance with the decision of the commission or its chairman by a Justice of the Supreme Judicial Court "shall have the same effect and all proceedings in relation thereto shall thereafter be the same as though rendered in a suit in equity duly heard and determined by said Court, except there shall be no appeal therefrom upon questions of fact found by said Commission or its chairman or where the decree is based upon a memorandum of agreement approved by the commissioner. Upon any appeal therefrom the proceedings shall be the same as in appeals in equity procedure and the law court may, after consideration, reverse or modify any decree made by a justice, based upon an erroneous ruling or finding of law." R S., Chap. 50, Sec. 34. The only question of law, as the inquiry of the respondent implies, is whether or

not there was any evidence before the commission upon which the decision can rest. *Viele* v. *Curtis*, 116 Maine, 328; *Paul* v. *Frye*, 80 Maine, 26, 27; *Murphy* v. *Utah, etc., Co.*, 114 Maine, 184, 185. And under the similar act of Massachusetts it has been repeatedly held that the finding stands upon the same footing as the finding of a Judge or the verdict of a jury. It cannot be set aside if there is any evidence upon which it can rest. *Pigeon's case*, 216 Mass., 51, 52; *Herrick's case*, 217 Mass., 111, 112; *Miley's case*, 219 Mass., 136, 138; *Septimo's case*, 219 Mass., 430, 431.

The evidence regarding the degree of incapacity was the oral testimony of physicians and of the petitioner herself. It will not be profitable to review the evidence. It is sufficient to state that the court is of opinion that there was evidence upon which the decree of the commission can rest. See *Sullivan's case*, 218 Mass., 141, 142; *Duprey's case*, 219 Mass., 189, 193, 194.

The appeal therefore must be dismissed with costs to petitioner and it is so ordered.

CORINNE MCKENNA'S CASE.

Androscoggin. Opinion March 14, 1918.

Right of Industrial Accident Commission to make certain rules and regulations fixing the dates when medical attendance shall be furnished. General rule as to right of Commission to make rules not inconsistent with statute.

The Workmen's Compensation Act, providing that during the first two weeks after the injury the employer shall furnish reasonable medical and hospital services, etc. (R. S., Chap. 50, Sec. 10), the Industrial Accident Commission exceeds its powers in making a rule that such services shall be furnished during the two weeks succeeding the date of incapacity arising from the injury.

The power of the Commission to make rules is limited to such as are not inconsistent with the Workmen's Compensation Act (R. S., Chap. 50, Sec. 29).

Where, upon an appeal, a modification of the decree in equity made in accordance with an order or decision of the commission or its chairman is found necessary and neither such order or decision nor the evidence reported present sufficient facts to enable either the Law Court or the sitting Justice to determine the extent of the modification to be made, the case will be remanded to the Commission for its determination.

An appeal from decree of single Justice sustaining the findings of the Industrial Accident Commission. Judgment in accordance with opinion.

Case stated in opinion.

H. E. Belleau, and Dana S. Williams, for claimant.

Edward C. Stone, of Sawyer, Hardy, Stone & Morrison, for respondents.

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

BIRD, J. The claimant in this case received her injury on the eleventh day of September, 1916. The Industrial Accident Commission found that disability began on the eighteenth day of September, 1916, and, in conformity to the rule of the commission held that "the date of the accident will be considered as of September 18th,"

and ordered that medical bills, not exceeding thirty dollars, covering the fourteen days following September 18th be paid by respondent.

The rule referred to is "no compensation shall be due an injured employee until fourteen days of disability shall have elapsed. For example; A is injured on January first but continues to work until January fifteen, when he becomes incapacitated from the injury received on January first. Compensation does not begin until fourteen days have elapsed beginning with January fifteen. Medical services accordingly." The commission is empowered, among other things, to make rules and regulations not inconsistent with "The Workmen's Compensation Act" or other laws of the State for the purpose of carrying out the provisions of the act, R. S., Chap. 50, Sec. 29.

Is this rule within the powers of the Commission?

"Sec. 10. During the first two weeks after the injury the employer shall furnish reasonable medical and hospital services, and medicines when they are needed, but the amount of the charge for such services and medicines shall not exceed the sum of thirty dollars, unless in case of major surgical operations being required, and the employer and employee being unable to agree upon the same, the amount to be allowed for such medical services or medicines shall be fixed by the commission upon petition by either party setting forth the facts." R. S., Chap. 50, Sec. 10.

The commission interprets the last sentence of its rule "medical services accordingly," as meaning that the charge for medical services shall be paid for a period of two weeks subsequent to the occurrence of disability. The rule is apparently inconsistent with the act. As interpreted by the commission in the instant case it warrants the finding that the day of the occurrence of disability is to be considered "date of the accident" and that the period of two weeks, during which the employer must furnish medical services, etc., commences therewith. The plain language of the statute restricts the period to the first two weeks "after the injury" and, while the act is remedial and to be broadly construed, *Simmons' case*, ante, we find no authority for the substitution for the word used in the statute of another term used in the same statute with a clearly different meaning. If it is desirable to change the period during which medical services shall be furnished, or to extend the powers of the Commission in that regard, legislative action should be had as was done in Massa-

chusetts. See *Huxen's case*, 226 Mass., 292, 295. *Coffin* v. *Rich*, 45 Maine, 507, 511; *Lizotte* v. *Nashua Mfg. Co.*, (N. H.), 100 Atl., 757, 758.

Nor do we consider that such a rule is necessary, to carry out the legislative intent. Its evident purpose was to allow no compensation in the nature of wages for the first two weeks after the injury, at least where the incapacity is partial, and during those two weeks to allow as compensation to the injured employee his medical expenses to the end that the latter might not for reason of economy delay seeking medical advice, even though the injury might be slight and not immediately incapacitating.

During the first week after the injury petitioner had no medical advice or treatment. During the second week she had four treatments from physicians in Canada and on her return she at once consulted a physician in Lewiston who advised treatment in a hospital whither she repaired either on the twenty-fourth or twenty-fifth of September, 1916. The record, however, discloses absolutely nothing as to her expense for medical attendance or medicines during the second week after the injury. The amount cannot be determined. We have no facts upon which to modify the decree. The case must therefore be recommitted to the commission that it may determine and fix, upon further hearing, if necessary, the amount of the charge for necessary and reasonable medical and hospital services and medicines, as to which the decree is reversed, as provided by Sec. 10 of the act and in accordance with this opinion. At such hearing additional evidence may be introduced by the parties. See *Murphy's case*, 226 Mass., 60, 64; *James A. Bannister Co.* v. *Kriger*, 84 N. J. L., 30, 32; *Dickson* v. *Bubb*, 88 N. J. L., 513, 515.

BLANCHE WOODS MERRILL, Applt.,

vs.

ANNIE WOODS REGAN, Executrix of
and Claimant against the Estate of Mary Woods, Appellee.

Cumberland. Opinion March 15, 1918.

Executors and administrators. Procedure in presenting private claim of executrix against the estate which she represents. Rule where private account has been allowed by Judge of Probate being open to attack when executrix files account in which the amount of the private claim is included.

Mary Woods died April 29, 1913, leaving a will which was duly allowed June 3, 1913. The appellee was appointed executrix of the will and assumed the discharge of that trust. The estate was solvent. On June 25, 1913, the appellee, being then executrix of the will, and having a private claim against the estate, presented that claim to the Probate Court, setting forth the amount, nature and grounds of the same, and praying that it might be examined and allowed by the court. Upon this claim, and prayer for examination and allowance, notice was given by publication for three successive weeks in two newspapers published in Portland, and personal notice was given to the appellant by service in hand, on July 3, 1913, of an attested copy of the petition and order of court. The return day upon which examination of the claim was to be made was fixed as July 15, 1913. The appellant did not appear upon the latter date, either in person or by counsel, and on July 17, 1913, a hearing was had and the Judge of Probate, by decree of that date, allowed the claim, fixing the amount at fifteen hundred sixty dollars. No appeal from this decree was taken.

Nearly two years later, namely on March 18, 1915, the appellee filed in Probate Court an account of her administration and prayed for its allowance. The first item in that account which she sought to have allowed was her private claim, the nature and amount of which was stated with considerable detail, and contained a reference to its allowance made by the Probate Court and the date of the decree of allowance. This account was allowed by the Probate Court, in turn was allowed in the Supreme Court of Probate, and exceptions were taken by the appellant as above stated.

Held:

1. The procedure was in accordance with the provisions of law relating to the establishment of private claims of an executrix against a solvent estate.

2. The claim was stated with sufficient particularity to meet the requirements of the statute.
3. The decree of the Probate Court allowing the private claim of the executrix, previous to filing her first account, not being appealed from, was res adjudicata.

Appeal from Judge of Probate allowing account of executrix. At Supreme Court of Probate the decree allowing the account of the executrix was affirmed by presiding Justice; from which ruling appellant filed exceptions. Judgment in accordance with opinion.

Case stated in opinion.

William H. Gulliver, for appellant.

Joseph E. F. Connolly, for appellee.

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

PHILBROOK, J. Mary Woods, late of Portland, aunt of both parties to this cause, died April 29, 1913, leaving a will which was duly allowed June 3, 1913. The appellee was appointed executrix of the will and assumed the discharge of that trust. On June 25, 1913, the appellee, being then executrix of the will, and having a private claim against the estate, presented that claim to the Probate Court, setting forth the amount, nature and grounds of the same, and praying that it might be examined and allowed by the court. Upon this claim, and prayer for examination and allowance, notice was given by publication for three successive weeks in two newspapers published in Portland, and personal notice was given to the appellant by service in hand, on July 3, 1913, of an attested copy of the petition and order of court. The return day upon which examination of the claim was to be made was fixed as July 15, 1913. The appellant did not appear upon the latter date, either in person or by counsel, and on July 17, 1913, a hearing was had and the Judge of Probate, by decree of that date, allowed the claim, fixing the amount at fifteen hundred sixty dollars. No appeal from this decree was taken.

Nearly two years later, namely on March 18, 1915, the appellee filed in Probate Court an account of her administration and prayed for its allowance. The first item which she sought to have allowed was set forth in the following language:

"Annie Woods Regan—private claim—of the Executrix—against the deceased for board, lodging, clothing, medicine and medical

attendance, furnished the testator from April 29, 1907, to April 29, 1913, 312 weeks at $5.00 per week, as appears more fully by petition now filed of record in said court, to which reference is made for more particular description of said claim, and which said petition was presented to the Honorable Justice of said Probate Court at the June 27, 1913 term thereof, notice thereon being ordered returnable at the July 15, 1913 term of said court, service of the same being ordered made by publication and by service in hand on the co-residuary, which said services by publication and in hand were made as appears by the return of the officer on the petition aforesaid, and, after hearing in said Probate Court, at a term thereof held July 17, 1913, said claim of said executrix, as presented in said petition, was allowed for the sum of.....$1560.00"

Upon this account, in which the private claim was made one of the items, due notice was given and at the return day of the notice the appellant appeared and filed in writing her objection to the allowance of the account, and declared that the item of $1560. was not a just or legal claim against the estate.

On October 25, 1915, the Judge of the Probate Court allowed the account, after some amendments which had no reference to the private claim of the executrix, and from the decree of allowance an appeal was taken to the Supreme Court of Probate. The reasons of appeal were twenty-four in number. At the hearing before the Supreme Court of Probate some of the reasons of appeal were dismissed by agreement of the parties, others were dismissed by order of the presiding Justice, who made certain findings of law and fact, allowed the private claim and affirmed the decree of the Probate Court in allowing the account of the executrix.

Exceptions were taken by the appellant and allowed by the presiding Justice. The real issues narrow down to the questions involved in the allowance of the private claim and the procedure followed in making that allowance. As stated by the appellant in her brief: "The main issues raised by the appellant's exceptions are: first, whether the procedure adopted by the claimant for the purpose of establishing her private claim against the estate of the deceased Mary Woods was in accordance with the statutes of the State of Maine relative to the establishment of such claims; second, whether the private claim of the executrix was 'particularly stated in writing' as required by the statute; and, third, whether the decision of the Judge

of Probate, in allowing the private claim of the executrix previous to the filing of the account, was res adjudicata, and therefore that the appellant was not entitled to be heard when the account of executrix including such private claim was presented for allowance, and was not entitled to be heard on the allowance of the private claim of the executrix at the time of the hearing on the account in the Supreme Court of Probate, and was not entitled to request the Judge of Probate to submit such private account to referees agreed upon in writing by the interested parties present."

Was the procedure of the claimant in accordance with the statute? By far the greater part of the appellant's argument is devoted to a negative answer to this question and, indeed, we should be doing practical justice to the appellant if we should say that her entire case stands or falls accordingly as this question is determined. The first and second issues, as stated in the quotation just made from the appellant's brief, may be with propriety united in one issue since both relate to procedure. As to the third issue we may properly aver that it stands or falls upon the decision of the other two.

It has already appeared that the private claim was presented to the Judge of the Probate Court nearly two years before the account, the allowance of which is the cause of this litigation, was presented for acceptance and allowance. It has already appeared that the appellant had full and timely notice of the presentation of this private claim but for some reason best known to herself she made no opposition to it when presented.

She now argues that, as there is no blank prescribed for the presentation of a private claim of an executrix against a solvent estate, the claimant used a blank designed for presentation of such a claim against an insolvent estate, with some modifications, and hence confusion arose which opened the first door to irregular procedure. Her argument upon this point is not persuasive. "The statute establishing uniformity in the use of blanks in the probate court is not to be so construed as to deprive the petitioner of his remedy if there is no prescribed form adapted to the existing situation." *McKenzie* v. *Hospital Association,* 106 Maine, 385.

But the chief burden of the appellant's complaint lies in the fact that there was an adjudication of the private claim before, and apart from, the time when the appellee presented this contested account. She relies with much confidence upon the expression "in his account"

which occurs in R. S., Chap. 68, Sec. 66, which reads as follows: "No private claim of an executor or administrator, against the estate under his charge, shall be allowed in his account, unless particularly stated in writing; if such claim is disputed by a person interested, it may be submitted to referees agreed upon in writing by the interested parties present, or their agents or guardians; and the judge may accept, or recommit their written report, made pursuant to the submission, and decree accordingly." It must be conceded that the Judge of Probate Court who made the decree on July 13, 1913, allowing the private claim, had jurisdiction over the parties, the estate and the subject matter in dispute. "If the executor or administrator has a private claim against the estate it must be specially passed upon by the probate judge or the payment of it cannot be allowed." *Wilson on Probate Practice*, Edition of 1896, page 192. The statute, to be sure, permits a reference under a written agreement of the parties interested and present, but this reference is not made a matter of absolute right and is at best subject to the approval or otherwise of the Probate Judge. Neither does the statute point out the time when a hearing upon such a claim may be held, nor limit such hearing to the time when the administrator files his first or subsequent account. In *Ela* v. *Ela*, 84 Maine, 423, this court said "Probate procedure, in this State, should be conducted upon the rules of the broadest equity, whenever the provisions of statute do not conflict with that view. Substantial justice should be awarded by methods conducive to economy and dispatch, and without unnecessary circuity of action or prolixity in procedure." This principle was approved in *Farnum's Appeal*, 107 Maine, 488, a case where a bill for professional services of an attorney, in opposing the appointment of a guardian, was presented after the guardian was appointed. The statute was silent as to the procedure by which the petition for allowance of such a claim might be presented to the Probate Court. The court declared that the "petition presents the whole matter to the judge of the probate court who will then deal with it, as to notice of time and place of hearing, and other proceedings, as justice and equity require." In the case at bar the claim was presented in proper form to the Judge of the Probate Court having jurisdiction of the parties, the case, and the subject matter of the controversy. He gave personal notice to the appellant, heard the petitioner, made a decree from which no appeal was taken. We think that the controversy then became res adjudicata.

As to the statement of the item in the account presented in the allowance, we have examined the same carefully, noting as a part of the statement the reference to prior proceedings and files of the court and are of opinion that the statement meets the requirement of the statute.

This conclusion covers also the elements of the third issue and the mandate must be,

Exceptions overruled.
Decree of Supreme Court of Probate affirmed with costs.

MILLARD A. KIMBALL *vs.* IVORY DAVIS.

York. Opinion March 15, 1918.

Negligence. Rule in actions of tort as to admissibility of evidence of the violation of the statute or ordinance by defendant as bearing upon the question of defendant's negligence.

Where evidence is admitted for a purpose alleged to be illegal, subject to objection and exceptions, and the court in its instructions to the jury confines the evidence so admitted to a single point for which it was confessedly admissible, the presumption is that the jury regarded the instructions in arriving at its verdict.

The evidence being conflicting and the credibility of the witnesses wholly for the jury, the court is of opinion that there was sufficient evidence in the case to sustain the verdict for the plaintiff.

Action on the case to recover damages on account of fire, caused, as the plaintiff alleged, through the negligence of defendant. Defendant filed plea of general issue. Verdict for plaintiff in sum of $795.95. Defendant filed motion for new trial, also exceptions to certain rulings of presiding Justice. Exceptions overruled. Motion for new trial denied.

Case stated in opinion.
Stone & Stone, for plaintiff.
Emery & Waterhouse, for defendant.

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

BIRD, J. This cause comes before this court upon defendant's bill of exceptions and general motion for new trial. It is an action of the case to recover damages occasioned to the property of the plaintiff by fire, sparks and cinders communicated thereto over and through the lands of others, which is alleged to have escaped from the smoke stack of defendant by reason of his negligent and careless use and operation of his steam saw mill, engine, boiler and smoke stack. The jury found for plaintiff.

It appears from the bill of exceptions that plaintiff during the cross examination of defendant asked him if he had obtained a license to operate and run his engine. The defendant objected to the admission of the question on the ground that the obtaining of a license would have no bearing upon how a man operated a mill and that, there being no allegation of the maintenance of a nuisance by defendant, the question was immaterial. The plaintiff claimed it to be admissible on the ground that failure to obtain the license required by Statute (R. S., Chap. 23, Secs. 21-24) "is evidence of not being willing to comply with the plain statutory enactments of this State," not claiming, if it is not obtained, that defendant is liable, or is not liable from that fact. The question was admitted subject to exceptions and was answered in the negative.

The license is required by statute to designate the place where the buildings for a stationary engine shall be erected, the materials and mode of construction, the size of the boiler and furnace, and such provision as to height of chimney or flues and protection against fire and explosion as the municipal officers think proper for the safety of the neighborhood. R. S., Chap. 23, Sec. 21. The rule as to the admission of evidence of the violation of a statute or ordinance by defendant in actions of tort, as declared in the State, is that such violation is not negligence per se but that the violation of a statute or ordinance prohibiting or requiring a certain course of action is evidence of negligence when the inquiry is whether the doing or the failure to do an act of that character was negligence and that, under

all the circumstances of such case, the questions of negligence and causal connection should be submitted to the jury. *Neal* v. *Randall*, 98 Maine, 69, 77; *Carrigan* v. *Stillwell*, 97 Maine, 247, 253; See *Wright* v. *Malden & Melrose R. R. Co.*, 4 Allen, 283, 290; *Same* v. *Atlantic Works*, 111 Mass., 136, 140; *Finnegan* v. *Winslow Skate Co.*, 189 Mass., 580, 582; And see also *Gilmore* v. *Ross*, 72 Maine, 194, 198; *Burbank* v. *Bethel Steam Mill Co.*, 75 Maine, 373, 382.

It is, however, unnecessary to discuss the matter further since counsel for defendant admits that in his charge to the jury the presiding Justice instructed it that it must find some causal connection between the omission to procure a license and the alleged negligence of defendant and otherwise the evidence of defendant's omission would be entitled to no weight, and that such is a correct statement of the law. He, however, claims that the instruction was ineffectual to remove from the minds of the jurors the prejudicial effect which the admission of the evidence caused when admitted for the purpose claimed by plaintiff in offering it. It seems to be conceded that cases may arise wherein the direction of the court may not repair the injury done a party by an improper course of procedure. *Stone* v. *Express Co.*, 106 Maine, 237, 240; See also *State* v. *Bartley*, 106 Maine, 505, 506; *Collagan* v. *Burns*, 57 Maine, 449, 473.

In *Stowell* v. *Goodenow*, 31 Maine, 538, 539, where testimony had been improperly admitted, the court says "such testimony could not affect the rights of the parties, and its admission might have afforded just cause of complaint, if its influence had not been prevented by the instructions." Holding the instructions appropriate, the court further says "under such instructions the testimony became immaterial, and it cannot be presumed, that the jury disregarded these instructions and allowed it to have an influence upon their minds." This decision has been followed in numerous cases among which the following may be cited. *State* v. *Kingsbury*, 58 Maine, 238, 242; *State* v. *Fortier*, 106 Maine 382, 384; *Whittaker* v. *Sanford*, 110 Maine, 77, 81; and see especially *McCann* v. *Mitchell*, 102 Atl., 740, 116 Maine, 490. We find nothing in this case to warrant the conclusion that the presumption has been overcome.

The exceptions must be overruled.

The motion for new trial is of the usual character. The amount of damages is not questioned by defendant. The evidence on the question of liability was, as usual, conflicting. To discuss or analyze

it at length will serve no useful purpose. It is the opinion of the court, the credibility of the witnesses being wholly for the jury, that there was sufficient evidence in the case to sustain the verdict.

Exceptions overruled.
Motion for new trial denied.

J. R. WATKINS MEDICAL COMPANY

vs.

D. O. STAHL AND W. R. WALTER.

Lincoln. Opinion March 15, 1918.

Rule of practice as to presenting entire evidence when exceptions are taken to the direction of a verdict or to the granting of a nonsuit. Rule as to liability of parties signing contract without reading same.

Exceptions to ruling of presiding Justice ordering verdict for plaintiff. The record fails to present the entire evidence, upon which the order of the Justice below was based, and for this reason the exceptions might well be overruled.

But so much of the evidence as the record does contain clearly shows that the defendants signed the bond on which suit was brought, that there is no sufficient proof, in the partial report of the evidence, to warrant a finding that their signatures were procured by fraud.

Action on the case against the defendants as guarantors on a written contract. At close of evidence, presiding Justice directed a verdict for plaintiff; to which ruling defendant filed exceptions. The defendants presented to the Law Court only what might be called a summary of the evidence or what was declared to be "the substance of the evidence." Exceptions overruled.

Case stated in opinion.

Edward K. Gould, for plaintiff.

A. S. Littlefield, for defendant.

SITTING: CORNISH, C. J., SPEAR, HANSON, PHILBROOK, JJ.

PHILBROOK, J. This is an action against the defendants as guarantors for R. M. Stahl in a written contract of guaranty with plaintiff. The presiding Justice ordered a verdict for plaintiff and the case comes forward upon defendant's exceptions to this ruling.

The record presents what is declared to be "the substance of the evidence in the case so far as it affects the question of liability, and the instructed verdict, and is to be taken as the evidence."

We have recently and frequently held that when a verdict is directed, and exceptions are taken, all of the evidence necessarily becomes a part of the case on exceptions, whether it is mentioned in the bill of exceptions or not. Such a ruling is based upon the entire evidence and will stand unless it is shown to be erroneous. The burden is on the excepting party to show that it is erroneous and that he is aggrieved. And it cannot be determined without an examination of all the evidence for it may be that the errors complained of are cured, or the omission supplied, by the evidence omitted in making up the case. *People's National Bank* v. *Nickerson,* 108 Maine, 341; *Austin* v. *Baker,* 112 Maine, 267. For this reason we should be amply justified in overruling the exceptions.

But an examination of so much of the evidence as is before us seems to amply justify the order of the presiding Justice which is complained of. These defendants signed a written contract of guaranty. They say that a letter from the plaintiffs, received before the contract was signed, which letter had been lost before trial, and no notice given to plaintiff to produce a copy if in the possession of the latter, had misled them as to the contents of the contract. But they say they signed the contract without even once reading it. If so, such conduct is folly on the part of the defendants and not fraud on the part of the plaintiff. *Maine M. M. Ins. Co.* v. *Hodgkins,* 66 Maine, 109. When a person signs a written contract he is presumed, by the ordinary rules of law, to know its contents, whether read or not. *Great Northern Mfg. Co.* v. *Brown,* 113 Maine, 51. There is no sufficient evidence in the partial report of the testimony furnished us to warrant a finding that the signatures of the defendants were obtained by fraud. They made the contract and must be bound by their voluntary act.

Exceptions overruled.

GEORGE BOUCHLES *vs.* EDWARD P. TIBBETTS.

Androscoggin. Opinion March 15, 1918.

Bills of exceptions. Necessity of full and complete record of evidence when exceptions are filed, either to refusal to grant a nonsuit or direct a verdict.

Exceptions to refusal of presiding Justice to direct a verdict for defendant. The record contains only the declaration and the bill of exceptions. No part of the testimony is presented.

Held:

1. When a nonsuit is ordered or a verdict is directed and exceptions are taken, all of the evidence necessarily becomes a part of the case on exceptions, whether it is mentioned in the bill of exceptions or not. Such a ruling is based upon the entire evidence and will stand, unless it is shown to be erroneous. The burden is on the excepting party to show that it is erroneous and that he is aggrieved, and it cannot be determined to be erroneous without an examination of all the evidence; for it may be that the errors complained of are cured, or the omission supplied, by the evidence omitted in making up the case.

Action of deceit. Defendant filed plea of general issue. At close of evidence defendant filed motion asking presiding Justice to direct verdict for defendant, on the ground that the plaintiff's action should sound in contract rather than tort. Presiding Justice overruled the motion; to which ruling defendant filed exceptions. Exceptions overruled.

Case stated in opinion.

Harry Manser, for plaintiff.

George S. McCarty, for defendant.

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

PHILBROOK, J. This is an action of deceit tried in the Superior Court for Androscoggin County. After all the evidence had been offered, and at the conclusion of the evidence, the defendant moved that the presiding Justice order a verdict for the defendant on the

ground that the action should have been in contract rather than in tort. The presiding Justice refused to grant the motion, to which refusal the defendant seasonably excepted and the exception was allowed. The case is before us solely upon that exception.

The record contains only the declaration and the bill of exceptions. No word of the testimony or charge of the presiding Justice is to be found in the record.

In *People's National Bank* v. *Nickerson,* 108 Maine, 341, the court said, "When a nonsuit is ordered, or a verdict is directed, and exceptions are taken, all of the evidence necessarily becomes a part of the case on exceptions, whether it is mentioned in the bill of exceptions or not. Such a ruling is based upon the entire evidence, and will stand unless it is shown to be erroneous. The burden is on the excepting party to show that it is erroneous, and that he is aggrieved. And it cannot be determined to be erroneous without an examination of all the evidence. For it may be that the errors complained of are cured, or the omission supplied, by the evidence omitted in making up the case."

Again, in *Austin* v. *Baker,* 112 Maine, 267, the court said "When exceptions are taken to an order of nonsuit, or to the direction of a verdict, all of the evidence necessarily becomes a part of the case."

In the former case, just cited, a verdict was ordered, in the latter a nonsuit was directed. In the case at bar the presiding Justice declined to order a verdict, after hearing all the evidence, and we think the same rule may be well applied here as in the other two cases which state the settled law in this jurisdiction. Even if it be conceded that one allegation in the declaration did not set forth an action of tort, yet others did, and for all the present record discloses the testimony and the charge of the presiding Justice may have warranted the verdict rendered by the jury.

Exceptions overruled.

ARNOLD W. KIDDER, by his next friend,

vs.

FRANK W. SADLER.

Cumberland. Opinion March 15, 1918.

Rule in Maine as to liability for maintaining dangerous structures attractive to children. Rule of law as to duty towards licensee, invitee or trespasser.

Action to recover damages for negligence. On report.

Held:

1. The plaintiff, at best, was a mere licensee upon the premises of the defendant.
2. The plaintiff has not sustained the burden of showing that the defendant did anything to wantonly injure him, or that the defendant wantonly and recklessly exposed him to danger.
3. In a legal sense, to come under an implied invitation, as distinguished from mere license, the visitor must come for a purpose connected with the business in which the occupant is engaged, or which he permits to be carried on there. There must be some mutuality of interests in the subject to which the visitor's business relates, although the particular thing which is the subject of the visit may not be for the benefit of the occupant.

Action on the case alleging negligence on part of defendant. Defendant filed plea of general issue. At close of evidence case was reported to Law Court for final determination. Judgment for defendant.

Case stated in opinion.

William A. Connellan, for plaintiff.

George F. Gould, Benjamin L. Berman, and Jacob H. Berman, for defendant.

SITTING: CORNISH, C. J., SPEAR, HANSON, PHILBROOK, JJ.

PHILBROOK, J. This is an action to recover damages for alleged negligence on the part of the defendant and comes up on report.

The defendant bought a tract of land in the suburbs of South Portland, plotted the same and engaged in the sale of lots. In the

course of this business, by appropriate methods of advertising, he invited and requested the public to visit his land and bring their friends. During the larger part of the month of May, 1916, he was at work on the premises, preparing them for development, and on June 1 occurred the opening sale. Special free cars, upon which everybody was invited to ride, were advertised to run to the place of sale daily from Munjoy Hill and Monument Square, both in the City of Portland. On June 8 he advertised "Sadler Land Sale. A good time out of doors. F. W. S. Co. Free to all over 21 years old." Owing to the fact that the plaintiff lived in the immediate neighborhood of the land offered for sale, it does not appear that he naturally would, or in fact, did, accept this invitation to ride upon these cars in going from his home to these lands.

In the previous year, 1915, the defendant had opened another tract of land for sale in the neighborhood of these premises offered for sale in 1916. The plaintiff, a boy of the age of six and one-half years when the accident occurred, lived with his parents on one of the lots in the tract opened in 1915 During the development of the tract opened in 1916 the defendant moved thereon, from the land developed in 1915, a small portable shed, or shack, and located it about one-third of a mile from the plaintiff's home. The mother of the plaintiff testified that it was not visible from her house in its new location. The father of the plaintiff described the building as being six by eight feet in dimension, about seven and one-half feet high, from the eaves to the ground, with four corner posts resting on timbers, which he described as shoes with one end of each sniped off so they would not dig into the ground when the building was hauled from place to place, a task easily performed by one pair of horses. He further testified that there was a floor in the building which was so placed as to leave an open space between it and the ground of about two and one-half feet in height. There was a door in one end of the building and movable steps, to lead from the level of the ground to the level of the floor. From the photographs introduced in the case it appears that the sides and ends of the building were boarded down to the ground or, as the plaintiff's father stated, "it was boarded from the ground to the eaves." These boards were nailed horizontally, and those which were on the end of the building containing the door, and between the floor and the ground, were arranged on hinges to swing upward when the steps were removed, forming what was called, in the

testimony, a trap door. It was necessary to remove the steps before the trap door could be opened but, when the steps were removed, it could be easily lifted if not fastened. The plaintiff's father assisted the defendant in securing customers for the lots placed on sale and the relations between these two men were very friendly. It was claimed that the defendant stored in the cellar of the plaintiff's father certain presents which he was accustomed to take therefrom at various times, presents attractive to children, and convey them to this small shack from which they were distributed. It was claimed that the defendant allowed the plaintiff to accompany him to the shack with the presents and at least once one of the presents was given to the plaintiff. On or about the sixth of June the plaintiff went out in the company of some boys of about his own age to gather flowers and on his return trip he claims that he went to the shack and found a number of nitro-glycerine caps on the ground, about five feet from the building, which he picked up and brought home. On the ninth of June he put one of these caps in the stove, an explosion followed, and plaintiff's right hand was blown off.

We have stated the plaintiff's contentions at some length because he invokes the principle of liability for maintaining dangerous structures attractive to children, and because he is at variance with the defendant as to whether he was an invitee, licensee or trespasser on the defendant's land.

In the plaintiff's brief are to be found a large number of cases from other jurisdictions supporting the doctrine of liability for maintaining dangerous structures attractive to children, but no such citation is made of any case so decided by this court. Indeed our court has distinctly declined to adopt this doctrine although admitting that other courts have adopted it. This principle has been so recently and thoroughly discussed that it is only necessary to refer to *McMinn* v. *N. E. Tel. Co.*, 113 Maine, 519, and *Nelson* v. *Burnham-Morrill Co.*, 114 Maine, 213. We adhere to our previously expressed position upon this point.

Was the plaintiff an invitee, licensee or trespasser upon the defendant's premises at the time when he obtained the nitro-glycerine caps? Upon the answer to this question depends the degree of care for which the defendant may be held responsible.

It is not claimed that on the morning when the caps were obtained the plaintiff was on the premises by reason of any express invitation

of the defendant but the plaintiff claims an implied invitation. In a legal sense, to come under an implied invitation, as distinguished from mere license, the visitor must come for a purpose connected with the business in which the occupant is engaged, or which he permits to be carried on there. There must be some mutuality of interests in the subject to which the visitor's business relates, although the particular thing which is the subject of the visit may not be for the benefit of the occupant. *Plummer* v. *Dill*, 156 Mass., 426; *Stanwood* v. *Clancey*, 106 Maine, 72; *Elie* v. *L. A. & W. Street Railway*, 112 Maine, 178. Plainly then this plaintiff was not an invitee. If we consider the relations between the parties and their previous conduct sufficient to warrant the finding that the plaintiff was a licensee, then the rule is well settled that the defendant owed the plaintiff no duty except the negative one not to wantonly injure him, nor wantonly and recklessly expose him to danger. *Russell* v. *M. C. R. R.*, 100 Maine, 406; *McClain* v. *Caribou National Bank*, 100 Maine, 437; *Moffatt* v. *Kenny*, 174 Mass., 311.

As we have already said, the plaintiff claims that these dangerous caps were left out upon the ground, unprotected and easily obtainable. The defendant and his witnesses stoutly deny this. One of the little boys who was with the plaintiff, in the frank manner characteristic of a boy of seven years of age, told of some one of their number seeing the shack and suggesting a visit thereto; that two of the boys took the steps away; that an attempt was made to lift up the trap door but the attempt failed because it was nailed; that the plaintiff looked under the building and first saw a pick and shovel, then saw the caps in a box and, finally, having laid down and reached under the building, got hold of the box, pulled out the caps and carried some away. Two other playmates of the plaintiff, one nine years of age and the other seven, in a naive way fully corroborated this story.

From a careful study of all the evidence we feel that the plaintiff has failed to show that the defendant did anything to wantonly injure him, or that defendant wantonly and reeklessly exposed him to danger.

It becomes therefore unnecessary to discuss proximate cause and other defenses raised against the plaintiff's action.

Judgment for defendant.

FRANCIS DANA *vs.* DANIEL A. SMITH.

Washington. Opinion March 15, 1918.

General rule to be applied in the interpretation and construction of deeds.

On report to determine the character and location of a right of way, and whether that way has been interfered with or obstructed by the defendant. The controversy is almost wholly over issues of fact. The rights of the plaintiff depend upon a deed given by the defendant to the plaintiff's predecessor in title. The familiar and well established rules of law, under which deeds are to be interpreted, apply in this case. After a careful examination of the evidence, and the deed, in the light of those rules,

Held:

1. That the way to which the plaintiff is entitled is a foot path and not a cart or wagon way;
2. That the way to which the plaintiff is entitled is that described in the deed as being "by the shore of the flowage;"
3. That the way to which the plaintiff is entitled has not been obstructed by the defendant.

Action on the case to recover damages for the obstruction of a right of way claimed by plaintiff. Defendant filed plea of general issue and also filed brief statement denying right of way claimed by defendant. At close of evidence case was reported to Law Court for final determination upon so much of the evidence as legally admissible. Judgment for defendant.

Case stated in opinion.

Frederick Bogue, and R. J. McGarrigle, for plaintiff.

Ashley St. Clair, A. D. McFaul, and J. F. Lynch, for defendant.

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

PHILBROOK, J. This case has been before us on exceptions, *Dana* v. *Smith,* 114 Maine, 262, and now comes on report, for determination of the rights of the parties upon so much of the evidence as is legally admissible. The cause of action claimed by the plaintiff is obstruc-

tion of and interference with a right of way from a public town way over and across land of the defendant to land of the plaintiff.

In the year eighteen hundred ninety-five the defendant sold to Sopiel Haney, now deceased, about an acre of land which jutted into Gardner's lake but was not contiguous to any public way. The deed provided however that "a right is also given Sopiel Haney to pass to the highway by the shore of the flowage, such as will convene his purpose." In the former consideration of this case we held that the habendum clause in the deed gave an estate in fee to the grantee, and that whatever right of way he acquired by the deed was capable of grant. The plaintiff, by deeds from the heirs of Sopiel Haney, holds the same right of way which was conveyed to Haney by the defendant. The plaintiff is not contending for a right of way by necessity but by grant. This requires a careful examination and interpretation of the original deed from Smith to Haney. We have recently had occasion to say, upon the authority of *Perry* v. *Buswell*, 113 Maine, 399, "that the cardinal rule for the interpretation of deeds is the expressed intention of the parties, gathered from all parts of the instrument, giving each word its due force, and read in the light of existing conditions and circumstances. It is the intention effectually expressed, not merely surmised. This rule controls all others. Technical rules of construction of deeds may be resorted to as an aid in getting at the intention. And technical rules may be controlling, when nothing to the contrary is shown by the deed. The ancient rigidity of technical rules has given way in modern times to the more sensible and practical rule of actual expressed intention."

The plaintiff, in his declaration, claims a right to a "cartway" across the defendant's premises. The deed from Smith to Haney grants a right to pass, such as would convene the grantee. Haney, grantee in the Smith deed, was an Indian, living and earning a livelihood in a manner now common to that aboriginal race of men. He made baskets, axe-handles and canoes for sale to those who might wish to buy. While there is evidence that Haney's boys owned horses after the death of their father, there is none that he owned any, or used any, so as to need any cartway for his convenience. Nor is there any evidence to show that when the deed was given there were customers desiring to come by automobile or other conveyance to the land described in the deed; nor did the grant purport to convey to Haney or to the general public any right to pass and repass with

teams or automobiles. The defendant testified that when he gave the deed to Haney they went to the premises to mark out the right of way; that they went along under the high water mark until they came to a place near the land which Haney bought; that Haney selected the right of way and with his knife marked bushes to indicate the location of the way; that he made no claim that he desired to pass with teams; that Haney said he "wanted a path wide enough to carry a basket;" that he said "the principle part of his outlet would be by water and ice" and that he "could go down there by a canoe." The defendant further testified that at extreme high water one could not walk where Haney marked the way, but that such conditions lasted only a short time and that there was a path around the shore. The defendant also testified that the way thus indicated by Haney was all he wanted, that it suited him and that he gave his reasons for the same.

Taking into consideration the description of the way given in the deed, together with all the testimony disclosing the existing conditions and circumstances of the grant and of the parties, it is the opinion of the court that the right of way created by the deed was not a cartway, or a way to be used by automobiles, or animal drawn vehicles, but simply a foot path.

There is controversy, however, as to just where the right of way, as agreed upon by Smith and Haney, existed upon the face of the earth. An examination of the plan which is incorporated in the record shows that there was a path close to the flowage on the easterly shore of defendant's land, beginning at a point where the highway very nearly touched the flowage, and ran along close to that easterly shore, from the highway to a bog, over which there appears to be a bridge marked "fill bridge;" that here the path crossed the bog by the bridge and continued along what is marked "Smith wood road to lake," to the little house in which Haney lived. This path shows the location of the way as claimed by the defendant. The "wood road," according to the plan, began at the defendant's buildings, quite a distance westerly from the point where the path began, ran to the "fill bridge," then over the bridge and across the Haney land to the lake. There appears upon the plan another way, or road, beginning at the highway just westerly from the point where the path began, and after running a few feet near the path it swerves a little farther away from the shore and joins the "Smith wood road" a short distance southwesterly from

the "fill bridge." This last named road, and its extension by the "wood road" and the "fill bridge," to the Haney house, is the way claimed by the plaintiff. It appears that before the plan was made by the surveyor a portion of the land, over which passed what we will call that part of the plaintiff's road leading from the highway to the "wood road," had been plowed and seeded, so that the surveyor located it where in his judgment "the old road used to go." In other words that part of the road claimed by the plaintiff had no visible existence, when the plan was made, for a distance of some two hundred fifty feet from the highway, but beyond that the road remained, according to the testimony of the surveyor. It should be observed, however, that on cross examination the surveyor testified that the part of the road which he said was remaining was a portion of the Smith "wood road" and not a portion of the old road leading from the highway to the "wood road" and which we have called the plaintiff's road. The surveyor also testified that there was a fence, made of stakes and barbed wire, across the location of this so-called old road. This is the interference and obstruction complained of by the plaintiff. Whether that fence obstructed the path or way claimed by the defendant, we will refer to later.

The plaintiff, by his own testimony and that of other witnesses, one being the son of Sopiel Haney, offered evidence that he, and these other witnesses, had travelled this so-called old road, in going to the Haney place, and had seen other people do the same. But the evidence falls far short of establishing any prescriptive rights for Haney, or his successors in title, over this so-called old road. The plaintiff urges, however, that since these things were true they contain strong elements of presumption that when Smith granted a right of way to Haney the actual way granted was by this so-called old road. This presumption encounters the positive testimony of the defendant that he did not grant the right of way over the so-called old road, and that Haney did not so claim when the right of way was selected by the latter. The defendant further testified that this so-called old road was not in existence at the time he gave the deed to Haney and explains its existence later by saying that he desired to cultivate the land, where later this so-called old road was used, that the land was very rocky, that he desired to haul these rocks over to where he made the "fill bridge," that while this was being done there were bars in the fence standing where the present fence is, that he used this so-called

old road for something like twelve years, that during that time others passed through these bars and over the so-called old road without consent or objection on his part. Thus he offers his explanation of the passing testified to by plaintiff and his witnesses, and says where he no longer needed this so-called old road for his own convenience he closed the bars and erected a sign forbidding any further passing.

The defendant is corroborated by several witnesses as to the impassable condition of the premises, where the so-called old road was claimed by the plaintiff to exist, until Smith removed the rocks, and that no road ever existed until those rocks were removed. It is uncontradicted that after purchasing the land Haney moved his house, not by the "old road" which plaintiff claims existed and was open to Haney, but by the road leaving the highway near the Smith homestead. All this testimony is opposed to the presumption of the plaintiff, as referred to above, and we think the plaintiff has failed to show by a fair preponderance of the evidence that the way which he purchased was the so-called old road.

It is suggested in argument that there was a new way substituted for the original one, by oral agreement of Smith and Haney, after the original one was marked out. It appears that about a year after Haney went there he complained that his road was wet and asked permission to "walk inside." The defendant says he told Haney that if he could make a road through the bushes, but keep outside the garden, he might do so, at times when he could not use his own way conveniently. But there is no evidence that the original way was permanently abandoned and a new one substituted therefor. At best it only appears that as a matter of accommodation Smith allowed Haney to "walk inside" temporarily.

It only remains to decide whether the way which Haney and his successors in title were entitled to is obstructed by the plaintiff. That way is the path as claimed by the defendant. The plaintiff claimed obstruction to this path by the fence. The defendant claimed that the only obstruction is growing bushes which he was not bound to remove. The evidence is conflicting but a careful examination leads us to the conclusion that there still exists, except perhaps as partially obstructed by bushes, the "path wide enough to carry a basket," which was the right of way which Haney asked for and obtained, and that this way has not been obstructed by the defendant.

Judgment for the defendant.

FREDERICK E. DYER *vs.* WILLIAM HELSON.

Penobscot. Opinion March 18, 1918.

General rule of law as to right of minor child to pledge credit of his father. Right of father to the care, custody and control of his child. General rule of law relating to rights and duties of parent and child.

On report. An action of assumpsit brought to recover for the support and maintenance of one Harry Helson, a minor child of defendant, from July 4, 1910, to September 19, 1916. Liability denied.

If a child leaves his parent's house voluntarily, for the purpose of seeking his fortune in the world, or to avoid the discipline and restraint so necessary for the due regulation of families, he carries no credit and the parent is under no obligation to pay for his support.

The father is entitled to exercise judgment and supervision as to the wants of the child, and the character, cost and necessity of the supplies furnished. The burden is upon the plaintiff to show that there existed a necessity for furnishing the supplies, and that this necessity was occasioned by defendant. It is not to be presumed that the defendant neglected his duty, or was unwilling to perform it.

Action to recover for board, lodging and clothing furnished and provided by plaintiff to minor son of defendant. Defendant filed plea of general issue. At close of evidence, by agreement of parties, case was reported to Law Court upon certain agreed stipulations. Judgment for defendant

Case stated in opinion.

Phillips B. Gardner, for plaintiff.

Charles J. Dunn, for defendant.

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

BIRD, J. The plaintiff sues to recover for the support of one Harry Helson, a minor child of defendant, from July 4, 1910, to September 19, 1916. Liability is denied. The case is presented upon report with the stipulation of the parties as to the amount of damages if this court finds the plaintiff entitled to recover.

The law applicable to cases of this character is well established. If a child leaves his parent's house voluntarily, for the purpose of seeking his fortune in the world, or to avoid the discipline and restraint so necessary for the due regulation of families, he carries no credit and the parent is under no obligation to pay for his support. *Angel* v. *McLellan,* 16 Mass., 28, 31. *Weeks* v. *Merrow,* 40 Maine, 151, 152.

The father is entitled to exercise judgment and supervision as to the wants of the child, and the character, cost and necessity of the supplies furnished. The burden is upon the plaintiff to show that there existed a necessity for furnishing the supplies, and that this necessity was occasioned by defendant *Dodge* v. *Adams,* 19 Pick., 429; *Glynn* v *Glynn,* 94 Maine, 465, 469, 471. It is not to be presumed that the defendant neglected his duty, or was unwilling to perform it. *Glynn* v. *Glynn,* supra.

Upon the conflicting evidence in this case, the discussion of which in detail will serve no useful purpose, the court does not feel warranted in concluding that the plaintiff has shown by a preponderance of the evidence that the defendant, the father of the boy, did not treat him with the kindness ordinarily shown by a parent to a child in their station in life or that the child was not adequately maintained in his father's house.

The court is also of the opinion that the plaintiff has not shown by a preponderance of the evidence that the plaintiff expected when the supplies were furnished the minor compensation from the defendant. The parties had no communication one with the other during the period in which the supplies were furnished and we fail to find in the conduct of defendant anything giving the plaintiff reason to expect compensation. See *Clary* v. *Clary,* 93 Maine, 220, 223. *Heron* v. *Webber,* 103 Maine, 178, 182.

Judgment must be entered for the defendant and it is so ordered.

LUCETTA N. ARCHIBALD

vs.

THE GRANITE STATE FIRE INSURANCE COMPANY.

Androscoggin. Opinion March 22, 1918.

Contracts of fire insurance. Proofs of loss. Rule as to the insured being bound by proofs of loss if made by person other than the insured, although accepted by the insured as her own. Overvaluation in proofs of loss. General rule governing the question of whether the overvaluation is fraudulent or otherwise.

In an action of assumpsit on a policy of fire insurance, the defendant set up fraudulent overvaluation in the proof of loss. After verdict for the defendant upon plaintiff's motion for a new trial and exceptions, it is

Held:

1. Mistaken and honest overvaluation is not, but intentional and fraudulent overvaluation is fatal to recovery.
2. The issue was one of fact for the jury and we are unable to say that the verdict was palpably wrong. Upon the question of overvaluation the evidence was strongly in favor of the defendant. Whether it was a fraudulent overvaluation was for the jury to determine and we do not feel justified in reversing their finding.
3. The fact that many of the values were stated by the plaintiff after consultation with and reliance upon her husband does not relieve her from all the responsibility attaching to her figures. The manner in which the proof of loss was made up was a proper matter of consideration by the jury, but she could not blindly adopt his estimates as her own and shirk all responsibility as to their correctness.
4. The question put by the plaintiff's counsel to the plaintiff's husband inquiring if anything was said by the broker at the time the insurance was effected, as to additional insurance was properly excluded. No such statement was binding upon the company, and could at best only reveal his idea of value at the time and its repetition was merely hearsay. Moreover the broker was a witness at the trial so that the plaintiff received the full benefit of his opinion.
5. The question put to the broker as to whether he did anything or attempted to do anything to defraud the company at the time the insurance was effected,

was properly excluded as being immaterial. There was no claim of fraud in the inception of the policy, but of false and fraudulent overvaluation after the fire occurred.

6. The admission of the evidence offered by the defendant that several other colts out of the same dam as the burned stallion Dexter R. were afflicted with a spavin, did not substantially prejudice the plaintiff. The more vital point was whether Dexter R. himself was spavined, and upon that question there was convincing evidence of the fact.

Action of assumpsit on policy of fire insurance. Defendant filed plea of general issue; also following brief statement. "That the proofs of loss furnished to the defendant by the plaintiff under the requirements of the policy of insurance and under the law are fraudulent in that they contained claims for articles not destroyed by fire and a gross and fraudulent overvaluation of certain items of property which were destroyed by fire and being so fraudulent, under the contract of insurance void." Verdict for defendant. Plaintiff filed motion for new trial; also exceptions to certain rulings of presiding Justice relating to the admissibility of certain testimony. Judgment in accordance with opinion.

Case stated in opinion.

McGillicuddy & Morey, for plaintiff.

W. R. Pattangall, and H. E. Locke, for defendant.

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

CORNISH, C. J. This is an action of assumpsit on a policy of fire insurance in the defendant company, and after a verdict for the defendant, the case is brought to the Law Court on plaintiff's motion and exceptions.

MOTION.

The issue of fact before the jury was the fraud of the plaintiff in making up her proof of loss, by fraudulent overvaluation of lost articles. Mistaken and honest overvaluation is not, but intentional and fraudulent overvaluation is fatal to recovery. *Dolloff* v. *Ins. Co.*, 82 Maine, 266; *Rovinsky* v. *Ins. Co.*, 100 Maine, 112; *Pottle* v. *Ins. Co.*, 108 Maine, 401; *Cole* v. *Ins. Co.*, 113 Maine, 512. This issue of fact was sharply contested before the jury and after a long trial it was decided in favor of the defendant. No exceptions were

taken to the charge of the presiding Justice and therefore we have the right to assume that the legal distinctions were properly and clearly drawn and the jury were made to understand the precise question which they were called upon to decide. The burden now rests upon the plaintiff to persuade this court that the verdict was so manifestly wrong as to indicate some bias or prejudice on the part of the jury or their failure to appreciate the force of the evidence and apply to it the pertinent rules of law. This burden has not been sustained, although had the question been primarily submitted to us as a question of fact we might perhaps have reached a different conclusion. The cold type cannot visualize the controversy to the court as could the living witnesses to the jury. The jury therefore had an advantage of which we are deprived. So far as bias and prejudice are concerned, we should expect them to operate, if at all, against an insurance company and in favor of a private individual, especially if that individual be a woman. Sympathy here would naturally have been on the side of the plaintiff rather than of the defendant.

The evidence is voluminous. Its careful study does not force us to a reversal of the verdict. It appears that the plaintiff and her husband lived on a farm in the town of Poland, the title being in the wife. Their farm house, a substantial building, had been burned a few years before. They then converted a garage, sixteen by twenty-six feet in size, into a dwelling. This was one story or one story and a half in height, had three rooms on the ground floor, a combination living room, dining room and kitchen, and a bed room and bath room. The walls were unplastered but were sheathed. There was no cellar. The attic was unfinished. This was the dwelling, which was insured for $1,000. and which was valued in the proof of loss at $1,000.

The other buildings consisted of a garage, twelve by twenty feet recently built, insured for $300. and valued in the proof of loss at $500.; a barn 36 feet square, thirty or forty years old, recently shingled and painted, insured for $1,000. and valued at $1,000., and three or four small outbuildings of little value. The amount of insurance was largely increased when this policy in controversy was taken out on November 15, 1915, the total on buildings and personal property being $4,950. and the total value claimed in the proof of loss being $7,833.53. This proof of loss was made up as follows: $3,000. sworn value of the buildings, $1,498.83 of household goods and furni-

ture, wearing apparel, etc., contained in the dwelling, $224.70 contents of garage, $560. farm produce, $750. for pair of work horses and a colt Nigger, $1,000. on stallion Dexter R. and $800. on colt Lady M. The itemized proof covers thirteen printed pages of the record, and while the existence and the claimed value of the various articles are testified to by the plaintiff and her husband, we can see how the jury may have viewed such a formidable list with suspicion and have discovered signs of gross and wilful overvaluation from the situation as a whole. The figures look extravagantly large, as for instance $1498.83 household goods, furniture, wearing apparel, etc., and $224.70 contents of the garage. It was of course difficult if not impossible for the Insurance Company to ascertain the facts as to the separate items of personal property, but their very bulk was significant and somewhat disproportionate to the size and capacity of the buildings supposed to contain them.

The nature and value of certain items however could be more readily ascertained and against these the evidence was sharply directed.

Take the value of the buildings, claimed to be worth $3,000. Beside her husband the plaintiff had only two witnesses on this point, one the broker who placed the insurance, and the other a carpenter. The broker may have been anxious to justify the amount of insurance and hence the amount of his commission, and he valued the buildings at $2600., while the carpenter considered the house and garage to be worth $1400. to $1700. apparently on the basis of a replacement value. On the other hand the defendant introduced four witnesses, including neighbors and a member of the board of assessors, who varied in their estimates as follows: two placed the value at $550., one at $600. to $750. and one at $1100. The evidence clearly preponderated in favor of the defendant on the value of the buildings.

Another point in controversy was the value of a pair of work horses, one about ten years old and the other about twelve, one being lame. These had been bought by the plaintiff four or five years before for the sum of $200. They were valued in the proof of loss at $500. Only one witness for the plaintiff beside Mr. Archibald testified as to their value, and he placed it at $400. to $500. On the other hand four witnesses for the defendant who had known the horses well and one of whom had sold them to the plaintiff testified that they were worth from $150. to $200. This discrepancy was large.

Another item of attack by the defendant was the claimed value of the stallion Dexter R. This horse had been purchased by Archibald when he was four years old, sound, and without a record, for four hundred dollars. At the time of the fire he was eight or nine years old, with a mark of 2.19¼, which was a handicap, and with a spavin on one leg according to credible testimony. He had been used somewhat for breeding purposes. The value in the proof of loss was set at $1,000. Two witnesses for the plaintiff, beside her husband, estimated the value to be $800. or $1,000. Seven witnesses for the defendant fixed it at from $150. to $275. Here again the difference was significantly wide.

It is unnecessary to go into further detail. Viewing the whole case impartially we are unable to say that the verdict of the jury is so palpably wrong that it should be set aside. Upon the question of overvaluation we think the evidence was strongly in favor of the defendant, and whether it was or was not an intentional and fraudulent or merely a mistaken and honest overvaluation was for the jury to determine. They have determined that question by their verdict and we do not feel warranted in reversing their finding.

The fact that many of the values were stated by the plaintiff after consultation with and reliance upon her husband does not necessarily change the situation, and does not relieve the plaintiff from all responsibility attaching to the figures which she gave. It was her proof of loss and if she consulted her husband in preparing it and accepted his figures, and stated them to be true, she was not thereby necessarily freed from all legal responsibility. The manner in which she made up her proof of loss was properly before the jury as bearing upon the question of her good faith and upon the intentional and fraudulent overvaluation of her loss. Its weight was for the jury to estimate, considering all the circumstances of the case. She could not blindly adopt his figures as her own and shirk all responsibility as to their correctness.

In *Mullen* v. *Insurance Co.*, 58 Vt., 113, the policy stood in the name of the husband, and the wife made out proofs of loss covering the household goods, as she was much better informed concerning these than was he. He adopted it without investigation. On this point the court say: "The evidence tended to show that the wife included many articles not lost, some greatly overvalued, which had been purchased by the plaintiff himself and some that he never pur-

chased at all. The plaintiff took his wife's inventory without scrutiny, swore to it, not knowing whether it was correct or otherwise; and it turned out to be grossly incorrect and false. . . . The company was entitled to a truthful inventory of the property lost. The plaintiff's duty under the policy was to supply it; his representations must be true in fact. He cannot even be honest by turning the matter over to his wife and omit to inspect her inventory to see if it be correct. If he had looked it over and wished to be honest, he would have discovered many false statements which were calculated and probably were intended to work a fraud upon the defendant. He could have arrested this intended fraud if he had done his duty. On the contrary he recklessly indorsed it without examination and by so doing made it his own within the meaning of the policy."

The facts in the case at bar do not go to the extent of those in the case just cited, but the principle that the insured must be held responsible for the truthfulness and accuracy of her proof of loss runs through both. The fundamental question of fraud or no fraud remained for the jury. The motion must be overruled.

EXCEPTIONS.

(1) The first exception relates to the exclusion of a question put to Mr. Archibald by the plaintiff's counsel inquiring if anything was said by the broker at the time the insurance was effected, as to additional insurance.

This ruling was correct. No such statement by the broker was binding upon the company. It could at best only reveal the broker's idea of the value of the insured property at the time, and its repetition by Archibald was merely hearsay. Moreover the broker was a witness for the plaintiff so that the latter obtained the full benefit of his opinion at the trial and before the jury. He was not harmed by the exclusion.

(2) The second exception arises from the exclusion of a question asked of the broker as to whether he did anything or attempted to do anything to defraud the company when he put on this insurance

This ruling was without error. There was no claim of fraud in the issuing of the policy, but of false and fraudulent overvaluation after the fire had occurred. The evidence was immaterial and irrelevant.

(3) The third exception covers the admission of a question put to one of the defendant's witnesses as to whether several other colts out of the same dam as Dexter R. were afflicted with a spavin.

The affirmative answer could have little effect upon the issue in this case, except as perhaps showing a tendency to transmit the defect. It could not have substantially prejudiced the plaintiff. The more vital point was whether Dexter R. himself was spavined, and upon that question there was convincing evidence of the fact.

Our conclusion therefore is that the entry must be,

Motion and exceptions overruled.

THOMASTON SAVINGS BANK

vs.

FRANCES E. HURLEY, LUCY C. FARNSWORTH, LENA R. LEACH AND EUGENE M. O'NEIL.

Knox. Opinion March 22, 1918.

Mortgages. Rights of mortgagee where property mortgaged has been legally partitioned. To what part of the property partitioned shall mortgage attach. Rule where part of the property covered by mortgage has been conveyed to persons having no knowledge of the mortgage. Where that part remaining is not sufficient to meet the mortgage indebtedness, what are the rights of the mortgagee. General rule of practice where equitable defense is made or offered under R. S., Chap. 87, Sec. 17-18.

Real action to foreclose a mortgage on an undivided interest in inherited property. Subsequent to the date of the mortgage the mortgagor, Mrs. Dinsmore, conveyed her equity of redemption to a co-owner, Mrs. Hurley, and the entire estate was afterwards divided by partition proceedings among the then owners. After partition was made Mrs. Hurley conveyed two lots by warranty deed which have come by mesne conveyances to two of these defendants.

Held:

1. That under the pleadings and the admitted facts the subject matter of the controversy should be governed by the rules of equity rather than those of law, as provided in R. S., Chap. 87, Secs. 17 and 18, and as the case is before the Law Court on report it can be so treated.

2. At the time the mortgage was given it covered the one-fifth undivided interest of the mortgagor in the entire property.
3. The effect of the partition, under R. S., Chap. 93, Sec. 28, was to attach the mortgage to the part assigned to the mortgagor or to the grantee. The several interest took the place of the undivided interest.
4. As the mortgagor had sold her undivided interest to Mrs. Hurley subject to the mortgage, as Mrs. Hurley had also purchased two other undivided interests so that at the time of partition she owned eight-fifteenths of the entire property, and as these were all grouped and treated as one interest in the partition, the mortgage after partition attached to three out of the eight-fifteenths assigned to Mrs. Hurley, or to three-eighths of her assigned portion.
5. The two lots conveyed by Mrs. Hurley after the partition should not be held subject to the mortgage unless the remaining interest in the hands of Mrs. Hurley should prove insufficient to meet the mortgage debt. The portion retained by a mortgagor in such a case stands primarily liable in equity for the payment of the whole debt, while that which had been sold by the mortgagor is chargeable only for any deficiency after the other had been applied.
6. Whether the remaining portion is ample can be determined by the sitting Justice who will have the power and duty of working out the rights of the parties in accordance with the equitable rules laid down in the opinion.

Real action to foreclose mortgage held by plaintiff bank. The defendants each filed plea of general issue and also brief statement claiming equitable defense under R. S., Chap. 87, Secs. 17, 18. At close of evidence, case was reported to Law Court upon certain agreed stipulations. Judgment in accordance with opinion.

Case stated in opinion.

Joseph E. Moore, and Rodney I. Thompson, for plaintiff.

A. S. Littlefield, for Frances E. Hurley, Lena R. Leach and Eugene M. O'Neil.

Charles T. Smalley, for Lucy C. Farnsworth.

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

CORNISH, C. J. This is a real action brought for the purpose of foreclosing a mortgage given by Mary K. Dinsmore to the plaintiff for the sum of $6,000. on June 26, 1890.

The history of the transaction is briefly this. Samuel Pillsbury died intestate in Rockland, sometime prior to 1890. He left a large amount of real estate as described in the writ, which passed to his heirs at law in undivided interests. Mary K. Dinsmore was a

daughter and inherited one-fifth, not one-fourth as the writ alleges. Frances E. Hurley was another daughter and also inherited one-fifth. At some time prior to 1893 Mrs. Hurley purchased from her sister, Mary K. Dinsmore, the latter's interest subject to the bank mortgage, and also a one-fifteenth interest each from two other heirs, Grace E. Green and Fannie E. McDemmon. This made her entire holdings eight undivided fifteenths. The remaining seven-fifteenths were held by other heirs, viz: Helen L. Kenney, three-fifteenths, Wm. H. Clark Pillsbury three-fifteenths and Maud L. Noera or Maud L. Anderson one-fifteenth.

On November 18, 1893, the entire estate was partitioned among the several owners by the Supreme Judicial Court. The Pillsbury block, which is the twelfth item in the writ, was set off to Helen L. Kenney and Wm. H. Clark Pillsbury, who together held six-fifteenths. The house and lot at the corner of Union and Summer Streets, together with a store house and lot and a shore privilege and wharf on Sea Street, being items 2, 9 and 10 in the writ, were set off to Maud L. Anderson as her one-fifteenth. All the rest of the property was set off to Mrs. Hurley, who at that time was the owner of the other eight-fifteenths as has already been explained.

The plaintiff's mortgage covered only the one-fifth undivided interest of Mrs. Dinsmore. Had she retained her title at the time of the partition the rights of the parties could be easily ascertained because the legal effect of a partition upon an undivided interest subject to mortgage is governed by R. S., Chap. 93, Sec. 28, which provides: "A person having a mortgage, attachment or other lien on the share in common of a part owner, shall be concluded by the judgment so far as it respects the partition, but his mortgage or lien remains in force on the part assigned or left to such part owner." In other words, the mortgage on the undivided interest follows after and attaches itself automatically to the several interest of the mortgagor after partition is made. The several interest takes the place of the undivided interest.

But Mrs. Dinsmore, the mortgagor here, had sold her undivided interest, subject to the mortgage, to Mrs. Hurley, a co-owner, after the mortgage was given and before partition, and in the partition the Dinsmore interest, three-fifteenths, was combined with the inherited interest of Mrs. Hurley, three-fifteenths, as well as with the two one-fifteenth interests which Mrs. Hurley had purchased from Green and

McDemmon, and the entire eight-fifteenths held by Mrs. Hurley were satisfied by the property assigned to her, no discrimination being made between the Dinsmore interest, the Green and McDemmon interest and the original Hurley interest. They were all grouped together and treated as one interest. It is clear that the portion set off to Helen L. Kenney, Wm. H. Clark Pillsbury and Maud L. Anderson became entirely free from the bank mortgage. That could be enforced only against the portion set off to Mrs Dinsmore or to her grantee Mrs. Hurley, and as no specific portion was assigned to satisfy the Dinsmore interest, in reality the mortgage attached to three undivided fifteenths out of the eight undivided fifteenths set off to Mrs. Hurley, or to three undivided eighths of her assigned portion.

But another complication arises here. It appears that on August 4, 1896, nearly three years after the partition, Mrs. Hurley conveyed to Patia M. Bird by metes and bounds, and under a warranty deed describing the premises as free from all incumbrances, a portion of the lot on the south side of Summer Street, being a part of item 4 in the writ and a part of the premises assigned to her under the partition. Immediately after the purchase said Bird built a house upon the lot expending a large sum of money in its construction, having no actual knowledge of the existence of this bank mortgage and believing that her title was perfect. On November 3, 1914, said Bird conveyed this lot with its buildings to the defendant Lena R. Leach, also by warranty deed.

It further appears that on June 26, 1903, Mrs. Hurley conveyed to Adelaide S. Osgood by warranty deed free of all incumbrances, another definite portion, by metes and bounds, of the lot on the south side of Summer Street, also being a part of item 4 in the writ and a part of the premises assigned to her under the partition. On this lot Adelaide S. Osgood at once constructed a house, at large expense, in the full belief that her title to said premises was perfect. This Osgood property has come by mesne conveyances to the defendant, Eugene M. O'Neill.

It should be further stated that Mrs. Hurley, after acquiring her interests in the property and after partition made, gave sundry mortgages of the same in favor of James R. Farnsworth as security for loans, the first being dated July 26, 1894, and the last November 1, 1900. Lucy C. Farnsworth as administratrix of the estate of James R.,

was made a party defendant in this action, and in her pleadings claims that these mortgages covered the several parcels of land described in the writ except items 9 and 10 which had been set off to Maud L. Anderson, and item 12, the Pillsbury block which had been set off to Helen L. Kenney and Wm. H. Clark Pillsbury. A bill in equity to redeem from these mortgages was brought by Mrs. Hurley and was pending when the action at law by the plaintiff bank was begun.

On March 4, 1916, the plaintiff bank, as mortgagee from Mrs. Dinsmore under the original mortgage of June 26, 1890, brought this writ of entry, making Mrs Hurley, Lena R. Leach, Eugene M. O'Neill and Lucy C. Farnsworth parties defendant. The defendants, by way of brief statement, set up all the foregoing facts claiming an equitable defense under R. S., Chap. 87, Secs. 17 and 18, and that the rights of the parties should be determined and enforced by a decree in equity rather than by a judgment at law. This claim is well made. Under the pleadings and the admitted facts we are of opinion that the subject matter of the controversy should be governed by the rules of equity rather than of law, and as the case is before the Law Court on report it is within our power to so treat it. *Hussey* v. *Fisher*, 94 Maine, 301; *Hurd* v. *Chase*, 100 Maine, 561; *Poland* v. *Loud*, 113 Maine, 260.

The main question to be decided is the portion of the land to which the bank mortgage attaches. The writ claims an undivided interest in all the lots that belonged to the intestate Pillsbury at the time of his death. But it is obvious that after the partition the mortgage covered only three undivided eighths of the portion set off to Mrs. Hurley into which the Dinsmore interest had been merged. Nor in equity should the lots which Mrs. Hurley had sold, after the partition, to Leach and Osgood be held unless the remaining interest of the mortgagor in the hands of Mrs. Hurley should prove insufficient in value to meet the mortgage debt. This is in compliance with an equitable doctrine established by the great preponderance of authority. The portion retained by a mortgagor stands primarily liable in equity for the payment of the whole debt, while that which has been sold by the mortgagor is chargeable only for any deficiency after the other has been applied. *Gill* v. *Lyon*, 1 John Ch., 447; *Clowes* v. *Dickinson*, 4 John Ch., 235; *Brown* v. *Simons*, 44 N. H., 475; *Sheperd* v. *Adams*, 32 Maine, 63; *Wallace* v. *Stevens*, 64 Maine, 225; *Cole* v.

Fickett, 95 Maine, 265. The lot therefore held by the defendant Leach, and the lot held by the defendant O'Neil, upon both of which lots valuable improvements have been made since their purchase from Mrs. Hurley, are not to be made subject to this mortgage unless the remainder of the mortgaged interest still in the hands of Mrs. Hurley is inadequate in value to pay the mortgage debt. The defendants claim in their answers that the remaining portion is ample. Whether or not this is the fact can be determined by the sitting Justice, who will have the power and the duty of working out the rights of the parties in accordance with the equitable rules laid down in this opinion. The cause will be retained, as though it were a bill in equity, for that purpose, and all proper decrees to protect the rights of all parties can be made by the sitting Justice.

Lucy C. Farnsworth, as administratrix of the estate of James R. Farnsworth, the holder of several junior mortgages given by Mrs. Hurley, was made a party defendant in this real action. We do not think she was a necessary party. However it was alleged in the pleadings of Mrs. Hurley that a bill in equity had been brought by her against Mrs. Farnsworth to redeem from said Farnsworth mortgages, the controversy being over the amount due, Mrs. Farnsworth claiming several thousand dollars, and Mrs. Hurley contending for an existing balance of less than one thousand dollars. Mrs Hurley further stated in her pleadings that if her contention in the equity suit against Mrs. Farnsworth were sustained by the court she would redeem from this mortgage held by the Thomaston Savings Bank.

The contention of Mrs. Hurley has been recently sustained, the Law Court finding that the balance due Mrs. Farnsworth was only nine hundred and ten dollars, *Hurley, in Equity*, v. *Farnsworth*, 117 Maine: 102 At., 563. The opportunity is therefore now offered Mrs. Hurley to redeem from the mortgage on which the present suit was brought.

Case remanded to nisi prius, to be finally heard and determined by the sitting Justice in accordance with the rules here laid down.

So ordered.

WALDO COUNTY FARMERS' UNION *vs.* E. B. HUNT.

Waldo. Opinion March 23, 1918.

Rights of referees to have their report resubmitted. Rule as to presiding Justice allowing same and as to exceptions being allowed to such ruling.

Recommitting a report both before and after acceptance, for the purpose of correcting clerical errors and the like in the interest of justice, has been the practice since the establishment of this court, and from the order to recommit for any such purpose exceptions do not lie.

Action on the case in the nature of assumpsit. By agreement of the parties the case was referred at the April term of court, 1917, Waldo County. The report of the referee was duly filed in court at the September term, 1917, and on the fourth day of the same term counsel for plaintiff filed a motion asking that the report of the referee so filed be resubmitted on account of an error in figuring the amount due plaintiff. On the same day the referee filed a further report showing that the error had been corrected. The second report was accepted by the Justice presiding and the same was allowed by him; to which ruling defendant filed exceptions. Exceptions overruled.

The case is stated in the opinion.

Morse & Cook, for plaintiff.

Arthur Ritchie, for defendant.

SITTING: CORNISH, C. J., SPEAR, HANSON, PHILBROOK, JJ.

HANSON, J. The plaintiff sued for breach of contract and on a claim for embezzlement. By agreement of the parties the case was referred. On the coming in of the report of the referee, the plaintiff filed the following motion: "And now comes the plaintiff in the above entitled cause and moves that the report of the referee be resubmitted to him that he may correct a mathematical error which the said Referee made in figuring the amount to be awarded to the

plaintiff, to wit: that he add to the amount already found by him for the plaintiff the further sum of two hundred and forty-five dollars and seventy-two cents, being the amount actually found due the plaintiff from the said defendant, but in making up his calculation said sum was omitted by mistake in figuring up the same and that his said report may be resubmitted for said purpose and not accepted in its present form."

The motion was granted, the report resubmitted, the amendment made, and the report as amended was accepted by the presiding Justice. To the acceptance of the report as amended the defendant excepted, and the case is before us on such exception.

Counsel also filed a petition to establish the truth of other exceptions, which on account of irregularity, and non-compliance with Rule of Court XLIII, will not require our consideration.

Recommitting a report both before and after acceptance for the purpose of correcting clerical errors and the like in the interest of justice, has been the practice since the establishment of this court, and from the order to recommit for any such purpose exceptions do not lie. *North Yarmouth* v. *Cumberland,* 6 Maine, 21; *Harris* v. *Seal,* 23 Maine, 437; *Mayberry* v. *Morse,* 39 Maine, 107; *Crooker* v. *Buck,* 41 Maine, 359; *Hickey* v. *Veazie,* 59 Maine, 284; *Fales* v. *Hemenway,* 64 Maine, 373.

Again, it is not urged, nor does it appear, that the defendant is aggrieved or injured by the alleged act of the presiding Justice. The facts and inferences all point to the opposite conclusion, and the entry will therefore be,

Exceptions overruled.

CARRIE A. CHARLESWORTH *vs.* AMERICAN EXPRESS COMPANY.

Androscoggin. Opinion March 27, 1918.

Declaration. Amendment to declaration alleging injuries other than complained of in original declaration. General rule as to right of defendant to have continuance on the ground of surprise by an amendment to the declaration. General rule as to the granting or denying a motion for continuance being a matter of judicial discretion. Rule in some States as to being entitled to a continuance as a matter of right when an amendment of substance is made to the declaration.

In an action of tort to recover for injuries received through the alleged negligence of the defendant's servants the plaintiff sought to introduce evidence concerning injuries not set out in the declaration. The evidence was excluded and plaintiff was allowed to amend by inserting allegations covering the additional injuries. Thereupon the defendant asked for a continuance on the ground of surprise and because of entire lack of preparation to meet the new issues.

This motion was overruled and after a delay of a half day the trial proceeded. On defendant's exceptions it is

Held:

1. The granting or denying of a motion for continuance is a matter of judicial discretion.
2. The term judicial discretion means sound discretion exercised according to the well established rules of practice and procedure, a discretion guided by the law so as to work out substantial equity and justice. It is magisterial not personal discretion.
3. A discretionary ruling is reviewable when some palpable error has been committed or when an apparent injustice has been done.
4. The amendment in this case was an important one and opened a new and wide field for investigation, for which the defendant being taken by surprise was not prepared. Sufficient postponement or continuance should have been granted to enable it to secure the testimony needed to meet the new issues. This was not done, and to refuse this was ground for exception.

Action on the case based on the alleged negligence of defendant. Defendant filed plea of general issue. During the progress of the trial plaintiff offered evidence in regard to injuries to plaintiff's back,

and defendant objected to the admission of such evidence on the ground that nothing appeared in the declaration in regard to such injuries. Plaintiff was allowed to amend his declaration and defendant thereupon made motion to have case continued on the ground that the amendment opened up new allegations which were serious in their nature and that the defendant did not have sufficient time within which to properly meet the same. Presiding Justice declined to grant defendant's motion; to which ruling defendant filed exceptions. Motion for new trial also filed by defendant. Judgment in accordance with opinion.

Case stated in opinion.

McGillicuddy & Morey, for plaintiff.

White & Carter, for defendant.

SITTING: CORNISH, C. J., SPEAR, HANSON, PHILBROOK, JJ.

CORNISH, C. J. On the afternoon of December 23, 1916, the plaintiff and her husband left their home in Lisbon for Newport Junction, via the Maine Central Railroad. They arrived at their destination about 4.30 or 4.45 P. M., shortly after dark. They alighted from the train, which was a long one, and started to walk down the lighted platform toward the railroad station. On their way they met an employe of the defendant wheeling an express truck loaded high with express packages and bundles among them two kegs, one an eight gallon and the other a sixteen gallon keg. As the plaintiff was passing this truck, one of the kegs fell from the load and knocked her down. For the injuries thus sustained this action of tort was brought. The nature and extent of the injuries are set out in the plaintiff's writ in these terms: "Said keg or barrel of beer or ale swayed and fell from the top of said loaded truck with great force and violence and struck the plaintiff on her right side and threw her violently to the floor of said platform, thereby rendering her unconscious. fracturing two of her ribs, and greatly bruising and wounding said plaintiff both externally and internally, so that she became sick and disabled, suffered a great shock to her nervous system and intense pain both of body and mind" etc.

During the progress of the trial plaintiff's counsel sought to introduce evidence concerning injuries to plaintiff's back, spinal column and nerve centers. To this the defendant objected on two grounds;

first, that it was at variance with the declaration, and second, on the ground of surprise. The presiding Justice sustained the objection. Thereupon the plaintiff moved to amend her declaration by inserting the words "and wounding, bruising and injuring the muscles, nerves, ligaments and other parts of her body, about and around her right side and back, so that her spinal column, spinal cord and other parts of her back, externally and internally have become injured, disordered and diseased, and otherwise greatly bruising" etc. This amendment was allowed. The defendant's counsel then moved for a continuance of the case until the next term, on the ground of surprise and entire lack of preparation to meet the new issue. The court granted a postponement until the afternoon of the following day. Counsel for defendant on the following day filed a written motion for further continuance alleging surprise and the impossibility of procuring expert witnesses and preparing the defense on the new issue within the time allowed. This motion was overruled and the trial was ordered to proceed. To this ruling, refusing the continuance, the defendant duly excepted.

This exception under the admitted facts and circumstances of this case should be sustained. The granting or denying of a motion for continuance is of course recognized as a matter of judicial discretion, but the term judicial discretion does not mean the arbitrary will and pleasure of the Judge who exercises it. It must be sound discretion exercised according to the well established rules of practice and procedure, a discretion guided by the law so as to work out substantial equity and justice. It is magisterial, not personal discretion. The chief test as to what is or is not a proper exercise of judicial discretion is whether in a given case it is in furtherance of justice. If it serves to delay or defeat justice it may well be deemed an abuse of discretion. Incidents attending the progress of a trial are necessarily addressed to the discretion of the court. "That discretion is not to be exercised arbitrarily but to be guided and controlled, in view of all the facts, by the law and justice of the case subject only to such rules of public policy as have been wisely established for the common good." *York & Cumberland R. R. Co.* v. *Clark,* 45 Maine, 151, 154.

Hence the rule has been laid down and often applied in this State that a discretionary ruling is reviewable when some palpable error has been committed or when an apparent injustice has been done, but

not otherwise. *Schwartz* v. *Drinkwater*, 70 Maine, 409; *Goodwin* v. *Prime*, 92 Maine, 355; *Fitch* v. *Sidelinger*, 96 Maine, 70; *Graffam* v. *Cobb*, 98 Maine, 200; *McDonough* v. *Blossom*, 109 Maine, 141, 145; and see note to *Stevenson* v. *Sherwood*, 22 Ill., 238, 74 Am. Dec., 140.

In the case at bar the amendment was properly allowed by the court. It introduced no new cause of action, but simply alleged other injuries sustained by the plaintiff in addition to those specified in the original declaration. But that addition was an important one. It opened a new and wide field for investigation. It came as a surprise to the defendant's counsel who was unprepared to meet it. In view of the fact that the officers of the defendant corporation lived in New York and that communication with them and the procuring of necessary medical testimony was practically impossible within the time limited by the court, there is substantial ground for the contention that the denial of defendant's motion was the denial of a substantial right. It has been held in many States that if an amendment in pleading is made of a matter of substance and the adverse party is surprised, he is entitled to a continuance. See cases cited in note to *Stevenson* v. *Sherwood*, 22 Ill., 238; 74 Am. Dec., 140, 143; and it may be stated as the general policy of the courts to grant a sufficient postponement or continuance to the adverse party, if desired, to enable him to secure the testimony needed to meet the new issue. To refuse this is ground for exception. *Gerkin* v. *Brown & Sehler Co.*, 177 Mich., 45, 48 L. R. A. N. S., 224.

This wholesome rule, promotive of that even handed justice which the courts endeavor to dispense, should be applied to the case at bar and thereby the defendant be given its day in court of which apparently it was in part deprived. To grant the continuance would have preserved the rights of both parties, to deny it was to abridge the rights of the defendant.

It is unnecessary to consider the other exceptions or the motion.

The entry must be,

Exceptions sustained.

STATE OF MAINE *vs.* WILLIS M. PRIEST.

Piscataquis. Opinion March 29, 1918.

Questions to be considered by Law Court on appeal from verdict in criminal case. General rule governing the admissibility of confessions. Test to be applied in admitting confessions. Meaning of voluntary confession. Rule to be applied in determining whether a confession is a voluntary or involuntary one. Ruling of court on the admissibility of a confession; how reserved. Weight of confession. General rule of responsibility where two persons conspire for the common object of robbery and in carrying out their plan death is caused.

The respondent stands convicted of the murder of one George Herbert. Upon appeal from the decision of the presiding justice denying respondent's motion for a new trial, and upon exceptions it is

Held:

APPEAL.

1. That the question before the Law Court on the appeal is whether, in view of all the testimony, the jury were warranted in believing beyond a reasonable doubt, and therefore in declaring by their verdict, that the respondent was guilty of the offense with which he was charged.
2. A study of the evidence leads the court to answer this question in the affirmative without the slightest hesitation or compunction. The respondent practically convicted himself by his own testimony. No other conclusion could have been reached by a jury regardful of the oath they had taken.
3. It is obvious that the respondent and his accomplice, Wood, left their home in Milo and went to Herbert's camp many miles distant with the deliberate and well formed intention of committing a robbery; but in this case robbery unfortunately culminated in murder.

EXCEPTIONS.

1. The confessions were properly admitted. The legal test of their admissibility is whether they were extorted by some threat or elicited by some promise; or on the other hand were made from a willingness on the part of the accused to tell the truth and relieve his conscience. The former are involuntary and inadmissible, the latter voluntary and admissible.
2. The term voluntary, in the legal sense, does not mean that such statements must be made spontaneously, that they must be volunteered. They are equally voluntary if made in response to interrogatories, provided they emanate from the free will of the accused.

3. The evidence offered by the State in rebuttal of the respondent's denial of certain facts and conversations was also admissible. It did not come within the rule that the cross examiner of a witness or collateral matters is bound by the answers. Here the denial came from the respondent and pertained directly to his conduct in connection with the crime of which he was charged.
4. Certain questions put to the respondent by the court may have reflected upon the respondent's credibility, but in view of the overwhelming volume of testimony proving his guilt, the harm, if any, must have been negligible. A just verdict is not to be set aside because of a slight but comparatively harmless error in the admission or rejection of evidence
5. The alleged failure on the part of the presiding Justice in his charge to distinguish between the acts done by Priest and those done by Wood, the respondent claiming that Wood and not he had struck the fatal blow, creates no ground for exception.

Priest and Wood were conspirators engaged in the perpetration of a felony. While so engaged each was responsible for the acts of the other as well as for his own. When two persons conspire together for the common object of robbery, and in pursuance of that object one of them does an act which causes the death of a third party, both are regarded as principals and both may be convicted of murder. The State need neither allege nor prove that the respondent used the weapon with which the killing was done.

Respondents were indicted for the crime of murder at the September term of the Supreme Judicial Court, Piscataquis County. After trial, respondents were both found guilty. Respondents duly filed an appeal and also exceptions to certain rulings of presiding Justice. Judgment in accordance with opinion.

Case stated in opinion.

Guy H. Sturgis, Attorney General of the State of Maine, and James H. Hudson, County Attorney for Piscataquis County, for the State.

Leon G. C. Brown, and John S. Williams, for the respondent.

SITTING: CORNISH, C. J., SPEAR, HANSON, PHILBROOK, JJ.

CORNISH, C. J. In the early evening of Tuesday, March 14, 1916, the body of one George Herbert was discovered by two neighbors lying on the floor of his camp, face downward in a pool of blood. This camp was located at Rand Cove in Lake View Plantation, at a remote and somewhat secluded spot between Schoodic Lake and a branch of the Bangor & Aroostook Railroad known as the Medford cut-off. Herbert was last seen alive about noon of the previous day. He was

a man seventy-two or seventy-three years of age, whose history and antecedents were unknown, and who had lived alone in this camp for several years, a recluse, of quiet habits and somewhat feeble health. He was reputed to have considerable money about him and the report was not without foundation as subsequent events proved. The room, twelve by sixteen feet in size, in which Herbert was lying, was found to be in great disorder, showing not only evidences of a struggle but the apparent rifling of its contents. Chairs were overturned, the bedding and clothing were scattered on the floor, stains and spatters of blood appeared on the table, the stove, the floor and the walls, while the shade at one window had been drawn down by a blood stained hand. Mr. Herbert's head was bruised in several places, his scalp broken, and above the left ear his skull was shattered for a space of about three inches in length by one and one-half inches in width. Death was due, as the physicians testified, to this fracture of the skull and the consequent loss of blood. Fragments of a broken bottle upon some of which were found blood and matted hair, were scattered over the floor, probably the instrument with which the fatal blow was struck. A pail of water and a blood marked towel showed where the perpetrators had washed and wiped their hands after the scene had closed. The tracks of two men in the deep snow led from the camp to the shore of the lake and thence up the lake for a considerable distance until they reached and followed the railroad track. These were, at the time, the only clues.

The officers and a detective promptly took up the case and ferreted out many facts that pointed to the guilt of the respondent. On July 19, 1916, he was arrested in Portland. After being taken to the police station he was interrogated by the detective in presence of police officers and his answers connected him directly with the tragedy. Another young man, named Roy Wood, was his accomplice, as he stated, and this accomplice has never been apprehended. The evidence leads to the reasonable inference that he fled to Canada the next day after Herbert was killed. He has never been found, although extended search has been made for him. The next day, July 20, the respondent was taken to Dover and at the Dover court house was interrogated at length by the County Attorney. This examination was taken down by a stenographer and a transcript of the notes was subsequently signed by the respondent. The admissibility of these two confessions, or of the statements made by Priest on these two occasions, was resisted by

his counsel but they were admitted by the court and the exceptions on this branch of the case will be considered later.

At the March term, 1917, of the Supreme Judicial Court in Piscataquis County, the respondent was tried on an indictment for murder and convicted by the jury. The case is now before the Law Court on appeal from the decision of the Justice before whom it was tried, denying a motion for new trial, (R. S., Chap. 136, Sec. 28), and on exceptions.

APPEAL.

The evidence, covering nearly seven hundred printed pages, has been examined with care and as a result the court has no hesitancy in holding that the verdict is fully justified. The respondent took the stand and testified in his own behalf, and from his testimony alone, balanced in the judgment of reasoning men, conviction could well have followed. Out of his own mouth, as well as the mouth of others, he was condemned. True, on some points he attempted to deny certain facts or to evade the consequences of certain acts, but his attempted explanations did not explain and his attempted excuses did not excuse. The intelligence of the jury pierced the veil, and separated the true from the false and the probable from the improbable.

Viewing the tragedy in the light of all the testimony and the circumstances, it is obvious that the respondent and his companion Wood left their home in Milo, where they had both been at work until within a short time, with the deliberate and well formed intention of going to Rand Cove, a distance of about twenty miles, and obtaining money from Herbert, both being in need of it as Priest testified. Robbery was undoubtedly their purpose, but in this case robbery unfortunately culminated in homicide. The respondent's familiarity with the premises, having worked near by Herbert's camp during the previous Summer, Fall and early Winter, his knowledge of Herbert's solitary life and reputed possession of money, the circuitous route taken by them on Monday, March 13, to reach the camp from Milo, partly by rail and partly on foot four miles across Schoodic Lake in the midst of a heavy snow storm, the scene in the camp after their arrival, two young men each about twenty years of age over against one of seventy-three, the condition of the camp after the struggle, the nature of the

wounds that caused his death, the heartless abandonment of him in his desperate or dying condition, although help could have easily been secured, the route of hurried departure designed to escape detection, their studied separation after the train was taken, the stealing from Herbert's camp of four hundred dollars as the fruit of their wicked enterprise, its equal division between them soon after they left, the retention by the respondent of his share and the sending of a little over one hundred dollars to his friend Ferris in Portland, as he admits, or one hundred and fifty as Ferris testifies, with instructions for Ferris to keep it for him and if he did not call for it in ten or fifteen years to keep it for himself, his subsequent going to Portland where he spent his ill gotten gains, and where he was finally arrested, all combine to prove beyond any reasonable doubt a premeditated and concerted robbery, ending in the brutal murder of an innocent, unprotected and somewhat enfeebled old man.

The claim of the respondent that he simply went to Herbert to borrow money with which to meet an outstanding and pressing bill, while on their way to Millinocket for work, that Herbert twice treated them to liquor and himself drank with them, then suddenly, without the slightest provocation, became seemingly crazy and pulling a revolver from his bed threatened to kill them, and when this weapon was wrested from him he seized Priest by the throat, threw him twice upon his knees, and a severe struggle ensued, Herbert having the better of the assault until Wood seized a stick of wood and struck Herbert over the head, felling him to the floor, this claim of self defense needs no other refutation than the number and age of the respective parties, the entire absence of any marks, bruises or even scratches upon Wood or Priest the next morning after the affray, and the condition of Herbert as left by them with bruised and shattered skull lying in his own blood. The "poor poor dumb mouths" speak to disprove the flimsy excuse of self defense.

The single question before the Law Court on the appeal is whether, in view of all the testimony, the jury were warranted in believing beyond a reasonable doubt, and therefore in declaring by their verdict, that the respondent was guilty of murder. *State* v. *Lambert*, 97 Maine, 57; *State* v. *Albanes*, 109 Maine, 199. A painstaking study of the case leads us to answer this question in the affirmative without the slightest hesitation or compunction. In fact we think no other conclusion could have been reached by a jury, regardful of the oath

they had taken, than the guilt of the accused. The appeal cannot be sustained.

EXCEPTIONS.

Exceptions number 1, 2 and 3, relate to the admission of the so called extra-judicial confessions, one made to the detective and arresting officer at the police station in Portland on July 19, 1916; the second to the County Attorney in the presence of officers in Dover on July 20, 1916; and the third a mere admission on July 21, 1916, as to a particular point of his story which had excited the curiosity of the officers. These three exceptions will be considered together. Counsel for respondent contends that these confessions were obtained by inducements or threats, were involuntary and therefore inadmissible.

The rule established in this State governing the admission of extra-judicial statements or confessions of the respondent in a criminal case was clearly set forth in the leading case of *State* v. *Grover*, 96 Maine, 363. It was there stated that the test of their admissibility is whether the statements or confessions were extorted by some threat or elicited by some promise, whether they were made for the purpose of escaping threatened evil or to secure promised good, thereby being regarded as involuntary, or were made from a willingness on the part of the accused to tell the truth and relieve his conscience, thereby being regarded as voluntary. The former are inadmissible, the latter admissible. As was further stated in that case, in earlier days when the respondent was deprived of counsel and not allowed to testify in his own behalf, the courts were quite strict in keeping from the jury evidence of confessions when there was any reasonable doubt of their being voluntary. But, at the present time, when the respondent is allowed the assistance of counsel and also is permitted to testify in his own behalf in explanation of his acts and statements, there is less reason for such restrictions, and more may be left to the jury as to the probative force of such confessions. The term voluntary in the legal sense does not mean that such statements must necessarily be made spontaneously, that they must be volunteered. They are equally voluntary if made in response to interrogatories, provided they emanate from the free will of the accused. Whether in a given case the alleged confession is voluntary or involuntary is a question of fact to be determined by the presiding Justice upon evidence offerable by both

sides, and his ruling upon that preliminary point can be reversed by the Law Court only when the court can find as a matter of law that the confession was involuntary in the legal sense. His finding has the force of the verdict of a jury and is allowed to stand unless the contrary inference is held to be the only reasonable one. After its admission by the presiding Justice its weight is for the jury, depending upon all the circumstances under which it was obtained, and the respondent then has the right to ask the jury to give little heed to it or to disregard it utterly because improperly secured. The presiding Justice may also instruct the jury that they shall not give credence to it, if they find it to have been improperly obtained, even though he has allowed it to be offered.

In the case at bar these rules were strictly adhered to and the legal rights of the respondent were safeguarded with unusual care and caution. Ordinarily the evidence upon the question of admissibility is taken out before the jury and at its close the ruling is made. Here this preliminary evidence was heard first by the presiding Justice in the absence of the jury, evidence was introduced on both sides at considerable length and the court ruled that the confessions were admissible. Then the same preliminary evidence was again introduced in the presence of the jury, the same ruling was made and the confessions were admitted.

We are of the opinion that the ruling of the presiding Justice was correct. It appeared that in the Portland police station, before the respondent made any statements whatever, he was told by the detective to be careful and that any statements made by him might be used against him in court. It also appeared that at Dover the County Attorney prefaced his interrogatories by this declaration: "I am the County Attorney of Piscataquis County. I understand that you made certain statements to Mr. Landry (the detective) and we thought we would give you an opportunity to tell it as it is. We want the truth. Of course you understand that this may be used later in Court proceedings and I understand that you are willing to make this statement of your own free will and accord. Is that right, Mr. Priest?" and Mr. Priest replied, "Yes sir." Then followed a detailed examination taken down by a stenographer, in the course of which the respondent also stated that he had answered Mr. Landry's questions voluntarily in Portland. There was no evidence of either threats or promises, of fear, or hope of reward on either occasion. The elements

essential to an involuntary confession were wholly lacking. No advantage was taken of the respondent nor sought to be taken. The truth was sought and he was ready and willing to tell his story.

The third exception, relating to the question put to him on July 21st, as to why his companion and himself after their departure had left the railroad track at a certain point and concealed themselves beneath a tree, and the respondent's answer that it was because a train was coming, was a mere admission. *State* v. *Gilman*, 51 Maine, 206, 225. Moreover, the respondent, when on the stand, corroborated the statement he had made to the officer. In fact the same is substantially true of the important facts contained in the two confessions. In practically all essential particulars the respondent, as a witness before the jury, confirmed his previous statements at Portland and Dover, and it is significant that he himself did not claim that these confessions were elicited from him in any improper way. The record further shows that when admitting the confessions the presiding Justice called attention to the fact that the jury still had the power to correct any error in their admission, and again in his charge he left to the jury as a fact both the voluntariness of the confessions and their weight under all the circumstances, calling their attention specifically to the rule of law governing the situation and to the facts bearing thereon.

The respondent takes nothing by these exceptions.

EXCEPTIONS 4, 5, 6 and 7.

These relate to the admission of certain evidence offered by the State in rebuttal. On cross examination the respondent had denied certain conversations with one Ferris, his Portland friend. In rebuttal the State introduced Ferris to contradict the respondent and to state what those conversations were. The contention of counsel for the respondent is that these conversations related to immaterial matters, that the State was therefore bound by the answers received and could not contradict them. It is true that a witness cannot be cross examined on collateral matters for the purpose of subsequently contradicting and impeaching his testimony in relation to such collateral matters, *State* v. *Benner*, 64 Maine, 267, cited by respondent, but that principle has no application here. The denial here came from the party to the cause, the respondent, and the evidence was not collateral but pertained directly to his conduct in connection with

the crime for which he was being tried. Whether or not he had written to Ferris a short time before Herbert was killed, asking him to procure and send him some sleeping powders or knock-out drops and the conversation he had with Ferris in Portland after Herbert's death to the effect that if he (Priest) had had the sleeping powders "the job would not have been done that way" were vital facts as bearing upon Priest's connection with the robbery and homicide, and the premeditated character of his acts. The evidence was properly admitted.

Exception 8 relates to certain questions put by the court to the respondent, during his cross examination. The court inquired as to the reasons why the respondent and his companion did not procure aid for Herbert in the condition in which they left him, and the reply was "I think we spoke about it and we didn't dare to." Asked why not, the answer was "because of what had happened, we didn't think any one would believe us." The court then added, "Do you think so now," and the respondent replied "I don't know." Neither objection was made nor exception taken by the respondent's counsel to these questions at the time, nor did they ask to have the evidence stricken out. The last question doubtless reflected on the credibility of the respondent, but in view of the overwhelming volume of testimony proving his guilt the harm, if any, must have been negligible. A just verdict is not to be set aside because of a slight but comparatively harmless error in the admission or rejection of evidence.

The 9th and last exception is based on the alleged failure on the part of the presiding Justice in his charge to distinguish between the acts done by Priest and those done by Wood; the respondent claiming that Wood and not he had struck the fatal blow.

Priest and Wood were conspirators engaged in the perpetration of a felony. While so engaged each was responsible for the acts of the other as well as for his own. No principle of criminal law is more firmly established than this, that when two persons combine and conspire together for the common object of robbery and in pursuance of that object one of them does an act which causes the death of another both are regarded as principals and both may be convicted of murder. The State need neither allege nor prove that the respondent used the weapon with which the killing was done. 13 R. C. L., 729; *People* v. *Friedman*, 205 N. Y., 55, 45 L. R. A. N. S., 45, and note; *People* v.

Lawrence, 143 Cal., 148, 68 L. R. A., 193, and note; *State* v. *Smith*, 32 Maine, 369; *State* v. *Smith*, 33 Maine, 48. This rule of law was fully explained to the jury in the charge.

This exception lacks merit.

Our conclusion therefore is, that the verdict rendered was in accordance with the law and the evidence, that the respondent was convicted of a crime of which he was undoubtedly guilty and the entry must be,

Appeal dismissed.
Motion for new trial denied.
Exceptions overruled.
Judgment for the State.

STATE OF MAINE

vs.

FORD TOURING CAR No. 1440316,

John Karakus, Claimant and Appellant.

Oxford. Opinion March 30, 1918.

Intoxicating Liquors. Necessary allegations in a complaint for the offense of keeping or depositing intoxicating liquors. Necessity of a legal seizure to have jurisdiction in a proceeding in rem. Rule where an offense is created by statute and there is an exception in the enacting clause as to setting out the exception.

A preceeding in rem against an automobile under Chap. 294, of the Public Laws of 1917.

The complaint upon which was issued the warrant by virtue of which the seizure of the car was made alleged that "at said Rumford intoxicating liquors were unlawfully kept, deposited and transported by one John Karakus in a certain . . . Ford Touring Car owned and driven by said Karakus on the public way in said Rumford;"

Held: That the complaint cannot be held to charge the offense of keeping and depositing intoxicating liquors, as there is no allegation of the place at which kept and deposited, nor to charge the offense of illegal transportation, the word "knowingly" being wholly omitted, and

That no valid warrant can be issued upon it.

When an offense is created by statute and there is an exception in the enacting clause, the indictment or complaint must negative the exception and so a libel in rem under such statute.

Libels, and monitions, are of a criminal nature and the rules applicable to criminal cases apply.

A legal seizure is essential to jurisdiction of a proceeding in rem by libel for the forfeiture of intoxicating liquors, containing vessels, and, under Chap. 294, Public Laws, 1917, of vehicles engaged in transporting them.

Proceedings under Public Laws, 1917, Chap. 294, in re seizure of an automobile claimed to be illegally transporting intoxicating liquors. Claim for automobile was duly filed in Municipal Court and appeal entered to Supreme Judicial Court, at which term the case was reported to the Law Court for determination of all questions presented. Judgment in accordance with opinion.

Case stated in opinion.

Frederick R. Dyer, for the State of Maine.

Aretas E. Stearns, and James B. Stevenson, for defendant.

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

BIRD, J. This case is reported for the determination of this court upon an agreed statement of facts of which the complaint and warrant, the officer's return thereon, and the libel and monition are made part.

From the agreed statement of facts, it appears that on the seventh day of September, 1917, a deputy of the Sheriff of Oxford, without warrant, seized at Rumford, a Ford Automobile, described substantially as in the title of this case, belonging to one John Karakus of Rumford, and also certain intoxicating liquors belonging to other parties. On the following day the deputy made complaint before a magistrate and procured a warrant upon which he made return that he had seized an automobile described substantially as above and as in the complaint. No arrest was made upon the warrant nor any return of the seizure of liquors. On the same day the deputy filed his libel with the magistrate issuing the complaint on which the latter

issued a monition on the return day of which Karakus appeared and filed his claim, as owner, for the automobile alleging therein, among other things, that it was seized and taken into possession by the deputy without proper warrant issued from any court of competent jurisdiction and without lawful authority and has been held by said deputy "and is now in his possession without any authority, right or claim."

Upon hearing the magistrate decreed the forfeiture of the automobile and the claimant appealed, claiming that the complaint, warrant and libel are defective and insufficient in law, because the complaint alleges that intoxicating liquors were kept, deposited and transported by John Karakus; because in neither complaint nor libel is it alleged that John Karakus was not at the time of the seizure of said automobile a common carrier and that said automobile was not then and there being used in the business of a common carrier; because the libel does not allege that at the time of seizure the automobile contained intoxicating liquors intended for illegal sale in this State and because the libel, if otherwise sufficient in form and substance, is void, because founded "upon a complaint and warrant which are defective and insufficient in law."

It is agreed in the statement of the parties that this proceeding in rem is instituted under Chap. 294 of the Public Laws of 1917, the part of which here material is as follows: "All automobiles, trucks, wagons, boats or vessels, and vehicles of every kind, not common carriers, containing intoxicating liquors intended for illegal sale within the state, found within the state in the possession or in the control of any person using them for the transportation of intoxicating liquors intended for illegal sale within the state, shall be seized by any officer seizing the liquors transported therein, shall be libeled as is provided for the libeling of intoxicating liquors and the vessels in which they are contained under chapter one hundred and twenty-seven of the revised statutes, and shall be declared forfeited by the court and sold in the same manner as is provided for the sale of vessels containing intoxicating liquors."

Evidently this provision of statute is in aid of R. S., Chap. 127, Sec. 20 (amended Chap. 291, Sec. 2, Public Laws 1917) forbidding the transportation knowingly from place to place in the State of intoxicating liquors intended for unlawful sale within the State.

The complaint alleges that "at said Rumford in said County intoxicating liquors were unlawfully kept, deposited, and transported by John Karakus in a certain. . . . Ford Touring Car numbered 1,440,316, owned and driven by said John Karakus, on the public way in said Rumford. . . ." The complaint cannot be held to charge the offense of keeping and depositing intoxicating liquors under R. S., Chap. 127, Sec. 27, as there is no allegation of the place at which kept and deposited; *State* v. *Roach*, 74 Maine, 562, 563; nor yet to charge the offense of illegal transportation, the word "knowingly" used in the Statute being wholly omitted. *State* v. *McDonough*, 84 Maine, 488, 489. In either case, no valid warrant could issue upon it. There is still a further defect, if it be necessary to seek others. There is no allegation in the complaint that the person using the automobile for the transportation of intoxicating liquors, was not a common carrier. The exception being in the enacting clause of the statute, and not introduced as a proviso, it must be negatived in that part of the complaint which makes the automobile a subject of seizure. *State* v. *Godfrey*, 24 Maine, 232, 234, 235; *State* v. *Turnbull*, 78 Maine, 392, 395, 396; *State* v. *Damon*, 97 Maine, 323, 325. The libel should contain the same negative allegation. It, and the monition, are of a criminal nature and the rules applicable to criminal cases apply. *State* v. *Intoxicating Liquors*, 80 Maine, 91, 93. "No rule of criminal pleading is better established than that proceedings before magistrates, being courts of limited jurisdiction, must show upon their face that the magistrate has jurisdiction of the cause." *State* v. *Intoxicating Liquors*, supra; See *State* v. *Whalen*, 85 Maine, 469, 472. A legal seizure is essential to jurisdiction of a proceeding in rem by libel for the forfeiture of intoxicating liquors, containing vessels, and, under Chap. 294, Public Laws 1917, of vehicles; see R. S., Chap. 127, Sec. 30; *State* v. *Intoxicating Liquors*, 110 Maine, 260, 263, 264. There must be, therefore, in accordance with the stipulation of the parties, an entry dismissing the libel and for a return.

Libel dismissed.
Automobile ordered returned to claimant.

MAY E. KELSEA, Petitioner, *vs.* THOMAS L. CLEAVES, et al.

York. Opinion March 30, 1918.

Dower. Public Laws, 1895, Chap. 157, interpreted. R. S., Chap. 80, Sec. 18. R. S., Chap. 65, Sec. 9.

Petition for partition. The respondents deny the right of partition upon the ground that the petitioner, at the date of her petition, was not seized in fee simple and as tenant in common in or to the premises described in the petition.

The case is reported to this court upon the following agreed statement of facts.

"The real estate of which partition is prayed was at one time owned in fee simple by Edgar O. Stephenson. The present petitioner was formerly the wife of said Edgar O. Stephenson. On the 15th day of October, A. D. 1894, and while this petitioner and the said Edgar O. Stephenson were still living together as husband and wife, the said Edgar O. Stephenson conveyed the premises in question to Sabrina Stephenson; but the petitioner, then the wife of said Edgar O. Stephenson, did not join in the deed and has not since barred her dower or interest in the property.

On the 22nd day of January, A. D. 1897, the petitioner obtained a decree of divorce upon her petition against the said Edgar O. Stephenson."

Held: Since the conveyance of the land in question was made before the passage of Chap. 157, Public Laws 1895, abolishing dower, without a release or bar of dower by the wife, that she now takes only such rights as she would have taken had his decease occurred, namely, a right of dower against the grantee or those claiming under him.

Petition for partition. Defendants each filed motion to dismiss, which motion was overruled by presiding Justice; to which ruling exceptions were filed. By agreement of parties exceptions were withdrawn and the case reported to Law Court upon certain agreed statements. Judgment in accordance with opinion.

Case stated in opinion.

Howard Davies, for plaintiff.

Leroy Haley, and Stone & Stone, for defendants.

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

PHILBROOK, J. Petition for partition. The respondents deny the right of partition upon the ground that the petitioner, at the date of

her petition, was not seized in fee simple and as tenant in common in or to the premises described in the petition. During the progress of the case motions to dismiss were filed and overruled. Exceptions were taken and allowed but the docket entries, made part of the record, show that the exceptions were withdrawn, and the case comes to us on agreed statement, this court to determine whether the petitioner is owner in fee and tenant in common in or to the premises described in the petition as alleged by the petitioner. The agreed statement is as follows:

"The real estate of which partition is prayed was at one time owned in fee simple by Edgar O. Stephenson. The present petitioner was formerly the wife of said Edgar O. Stephenson. On the 15th day of October, A. D., 1894, and while this petitioner and the said Edgar O. Stephenson were still living together as husband and wife, the said Edgar O. Stenphenson conveyed the premises in question to Sabrina Stephenson; but the petitioner, then the wife of said Edgar O. Stephenson, did not join in the deed and has not since barred her dower or interest in the property.

On the 22nd day of January, A. D. 1897, the petitioner obtained a decree of divorce upon her petition against the said Edgar O. Stephenson."

The petitioner seeks a construction of Sec. 8 of Chap. 157 of the Public Laws of 1895 which is one portion of an act commonly known as an act to abolish dower and to establish the rights of widows and widowers in the real estate of deceased husbands and wives by creating title by descent. The act was amendatory not only of the statute relating to the descent of real estate, but also of that relating to divorce, and the rights of the wife when a divorce was decreed to her for any fault of her husband except that of impotence. Prior to this act of 1895, the wife obtaining such decree was entitled to dower in her husband's real estate "to be recovered and assigned to her as if he were dead." Under the act of 1895 which, as we shall see, abolished dower, the wife obtaining such decree is entitled to one-third, in fee, in common and undivided, of all her husband's real estate, except wild lands, "which shall descend to her as if he were dead."

The act of 1895, in plain terms, abolished dower and in place thereof provides that upon the death of the husband one-third of his real estate descends to his widow, if there be issue, one-half to his widow if

no issue and all if there be no kindred. Thus it will readily appear that it was the plain intention of the legislature, having abolished dower and provided for the descent of real estate to his widow at his decease, in lieu thereof, to guard the interests of the wife who obtained such a decree of divorce as we have referred to, by making provisions similar to those made for the widow in case of the husband's death. The two provisions are correlative.

But the legislature wisely and carefully guarded against complications which might arise in cases where the husband had conveyed real estate without the joinder of the wife prior to the passage of the act, and whereby titles of third parties might be affected at his decease. In section eight of the act of 1895 it is provided that "If the wife of the grantor or mortgagor of lands heretofore conveyed or mortgaged has not released or barred her right of dower in the same, she shall be entitled, as against the grantee or mortgagee, and those claiming under him, to her right of dower only, as now existing." Could it have been the intention of the legislature to preserve only a right of dower, at decease of her husband, in lands granted before the act, and without the joinder of the wife, and at the same time, and by the same act, provide a right of fee simple in those same lands for the wife who was decreed a divorce for the fault of her husband? Such a contradiction of provisions would stultify the wisdom of the law making body. In the construction of statutes the entire act must be considered and its provisions be made harmonious one with the other. *Smith* v. *Chase*, 71 Maine, 164.

It is the opinion of the court, since the conveyance of the land in question was made before the passage of the act, without a release or bar of dower by the wife, that she now takes only such rights as she would have taken had his decease occurred, namely, a right of dower against the grantee or those claiming under him. Such a construction is in harmony with the well established rules for construction of statutes. The petitioner not being seized in fee simple and as tenant in common as to the lands described in the petition the mandate must be,

Petition for partition denied.

JOHN MCKINNON, by POPE D. MCKINNON,
His father and next friend,

vs.

BANGOR RAILWAY AND ELECTRIC COMPANY.

Penobscot. Opinion March 30, 1918.

Amendments to declarations. General rule as to when amendment may be allowed.

On exceptions to the allowance of an amendment to the original declaration in an action for tort.

After verdict for plaintiff, which was set aside on defendant's motion, the former offered an amendment setting forth defendant's acts of negligence other than those described in the original declaration, and which plaintiff declared were negligent acts of the defendant contributory to the same injury on account of which he brought his suit. The defendant claims that this amendment was not allowable because it introduced a new cause of action.

Held:

1. A cause of action may be defined, in general terms, to be the invasion of a legal right without justification or sufficient excuse.
2. The primary right belonging to the plaintiff, the corresponding duty resting upon the defendant, the breach of that right, without justification or sufficient excuse, constitute a cause of action.
3. Several distinct negligent acts or breaches of duty of one person may contribute to cause an injury to another. Although any one of these negligent acts may be a ground on which the injured person could present his case, yet, as he has suffered but a single injury, he has only one cause of action.
4. An amendment alleging other negligent acts of the defendant at the same time, which contributed to the injury, neither changes the form nor the cause of action.
5. The ultimate duty of the defendant was to so conduct its business as not to injure others. A breach of that duty, without justification or sufficient excuse, not necessarily the particular manner of that breach, gives the injured party the cause of action.
6. The amendment was properly allowed.

On exceptions to the allowance of an amendment to original declaration. Judgment in accordance with opinion.

Case stated in opinion.

W. R. Pattangall, E. P. Murray, and H. E. Locke, for plaintiff.

Ryder & Simpson, for defendant.

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

PHILBROOK, J. This case has been once before this court upon motion by the defendant to set aside a jury verdict rendered in favor of the plaintiff, and is reported in 116 Maine, 289. The motion was sustained and a new trial granted because the evidence clearly showed that the plaintiff was guilty of negligence in falling upon the fender of the defendant's car, that his negligence contributed to the injuries he received, and that the defendant was guilty of no independent subsequent negligence after the plaintiff's negligence. Thereupon his counsel, before proceeding to a second trial, presented an amendment to the original writ in the form of two counts. Against the objection of defendant's counsel the amendment was granted, an exception was taken and allowed, and the case is now before us on that exception. The ground of the objection and exception is that the amendment introduced a new cause of action.

The original declaration, consisting of but one count, alleged in brief that the plaintiff was crossing a street in the city of Bangor, that while he was so doing the defendant ran one of its cars negligently, recklessly, unlawfully, at an excessive speed, without giving due notice of its approach, and thereby struck the plaintiff and threw him upon the fender of the car; that after the plaintiff was so thrown upon the fender, the defendant negligently, recklessly and unlawfully failed to stop the car, so that the plaintiff, lying on the fender, was carried quite a distance to a point where a second car of the defendant was standing stationary on the car track; that the two cars collided, the fender on which plaintiff was lying striking the rear end of the second car and thus the plaintiff received his injuries. The plaintiff in concluding his count averred that this injuries were "caused wholly by the reckless, negligent and unlawful manner in which the defendant, by its servants, ran and managed its said car," which we interpret to mean the car on which was the fender and which we will call the first car.

The first count in the amendment alleged the negligent driving of the first car in language similar to that used in the original count, but

added that the defendant negligently and carelessly failed to sand the track, so that it was impossible to stop the car; that there was a pail of sand upon the front platform of the first car, on which the plaintiff was being borne to his injury; that the motor man and conductor negligently and carelessly failed to put the sand on the track; that the car slipped and skidded, and that "solely because of the negligence of the defendant and its servants as heretofore set forth" the plaintiff received his injuries. In the same first count of the amendment the plaintiff also averred that the defendant was negligent, through its servants, because the conductor of the second car was absent from, and in the street some distance ahead of the second car; that the motorman of the second car was engaged in an altercation with a person in the street in front of his car, so that neither the conductor nor motorman of the second car, nor any other servant of the defendant, was in the control of the second car; that "because of the negligence of the defendant and its servants, as regards care and control of said second car, and because of the negligence of the defendant and its servants as hereinbefore alleged" the collision and injuries ensued. This count closes with the averment of the plaintiff "that the injuries then and there received by him were caused wholly by the negligence of the defendant and its servants in the operation and care of its cars and care of its tracks as hereinbefore set forth."

The second count in the amendment made no reference to the reckless and rapid driving described in the original declaration, nor to the failure to sand the tracks, but in apt language, similar to that used in the first count of the amendment, alleged negligence on the part of the company in not having the second car under proper control and in proper care of a motorman, conductor, or other servant, and closes with the averment that his injuries "were caused wholly by the negligence of the defendant and its servants in the care and control of its car as hereinbefore set forth."

Did these proposed amendments introduce any new cause of action. We think not, since a cause of action, as defined by *Pomeroy on Remedies*, Sec. 452, and adopted as a proper definition by this court in *Anderson* v. *Wetter*, 103 Maine, 257, is this: "The primary right belonging to plaintiff and the corresponding duty belonging to defendant, and the delicit or wrong done by the defendant, consisting in a breach of such primary right or duty, constitute a cause of action." In *Emory* v. *Hazard Powder Co.*, 53 Am. Rep., 730, it is said that "a

cause of action may be defined in general terms to be a legal right, invaded without justification or sufficient excuse. Upon such invasion a right of action arises, which entitles the party injured to some relief by the application of such remedies as the laws afford. But the cause of action and the remedy sought are entirely different matters." Our own court in *Anderson* v. *Wetter*, supra, adds "a cause of action is therefore neither the circumstances that occasioned the suit, nor the remedy employed, but a legal right of action."

In a recent and very exhaustive note upon the subject of causes of action, and amendments to declarations setting out such causes, found in Ann. Cas. 1913 D. at page 742, the annotator says "Several distinct negligent acts or breaches of duty of one person may contribute to cause an injury to another. Although any one of these negligent acts may be a ground on which the injured person could present his case, yet as he has suffered but a single injury he has only one cause of action."

Since this is true the courts, with much uniformity, have allowed amendments alleging additional negligent acts, where the wrong may be composed of various elements, but a violation of the same right. We cite a few instances from cases like the one at bar, where pedestrians or drivers of teams have suffered injuries from being struck by trains or street cars.

In *McIntire, et ux.*, v. *Eastern Railroad*, 58 N. H., 137, the declaration alleged that defendant did not make a safe and convenient crossing for travellers, and negligently suffered it to remain unsafe. The court allowed an amendment adding an allegation of negligence in the management of defendant's locomotive and cars at the time of the collision. The court speaking through Bingham, J., said "The plaintiff alleged in the declaration that the wife was injured by the negligence of the defendants. An amendment alleging other negligent acts of the defendants at the same time, which contributed to the injury, neither changed the form nor the cause of action."

In *Flaherty* v. *Butte Electric Ry. Co.*, 115 Pac. Rep., 40, a child was struck by a street car and injured grievously. In the original declaration the negligence charged was failure of the motorman to turn off the electric current and apply the brakes. The amendment allowed by the court, under objection that a new cause of action was introduced thereby, charged negligence of the motorman to keep a proper and vigilant outlook. In that case the court cited many authorities

sustaining its decision and declared that the theory of all such cases is that so long as the plaintiff adheres to the injury originally declared upon he may amend his pleading by alleging that the injury was caused in a different manner without infringing the general rule against introducing a different cause of action. Supporting this rule may be cited *Raleigh & G. R. Co.* v. *Bradshaw*, 39 S. E. Rep., 555; *Harris* v. *Central R. R. Co.*, 3 S. E., 35; *Alabama G. S. R. Co.* v. *Chapman*, 3 So., 813.

Allowance of amendments in actions to recover for an injury, by stating therein facts other than were stated in the original declaration, is well illustrated in *Chapman* v. *Nobleboro*, 76 Maine, 427, an action to recover damages for injuries caused by a defective way. "The first of the amendments," says the court, "is not a change in, but an addition to the description of the alleged defect in the way, and the second relates to the manner in which the accident happened, leaving the accident itself and the result of it the same. There is therefore no change in the cause of action, either in the alleged defect or the result of it, and the allowance was within the discretion of the presiding justice."

In *Babb* v. *Paper Co.*, 99 Maine, 298, an amendment was allowed giving additional description of the conditions which might make the defendant's operation of an ash hopper negligent; the court declaring that no new cause of action was introduced, since the failure to properly empty the hoppers, or negligently allowing the hopper to become and remain loaded was the principal thing. See also *Whitney* v. *Gilman*, 33 Maine, 273.

The ultimate duty of the defendant was so to conduct its business as not to injure others. A breach of that duty, without justification or sufficient excuse, not necessarily the particular manner of the breach, gives to an injured party the cause of action. Under the well established rules of law we think the amendments offered were properly allowable.

Exceptions overruled.

MARY I. HUGHES, Admrx.,

vs.

METROPOLITAN LIFE INSURANCE COMPANY.

Androscoggin. Opinion March 30, 1918.

Life Insurance contract. Fraud or misstatements in application. General rule as to the knowledge of the agent binding the Company. False statements as to whether applicant has consulted or been treated by a physician.

There are two actions of assumpsit brought by the Administratrix of the estate of George A. Gordan upon two policies of life insurance. The first policy was issued February 23rd 1915, for the amount of fire hundred dollars. The second was dated June 4th 1915, and was for one thousand dollars. The insured died September 8th 1915.

The defendant company resists payment on the ground that the insured misstated the facts with reference to his having had a disease of the heart and kidneys; his habits as to his use of intoxicating liquors; his treatment at a sanitarium or hospital, and his treatment by other physicians.

The plaintiff at the trial, contended that those answers which were in fact proved to be false by the defendant company, were waived by it, because of the fact that the agent, Mr. Tabachnick, whose name appeared on the policy and who effected the insurance, had knowledge of the true facts. It was also contended that the medical examiner was an agent of the company. The jury found for the plaintiff in each case.

These cases come up on motion and exceptions.

Held:

1. The medical examiner is not an agent of the company, either under the statute or the common law.
2. That the knowledge of the agent is constructive knowledge of the company, under the statute, regardless of the source, from whom the agent's knowledge may come.
3. That so far as material false representations to the medical examiner are known to the agent they are known to the company.
4. That, on the contrary, any material false representation made to the medical examiner if not known to the agent is not the knowledge of the company.
5. That so far as material false representations made to the medical examiner, coincide with the agent's knowledge, thereof, they are constructively known to the company.

6. But that beyond such coincidence they are not constructively known to the company, will not be deemed to be waived, will operate as a fraud, and vitiate the policy.
7. That in the medical examination in each policy, are found material false representations beyond the knowledge of the agent.
8. That, for these reasons the policies are void.

Action of assumpsit to recover amount due on two policies of life insurance. Defendant filed plea of general issue, and also brief statement setting forth in substance that certain statements claimed as warranties in the application were not true, but on the contrary false. Verdict for plaintiff on each policy for the amount due thereon. Defendant filed motion for new trial; also exceptions to certain rulings of presiding Justice. Judgment in accordance with opinion.

Case stated in opinion.

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

White & Carter, for defendant.

SITTING: CORNISH, C. J., SPEAR, HANSON, PHILBROOK, JJ.

SPEAR, J. These are two actions of assumpsit brought by the Administratrix of the estate of George A. Gordan upon two policies of life insurance. The first policy was issued February 23rd 1915, for the amount of five hundred dollars. The second was dated June 4th 1915, and was for one thousand dollars. The insured died September 8th 1915.

The defendant company resists payment on the ground that the insured misstated the facts, with reference to his having had a disease of the heart and kidneys; his habits as to his use of intoxicating liquors; his treatment at a sanitorium or hospital, and his treatment by other physicians.

The plaintiff at the trial, contended that those answers which were in fact proved to be false by the defendant company, were waived by it, because of the fact that the agent, Mr. Tabachnick, whose name appeared on the policy and who effected the insurance, had knowledge of the true facts. The jury found for the plaintiff in each case.

These cases come up on motion and exceptions. The first exception raises the question, whether the defendant company is bound by the knowledge of its agent. As this exception is solved in the discussion and determination of the motion, it is unnecessary to refer to

it specifically. It may also be said that the second exception, which raises the question, whether the medical examiner is an agent for the company whose knowledge of the risks binds the company, was taken care of by the charge of the presiding Justice, but will be referred to as it becomes material in a discussion of the motion.

The result of the motion depends upon the construction of the following statute, found in R. S., Chap. 53, Sec. 119: "Such agents. . . . 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."

The language of this statute has been so often construed that citation of cases is no longer necessary.

Under this statute there can be no question that the knowledge of Tabachnick, the agent, who represented the company, must be regarded as the knowledge of the company with reference to every physical and mental condition of Gordan of which he had knowledge, and of the medical or other treatment which he knew he had received, whether administered in a sanitorium or elsewhere; and any misrepresentations by Gordan in the application, which were within the knowledge of the agent, however obtained, were the knowledge of the company, and, in the language of the statute, must be deemed as "waived by it as if noted in the policy."

But Gordan, the insured, made representations not only to the agent, Tabachnick, whose name appeared upon the policy, but to the medical examiner. The medical examination when completed was not turned over to the agent, but forwarded directly to the home office. The term "agent" is here used to designate the agent of company, within the meaning of the statute.

At this juncture, arises occasion for noting the distinction that differentiates the knowledge of the agent, in its effect upon the responsibility of the company, and the knowledge of the medical examiner, in the same regard: Did Gordan make any material false representation in his medical examination of which Tabachnick did not, in fact, have knowledge? If so, it cannot be regarded as the knowledge of the company, and to have been waived, even though the medical examiner had knowledge of its falsity. It is contended,

however, by the plaintiff that the medical examiner is an agent of the company which employs him, and that his knowledge of the risk comes within the purview of the statute and binds the company. But this contention cannot be conceded. There is no rule of common law by which he becomes such agent, and the statute limits such agency to those whose names are borne on the policy, and upon whom service of all notices and processes may be made.

Without further discussion, we are of the opinion that a medical examiner is not, in contemplation of the statute, an agent of the company by whom he is employed, but an employe.

But the plaintiff further contends that the wording of the statute "such agents. . . . shall be regarded as in the place of the company in all respects regarding any insurance effected by them," means just what it says—all respects—"whether it appears in answer to questions propounded by the agent or medical examiner." In other words, if the knowledge of the agent is the knowledge of the company, then the company has all the knowledge that the agent has, and, if a misrepresentation came to the company through the office of the medical examiner, if the fact about which the representation was made was known to the agent, it would be the knowledge of the company. Granting this, yet a false statement by the insured to the medical examiner, communicated by him to the company, itself, would not be the knowledge of the company, unless it had knowledge of the falsity; a fortiori, a false statement to the medical examiner, communicated by him to the agent is not the knowledge of the agent, if "in all respects" the company, unless the agent had actual knowledge of its falsity. Hence the medical examiner, not being an officer, whose knowledge is the knowledge of the company, is not an officer whose knowledge is the knowledge of the agent. The medical examination, accordingly, adds nothing to the actual knowledge of the agent, in regard to the facts therein stated. It however further appears, uncontradicted, that the medical examination in these cases did not go into the hands of the agent at all, but were sent directly by the examiner to the company. If so, for this reason, also, the agent could not be charged with knowledge of answers he had never seen.

In view of this interpretation, the defendant contends that the plaintiff is at once concluded; that if the medical examiner is not an agent, under the statute, a material false representation communicated to him and by him to the company, is a false representation to

the company, regardless of the knowledge of the agent; that the only false representations by which the company is bound are such as are made directly to its agent, and are known by him to be false.

But this contention cannot prevail. It would thwart the plain language of the statute, that the company is bound by the agent's "knowledge of the risk and all matters connected therewith." There is no limitation upon the source of his knowledge. A reasonable interpretation clearly imparts to the statute an intent to hold the company responsible for material false representations made to the medical examiner, although not known by him to be false, provided they were, in fact, known to the agent to be false. In such case the knowledge of the agent is the constructive knowledge of the company. Accordingly, when the company is once charged with constructive knowledge of facts, false representations in the medical examination, in regard to the same facts, become immaterial, as the company cannot be deceived in regard to what it already constructively knows, through the knowledge of its agent, and will be bound by this knowledge in all dealings with its policy holders.

Therefore, so far as material false representations to a medical examiner are known to the agent, they are known to the company; but, on the other hand, any material false representation made to the medical examiner, which was not known to the agent, is not made the knowledge of the company either by the statute, or common law. That is, just so far as material false representations to the medical examiner, coincide with the agent's knowledge, thereof, they are constructively known to the company, and binding upon it; but beyond such coincidence, such false representations are not constructively known to the company, will not be deemed to be waived, will operate as a fraud and vitiate the policy. Applying this rule of interpretation to the facts we find the following results.

We will first consider the five hundred dollar policy. The testimony shows that material false representations were made by the plaintiff's decedent, as appears in his "statements made to the medical examiner." Paragraph 4 of the medical examination contains this statement: "The following is the name of the physician who last tended me, the date of the attendance and the complaint for which he attended me. Dr. Haskell one year ago for grippe." This examination was February 18, 1915. Dr. Haskell testified that he treated him for a cold in 1913, and at his office on June 13, 1914, and

June 19, 1914. These last two visits were both within two years from date of the examination. The doctor also says he treated him, not for grippe, but for valvular heart trouble and nephritis—kidney condition. On cross-examination the doctor says the dates upon which he treated him for these troubles were the 13th day of June, 1914, and the 19th day of June, 1914. These dates were based upon memoranda. To the inquiry. Q. You treated on those occasions for the cold? A. No, sir, valvular heart trouble and nephritis. The doctor further says he prescribed for him for the valvular heart trouble, and also for nephritis, "all together." The doctor was not asked whether he told the patient of the malady with which he found him suffering, but the necessary presumption is that Dr. Haskell, charged with the observance of professional ethics, told his patient the truth rather than a voluntary falsehood. It is altogether improbable that the doctor told him he had grippe, when he did not have it, but an entirely different malady; therefore, the reasonable presumption is that he prevaricated in his answer to the medical examiner, in regard to the disease for which he was treated, by Dr. Haskell. This presumption is strengthened by the unfortunate fact that the decedent is admitted to have made false representations in other respects in his application. We regret to say the admission is thoroughly established by the evidence.

Although the burden is on the plaintiff, it is not proven by any evidence in the case that the agent, assuming he knew about the decedent all it is claimed he did, (and we think he did) had any knowledge whatever of the fact that the applicant had been several times to Dr. Haskell and had been treated for heart disease and nephritis, the latter being the disease with which he died within a year. Had the agent known this we doubt if he would have had the audacity to conceal it.

The above answers were made with reference to the five hundred dollar policy, but they are found to be of the same false character in paragraphs 12, 13, 15 and 16 in the medical examination in the thousand dollar policy.

A false statement as to whether applicant has consulted or been attended or treated by a physician is material to the risk and will defeat recovery, especially where it is warranted to be true. *Cobb* v. *Covenant Mut., Etc.*, 153 Mass., 76, 25 Am. St. Rep., 619.

While there are several other representations which fall within this category, the foregoing are sufficient to establish the fraudulent procurement of these policies on material false representations, found in the medical examination, of which the agent of the company is not proven to have had any actual knowledge.

The statute which our legislators have enacted, making the knowledge of the authorized agent the knowledge of the company, is wise and salutary, but when invoked to accomplish a fraud on the company it should be strictly limited within the boundary prescribed, the knowledge of the agent. The statute thus construed safeguards the insured in every legitimate respect and protects the company against material fraudulent representations not known to it or its agent. It should be here noted that we are considering only the "knowledge" clause of the statute.

But it is claimed that the instructions of the agent and his answers, as to the result of outside inquiries, should be held to enlarge the scope of the agent's knowledge by which the company is bound. The instructions are as follows: "The mere filling in of answers is not sufficient unless they are based on an absolute and thorough investigation and inquiry. Do NOT put your signature to statements YOU CANNOT PERSONALLY vouch for. Do not assume anything you are not prepared to become PERSONALLY responsible for. YOU ARE RESPONSIBLE for your report and its consequences."

At the end of the application the agent is requested to give the result of his outside inquiry. In this case the answers were undoubtedly false. We are unable to discern, however, how these instructions and requests can be construed to change the nature or extent of the knowledge of the agent with which the company is charged by the statute. By the statute the company is bound by the agent's knowledge, not by his falsehoods, nor by the falsehoods of the insured to the agent, unless the agent knew them to be false. The company being at the mercy of its agent, these instructions would seem, by fair interpretation, to have been adopted to impress the agent with a sense of fidelity commensurate with the confidence necessarily reposed in him. Accordingly, these instructions were manifestly intended as a precaution to obviate danger from malfeasance, not to encourage and increase it.

We have discussed the case on the assumption that the knowledge of the agent was the knowledge of the company and that the medical

examiner was not an agent, by whose knowledge of the risk the company is bound. The exceptions, therefore, are not important. But the motion raises the question of law which we have discussed and upon the application of which we have decided these cases. We have no hesitancy in declaring that these cases are frauds upon the company. Yet so far as the knowledge of the agent covers the false representations made by the insured, that knowledge, by force of the statute, binds the company. But, beyond this, the statute does not in terms or intent permit the fraud to go. In each medical examination are found material false representations, beyond the knowledge of the agent. The policies for this reason are void.

Motion sustained.

FRANK P. J. CARLETON, et als.,

vs.

CAMDEN ANCHOR-ROCKLAND MACHINE COMPANY.

Knox. Opinion April 2, 1918.

Water rights. Liability for adding flash-boards to dam.

In an action on the case to recover damages because of the flowing out of the plaintiff's water wheel and consequent loss of power by the defendant's dam next below on the river it is

Held:

1. That whatever the rights of the respective owners of the two water privileges might be under their deeds, their legal rights have been fixed so far as this case is concerned by the agreement entered on the docket by which both parties and the court are bound.
2. That under that agreement the defendant's flowage level of the lower pool in Megunticook River is "the level of the top of the northeast side planking of the old flume at the dam, to be fixed from the Government bench mark at Camden National Bank."
3. That therefore the only issue in the case was one of fact for the jury, whether the defendant's flowage level had exceeded the agreed limit.
4. That the verdict of jury finding such excess was warranted by the evidence.
5. That the damages awarded to the plaintiffs, $506.25, were not excessive.

Action on the case to recover damages on account of the unlawful raising of water by defendant thereby causing damage to plaintiffs' mill. Defendant filed plea of general issue. Verdict for plaintiff in the sum of $506.25. Motion for new trial filed by defendant. Judgment in accordance with opinion.

Case stated in opinion.

A. S. Littlefield, and M. T. Crawford, for plaintiffs.

J. H. Montgomery, for defendant.

SITTING: CORNISH, C. J., SPEAR, HANSON, PHILBROOK, JJ.

CORNISH, C. J. Action on the case to recover damages because of the flowing out of the plaintiffs' water-wheel and consequent loss of power.

The plaintiffs and defendant are the owners of dams on Megunticook River in the town of Camden, the plaintiffs' dam being next above the defendant's. Originally both properties were under a single ownership and on January 15, 1823, nearly a century ago, the owners, John Pendleton and others, carved out and sold the lower privilege to one Lewis Ogier. Through mesne conveyances the plaintiffs have succeeded to the Pendleton interest and the defendant to the Ogier interest. The Pendletons in their deed specifically defined the rights granted to the lower privilege and the height at which the dam could be maintained. But because of the lapse of time, as stated by counsel for defendant in his brief, "the exact knowledge of where the top of the lower dam should be was not known to either party. The marks indicating it when the deed was first made had been obliterated by the changes made during the different employments of the lower dam." Therefore the parties entered into the following agreement which was entered on the docket and became a part of the record in this case: "It is agreed by the parties that the defendant's flowage level of the lower pool in Megunticook River by defendant's dam shall be the level of the top of the northeast side planking of the old flume at the dam, to be fixed from the Government bench mark at Camden National Bank."

Whatever construction might have been placed upon the original deed this agreement is binding upon the parties and the court, and must govern here. The precise allegation in the writ, which forms the

basis of the plaintiffs' action, is that the defendant without any lawful authority, right or permission has erected, built and maintained certain structures called "flush boards" upon and across the spillway of their dam thereby raising the water in the defendant's mill pond above its lawful height, causing it to flow back upon the plaintiffs' wheel and thereby diminish its effective power for manufacturing purposes. Under this allegation and the agreement above referred to as to the legal flowage level of the defendant's dam, the issue became one of simple fact for the jury, and their finding was in favor of the plaintiffs with a verdict of $506.25. The claim of the plaintiffs was that some years ago in repairing the spillway in its dam the defendant constructed the standards at the side so that they projected higher than before, and then gradually filled in the space with flash-boards, at first of a temporary nature and unfastened, and finally fastened, and that these boards ultimately extended to the top of the standards. This was denied by the defendant, but there was substantial evidence to support the contention. These flash-boards became an effective part of the defendant's dam. *National Fibre Board Co.* v. *Electric Co.*, 95 Maine, 318. Whether the dam, as thus changed by the flash-boards, exceeded in height the legal limit as provided by the agreement, in other words, whether the flowage level of the defendant's mill pond exceeded "the level of the top of the northeast side planking of the old flume at the dam" was a matter of engineering, of scientific and accurate testimony. On this point the evidence preponderates in favor of the plaintiffs. Their engineers place the excess at about fifteen inches, while even the engineer for the defendant admits that the dam is from two to four inches higher in places. The plaintiffs' contention is confirmed by the results. Their wheel is set in such a position that with the water at the legal height the water level would correspond with the top of the thrust block on the wheel. Were this the usual water level the thrust block would bear the imprint. But as a matter of fact at a point fifteen inches above this is a well defined mark showing the water line as maintained through a long period of time. It is visible even in a photograph. This is a convincing witness. Moreover it appeared in evidence that prior to the raising of the level, a quarter turn on the plaintiffs' wheel would give sufficient power for their mill, while, since the change, the wheel must be run wide open, and no more power is required now than then.

In the light of all the testimony, which it is unnecessary to further detail, and especially in consideration of the fact that the jury took a view of the premises and were thereby enabled to see the situation for themselves, a privilege of which this court is deprived, we do not feel warranted in disturbing the verdict.

Nor are the damages excessive. The only testimony on this point came from the plaintiffs' hydraulic engineer who computed the loss of power caused by the back water. The charge clearly stated the elements of damage and eliminated all speculative profits. The jury evidently did not disregard the instructions of the court.

Motion overruled.

STATE OF MAINE, By Indictment, *vs.* THEODORE KERR.

Cumberland. Opinion May 2, 1918.

Cheating by false pretenses. Forgery at common law and forgery under the Statute. Necessary allegations in an indictment for obtaining money by false pretenses. What constitutes duplicity in criminal pleading.

This case involved an indictment under the statute for cheating by false pretenses. To this indictment the defendant filed a demurrer which was overruled. To this ruling exceptions were taken by the defendant with the right to plead over, if the exceptions were overruled.

The statute under which this indictment is brought, R. S., Chap. 128, Sec. 1, reads as follows: "Whoever designedly and by false pretenses or privy or false token, and with intent to defraud, obtains from another . . . . his signature to any written instrument, the false making of which is a forgery, is guilty . . . . of cheating by false pretenses and shall be punished," etc. Under this statute it is necessary to allege: (1) that a written instrument was obtained; (2) that the signature of the maker was obtained by the defendant; (3) that it was designedly obtained by false pretenses; (4) with intent to defraud; (5) that the false pretenses deceived the maker; (6) that the instrument thus procured was an instrument the false making of which is a forgery.

Upon inspection, the indictment discloses legal averment of all these elements.

Indictment under R S., Chap. 128, Sec. 1. Upon being arraigned, respondent filed a general demurrer to the indictment which was joined in by attorney for State. The presiding Justice, ruling pro forma, overruled the demurrer giving to the respondent the right to plead over. To the ruling of the court, respondent filed exceptions. Exceptions overruled.

Case stated in opinion.

Carroll L. Beedy, for the State.

William H. Murray, and Jacob H. Berman, for respondent.

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

SPEAR, J. This case involved an indictment under the statute for cheating by false pretenses. To this indictment the defendant filed demurrer which was overruled. To this ruling exceptions were taken by the defendant with the right to plead over, if the exceptions were overruled. The indictment, in part, reads as follows:

"The Grand Jurors for Said State upon their oath present that Theodore Kerr of Westbrook, in said County of Cumberland, on the twenty-fourth day of October, in the year of our Lord one thousand nine hundred and sixteen, at Windham, in said County of Cumberland, feloniously, designedly and by false pretense, and with intent to defraud, did falsely pretend to one Lars C. Klagenberg, for the purpose of obtaining the signature of said Lars C. Klagenberg to a certain written instrument, that said written instrument then and there delivered by the said Theodore Kerr to the said Lars C. Klagenberg was a note for three hundred dollars, which said amount of money Carl, then and there meaning Carl H. Klagenberg, son of the said Lars C. Klagenberg, had got and borrowed from him, the said Kerr, three years ago, and that the interest had been paid on it, and that if the said Lars C. Klagenberg refused to sign said written instrument he, the said Kerr, would take everything he, the said Klagenberg, had away from him, which said false pretenses were then and there believed to be true and were relied upon by the said Lars C. Klagenberg, and he was thereby deceived and induced to sign said written instrument, and did then and there sign and deliver said written instrument to the said Theodore Kerr whereby and solely by means of said false pretenses the said Theodore Kerr did then and there feloniously, designedly and by false pretense and with intent to

defraud, obtain the signature of said Lars C. Klagenberg to said written instrument, the false making of which said written instrument is forgery, whereas in truth and in fact said written instrument was not a note for the sum of three hundred dollars as aforesaid, but was then and there a written instrument purporting to be the authorizing of P. J. Larrabee, an attorney at law, to consent that judgment be entered against the said Lars C. Klagenberg and in favor of the said Theodore Kerr, in an action brought against said Lars C. Klagenberg by the said Theodore Kerr and then pending in said Superior Court for said County of Cumberland, said written instrument being of the following tenor:

Windham, Me., Oct. 24, 1916.

P. J. LARRABEE,
Portland, Me.

DEAR SIR:—

In the matter of *Theodore Kerr* v. *Lars Klagenberg*, action entered at the Superior Court for Cumberland County, at the October Term, 1916, I hereby consent and agree to the following entry, viz:

Judgment for Plaintiff."

The rest of the indictment, by way of inducement, avers that Klagenberg had no knowledge whatever that the suit had been brought against him by the defendant and was pending in the Superior Court, and that the defendant took and received the written instrument and caused it to be filed in the Superior Court and made it a part of the records of the court in the action which Kerr had brought against Klagenberg and thereby obtained a judgment, in his own favor, without the knowledge and consent of Klagenberg, for $347.02.

Under the demurrer the defendant attacks the sufficiency of the indictment in the following particulars: First, That the indictment is bad for duplicity. Second, That the indictment on its face does not set out the crime as alleged. Third, That the indictment does not follow the wording of the statute. Fourth, That the writing to which the state alleges the said respondent obtained the signature is not a subject of forgery. Fifth, That the writing as set out in the indictment does not contain the signatures of the persons whom the

state alleges the respondent procured to sign. These several objections will now be considered in connection with the allegations which an indictment in general for this offense should contain. Upon this matter the concensus of authorities may be found in 11 Ruling Case Law, Paragraph 39, Page 857; under the heading "Indictment" and the subdivision "In General." "An Indictment for obtaining property by false pretenses is sufficient if the language used is such that it designates the person charged and indicates to him the crime of which he is accused. It must, however, have that degree of certainty and precision which will fully inform the accused of the special character of the charge against which he is called on to defend, and will enable the court to determine whether the facts alleged on the face of the indictment are sufficient in the contemplation of law to constitute a crime so that the record may stand as a protection against further prosecution for the same alleged offense."

If we apply these general requirements of pleading to the allegations found in the above indictment, it will be seen that they come well within the rule. The language of the allegations fully informs the accused of the special character of the charge against him; shows that the facts alleged are sufficient in law to constitute a crime; and that the record of conviction, if found upon the facts alleged, will sustain a plea in bar. While the indictment may have more fully described the offense, defined by the statute, than is required, it promotes rather than obscures a full understanding of the charge. In addition to the above statement of what the indictment must contain in general, this same section goes on to state what must be alleged in detail. (1) "It must aver all the material elements of the offense, and hence must show what the false pretenses were." (2) "That they were made or authorized by the defendant." (3) "That they were false and fraudulent." (4) "That they deceived the prosecutor." (5) "What was obtained by and under them." Upon inspection the indictment will be found to contain all these particulars.

The indictment must, however, not only fulfill these general and particular essentials of pleading, but also the requirements of the statute under which this indictment is brought, R. S., Chap, 128, Sec. 1, which reads as follows: "Whoever designedly and by false pretenses or privy or false token, and with intent to defraud, obtains from another . . . . his signature to any written instrument,

the false making of which is a forgery, is guilty. . . . . of cheating by false pretenses and shall be punished," etc. Under this statute it is necessary to allege: (1) that a written instrument was obtained; (2) that the signature of the maker was obtained by the defendant; (3) that it was designedly obtained by false pretenses; (4) with intent to defraud; (5) that the false pretenses deceived the maker; (6) that the instrument thus procured was an instrument the false making of which is a forgery. Again, upon inspection, the indictment discloses an averment of all these elements. From aught that appears, this indictment conforms both to the general and specific rules of pleading and meets the requirements of the statute.

But granting this, the defendant, by demurrer says, that the indictment is bad for not stating the requirements in a legal way. First, he says the indictment is bad for duplicity. In argument he claims that, after setting forth what the state intends to prove, the indictment then goes further and alleges that "said Theodore Kerr then and there took and received the said written instrument, etc., and thereby obtained judgment in his own favor in said Superior Court, fraudulently, etc., for the sum of $347.02. It is claimed that this language charged the respondent with the common law crime of falsely and fraudulently obtaining judgment against the prosecutor in the Superior Court, etc. This contention cannot prevail. The statement of the use made of the writing was proper matter of inducement descriptive of the fraudulent intent with which the instrument was obtained. The offense charged is cheating by false pretenses, accomplished in a manner defined by statute; but the gravamen of the offense, as defined, is the false procuring of a signature to a written instrument. Accordingly, we find no allegation in the indictment setting out any offense in the use made of the instrument. But, in order to constitute duplicity, a second offense must be sufficiently averred; otherwise the description will be rejected as surplusage. Wharton's Criminal Pld. and Pr., 8ed. par. 243, and cases cited. *State* v. *Haskell*, 76 Maine, 399.

The second objection "that the indictment does not set out the crime alleged" is based upon the argument that the indictment avers that the instrument, the false making of which is a forgery, was an authorization of one P. J. Larrabee, attorney at law, to consent that judgment be entered against Klagenberg, but does not aver that he was attorney of Klagenberg. We need not further note the reasons

for this argument for the reference to the name of P. J. Larrabee in this indictment in no way affects its validity. The reference to Larrabee's name describes the method employed by the respondent to accomplish his purpose. The indictment alleges it was an instrument purporting to authorize Larrabee to consent to a judgment. But the name through whom the defendant undertook to operate is immaterial. The name was merely a deceit,—one link in the chain of the fraud. The instrument had to be directed to some name, for it was necessary to deceive the court as well as the intended victim. It was the procurement of the fraudulent instrument, regardless of its form, and the alleged use which the defendant intended to make of it, and did make of it, which are material in averring the offense, not to whom it was directed. Was the instrument in its entirety, a forgery, if falsely made and its use a fraud, is the question involved. This objection is without merit.

The third objection is, that the indictment does not set out the offense charged in the language of the statute. This is not necessary. The reading of the indictment shows that the language is equivalent to that of the statute, which is all that is required. It is further claimed under this head that the indictment does not conclude with the words "by reason whereof the said respondent is deemed to be guilty of cheating by false pretenses." The indictment, however, does conclude with the words "contrary to the form of the statute in such case made and provided," which is the usual formula, used to indicate that the offense charged is in violation of the statute.

The fourth objection is based upon the theory that the instrument, the signature to which is alleged to have been procured in the manner described, is not a subject of forgery. In support of this argument the defendant refers only to "forgery" as defined by the statute, R. S., Chap. 123, Sec. 1. But the statute under which this indictment is drawn, making the procurement of a signature to an instrument, "the false making of which," in the language of the statute, "is a forgery," does not limit the meaning of the word "forgery" to the definition of the statute. It was held in *State* v. *Kimball*, 50 Maine, 400, that our statute in relation to forgery and counterfeiting does not repeal the common law. Forgery at common law was early defined by our court in *State* v. *Frye*, 26 Maine, page 316; "The definition of forgery at common law, is the fraudulent making or alteration of a writing to the prejudice of another man's rights."

The written instrument set out in the indictment, procured and to be used as therein alleged, clearly comes within the definition of the common law. To procure a judgment against a party in an action, pending in court, of which he has had no notice, by means of a fraudulent writing directing such judgment, would seem to the ordinary mind to be somewhat prejudicial to the rights of the man thus deceived. But if there is any doubt in regard to the interpretation of the word, as to whether forgery by common law or statute, is meant, we have no question, that the definition of forgery in the statute is sufficiently broad to embrace the written instrument set out in this indictment. Sec. 1, of Chap. 123 defines forgery as follows: "Whoever with intent to defraud, falsely makes, alters, forges or counterfeits any public record or proceeding filed or entered in any court. . . . . shall be punished", etc. Condensed, this statute reads: "Whoever with intent to defraud forges any proceeding filed or entered in court is guilty." The only question is, whether this written instrument, described in the indictment, when entered and acted upon in court, comes within the definition of "a proceeding filed or entered in court." The language of the statute using the words, "any public record or proceeding filed" differentiates between "a public record" and "a proceeding," and shows that the word "proceeding" should be used in its broadest sense.

In Words and Phrases, Vol. 6, page 5632, under the heading "Proceedings" and subdivision "All Matters and Steps", we find this definition: From a New York case: "The term 'proceeding' in its more general sense in law means all steps or measures adopted in the prosecution and defense of an action." From a Nebraska case: "The word 'proceeding' is applicable to every step taken by a suitor to obtain the interposition or action of a court " From a Minnesota case, and from many other cases, it is said: "In its most comprehensive sense the term 'proceeding' includes every step taken in a civil action, except pleadings." It is therefore evident that an order purporting to direct an attorney or anyone else to make an entry, which authorizes the court to order a judgment, is, when filed and acted upon, a proceeding in court. The indictment in this case alleges that the defendant did file the instrument set out and that the court acted upon it. Hence it appears that within the definition of the statute, this instrument was one, the false making of which is a forgery.

The fifth objection is based upon the contention that the instrument should have been inserted in the indictment with the signature attached, and that a failure to set out the entire instrument, including the signature, vitiates the indictment. But the instrument here described is not a forgery. The statute not only does not so regard it, but on the other hand, expressly provides that the signature must be genuine. The instrument has no element of forgery, except that its contents must define an offense analogous to that of forgery. Accordingly the name or signature is not in issue, and need not be set out as a part of the instrument falsely obtained. *Commonwealth* v. *Coe,* 115 Mass., at page 500. It is the manner of obtaining the signature, and the contents of the instrument, that are material under the statute, which are declared by the statute to constitute, not forgery, but "cheating by false pretenses." It may be also said regarding this contention that a rule should neither be promulgated nor adopted, the effect of which is to negative the plain import of the English language and thereby permit criminals to go unwhipped of justice.

Exceptions overruled.

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

Androscoggin. Opinion May 28, 1918.

Rule of practice in actions brought under R. S., 1916, Chap. 92, Secs. 9-10.

While in actions to recover damages for negligently causing the death of a person, or for injury to a person who is deceased at the time of the trial of such action, the person for whose death or injury the action is brought shall be presumed to have been in the exercise of due care at the time of all acts in any way related to his death or injury (R. S., Chap. 87, Sec. 48), it does not follow that the question of contributory negligence must necessarily be submitted to the jury.

Where in such a case there is no substantial conflict in the evidence nor doubt as to the fair and reasonable inferences deducible from it, a question of law is presented for the court.

Action to recover damages for death of plaintiff's intestate on account of alleged negligence on part of defendants. Action brought under R. S., 1916, Chap. 92, Secs. 9-10. At close of evidence, presiding Justice directed verdict for defendant with certain stipulations which provided that in case the Law Court should decide that there was evidence enough to sustain a verdict for the plaintiff, it was agreed that the Law Court should enter judgment for the plaintiff and fix such damages as the Law Court should decide the plaintiff would be entitled to recover upon all the evidence. Judgment in accordance with opinion.

Case stated in opinion.

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

McGillicuddy & Morey, for defendant.

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

BIRD, J. An action on the case to recover damages for death of the plaintiff's intestate on account of alleged negligence of defendant. R. S., 1903, Chap. 89, Secs. 9 and 10. (R. S., 1916, Chap. 92, Secs. 9 and 10).

This case has been twice tried. The first trial resulted in a verdict for the plaintiff. The motion of defendants for a new trial was sustained by this court upon the ground that the contributory negligence of plaintiff's intestate was a bar to recovery. *Levesque* v. *Dumont*, 116 Maine, (MADIGAN, J.) 25. The second trial was had at the April term, 1917. At the close of the evidence, the defendant's motion to direct a verdict for the defendant was granted by the presiding Justice upon the ground that there was no material change in the evidence bearing upon the contributory negligence of the intestate. To this ruling the plaintiff had exceptions.

An examination and comparison of the evidence adduced at the two trials, viewed in the light of the argument and brief of counsel of plaintiff, lead us to the conclusion that there was no error in the ruling and direction of the presiding Justice. Upon the defense of contributory negligence of plaintiff's intestate, the evidence is substantially the same as before. While it is true that in cases of the character of that under consideration, the plaintiff or his intestate, as the case may be, is presumed, as emphasized by plaintiff's counsel, to have been in the exercise of due care (R. S., Chap. 87, Sec. 48), it does not follow that such cases must necessarily be submitted to the jury. The question is to be decided upon all the evidence. *Indianapolis, etc., R. R. Co.* v. *Horst*, 93 U. S., 291, 298; *Northern Pac. Ry. Co.* v. *Mores*, 123 U. S., 710, 721; *City of Mares* v. *Botzet*, 169 Fed., 321, 329, 330; We conclude there was no substantial conflict in the proof nor doubt as to the fair and reasonable inferences deducible from it. Such being the case, a question of law was presented for the court alone. *Chicago, etc., Co.* v. *Burnett*, 181 Fed., 799, 801. *Hart* v. *Northern Pac. Ry. Co.*, 196 Fed., 180, 185.

Exceptions overruled.

FLORENCE I. CILLEY *vs.* SAMUEL W. HERRICK.

Somerset. Opinion May 31, 1918.

Bill in Equity. Equitable proceedings to obtain an accounting and redemption of mortgage. General rule of law as to interest necessary in order to redeem from a mortgage. Rule as to accounting of mortgagee for insurance money received from mortgaged property. General rule as to insurance money standing in place of property mortgaged. Right of mortgagee to appropriate insurance money to indebtedness, other than the mortgage indebtedness, with consent of mortgagor. Rule where there are intervening rights or mortgages.

On report. A bill in equity for an accounting and redemption of a mortgage of real estate.

In general any party in interest may redeem from a mortgage and ordinarily any one who has an interest, legal or equitable, in the land and would be a loser by foreclosure is entitled to redeem.

If a party is affected by the mortgage, he may redeem; if he is not affected by it, there is no occasion for his redeeming and he is not allowed to do so.

Where certain specific property is made liable for the payment of the debt of another and its owner, although not personally liable, must respond or lose it, the latter becomes a surety real for the payment of the debt.

Where, in accordance with the provisions of a mortgage of real property, the mortgagor insures the buildings thereon for the benefit of the mortgagee, such insurance as to the mortgagee is for protection of the security and not for the payment of the debt. It is collateral to the debt.

After loss the money received from the insurer takes the place of the property destroyed and is still collateral until applied in payment by mutual consent, or by some exercise by the mortgagee of the right to demand payment of the debt, and, upon default of payment, to convert the securities.

Proceeding in equity asking for an accounting and also redemption of a mortgage. Cause heard upon bill, answer, replication and proof. At close of evidence, by agreement of parties, case was reported to Law Court upon certain agreed stipulations. Judgment in accordance with opinion.

Case stated in opinion.
Merrill & Merrill, for plaintiff.
L. B. Waldron, for defendant.

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

BIRD, J. On report. A bill in equity for an accounting and redemption of a mortgage.

On the twenty-eighth day of June, 1913, the husband of the complainant conveyed to her by warranty deed of that date sundry lots of land in Harmony and on the same day she conveyed the same premises in mortgage to the defendant to secure the payment of the sum of twelve hundred dollars, in twelve equal annual payments. Subsequently the complainant desired to convey the premises to one Willie A. Peterson with a reservation of certain standing trees and to have defendant discharge his mortgage given by her and take a new mortgage from Peterson in like amount. At a conference of the three parties, defendant objected to the reservation unless the right to cut and remove the trees was made conditional upon a substantial payment upon the mortgage debt. To this the other parties acceded. The complainant thereupon conveyed the premises to Peterson by a warranty deed dated October 13, 1913, containing the following reservation:—

"All spruce, fir, pine, hemlock, poplar and basswood, to be reserved by said Florence I. Cilley, same to be cut and hauled within eighteen months from the time that said Willie A. Peterson shall pay or cause to be paid to S. W. Herrick, owner of a mortgage of the above described property, five hundred dollars." The defendant discharged the mortgage given by complainant and by mortgage deed of the same date Peterson conveyed the premises to defendant as security for the payment of twelve hundred dollars as follows, $100. on each thirteenth day of October, following the date, with interest payable annually until fully paid and covenanted to keep the buildings on the premises insured against fire in a sum not less than eight hundred dollars for the benefit of the mortgagee.

Willie A. Peterson on the same thirteenth day of October, conveyed the same premises, subject to the prior mortgage, to one Victor J. Peterson to secure the payment of the sum of $300. payable with interest in six equal annual installments. This mortgage was

assigned by Victor J. Peterson to defendant on the twenty-fourth day of April, 1914, by deed recorded on the nineteenth of September, 1916.

Prior to the first of July, 1915, the buildings on the premises were destroyed by fire and on that day defendant received from the insurance company with which the mortgagor, Willie A. Peterson, had effected insurance as covenanted in his mortgage to the defendant, the sum of five hundred dollars in payment of the loss. Of this sum $98.09 was expended for lumber used by mortgagor in erecting a small building on the mortgaged premises and not in payment of the debt secured, and the balance was, with the consent apparently, of the mortgagor, applied to indebtedness of his to the defendant other than that secured by either mortgages.

On the fifteenth day of July, 1915, the defendant took possession of the mortgaged premises.

Upon the notes secured by the two mortgages held by defendant no payment of principal or interest has ever been made unless the sum of $500 received from the insurer is to be so regarded. On or about the fourth day of February, 1916, the defendant commenced foreclosure by publication of the mortgage given him by Willie A. Peterson, on the twenty-fifth day of July, 1916, the complainant demanded of defendant an accounting under this, the earlier mortgage, and later defendant rendered an account agreed to be seasonable.

The mortgagor has failed to pay $500. upon the mortgage indebtedness as provided in the reservation in complainant's deed, unless the sum realized from the insurer is such payment. As we construe the provision, in view of the circumstance, payment made as stipulated in the mortgage was intended, that is to pay $500. of the principal sum secured, unless the mortgagee waived such payment of which there is no evidence. The sum obtained from the insurer was not, as we have already seen, applied in payment of the mortgage debt. As the condition of the mortgage has been broken, it is too late for complainant to provide the sum of $500. and thus make her reservation effectual and her only remedy if any, must be sought through redemption and the payment of the full sum due upon the mortgage. *Bailey* v. *Myrick*, 36 Maine, 50, 52; *McPherson* v. *Hayward*, 81 Maine, 329, 337; *Eugley* v. *Sproul*, 115 Maine, 463, 466; See also *Smith* v. *Kelley*, 27 Maine, 237, 241.

Has the complainant the right to redeem? In general any party in interest may redeem. Ordinarily anyone who has an interest legal

or equitable in the land and would be a loser by foreclosure, is entitled to redeem. *Frisbie* v. *Frisbie*, 86 Maine, 444, 447; *Grant* v. *Duane*, 9 Johns., 591. *Lomax* v. *Bird*, 1 Vt., 182; *Platt* v. *Squire*, 12 Met., 494, 501; See also *True* v. *Haley*, 24 Maine, 297, 298. His interest must be derived directly or indirectly from or through the right of the mortgagor so that he is in privity of title with the mortgagor and an owner of part of his original equity or of some interest in it. If he is affected by the mortgage, he may redeem; if he is not affected by it, there is no occasion for his redeeming and he is not allowed to do so. *Moore* v. *Beasom*, 44 N. H., 215; II Jones Mort., Sec. 1055. Moreover where certain specific property is made liable for the payment of a debt of another and its owner, although not personally liable, must respond or lose it, the latter becomes a surety real for the payment of the debt. *Rowan* v. *Sharp's, etc., Co.*, 33 Conn., 1, 18; *Metz* v. *Todd*, 36 Mich., 472; *Mitchell* v. *Roberts*, 17 Fed., 776, 781. In the present case it was the agreement of the mortgagor, the mortgagee and complainant that the standing timber reserved by her should be subject to the mortgage. We think there can be no doubt of her right to redeem.

The complainant claims that if she redeems, she is entitled to the benefit of the sum received from the insurers. The insurance effected as between mortgagor and mortgagee was for the indemnity of both. To the morgtagee it was for the protection of the security not for the payment of the debt. It was collateral to the debt. After the loss, the money received from the insurance took the place of the property destroyed and was still collateral until applied in payment by mutual consent, or by some exercise by the mortgagee of the right to demand payment of the debt, and upon default of payment, to convert the securities. *Gordon* v. *Ware Savings Bank*, 115 Mass., 588, 591; See *Connecticut, etc., Co.* v. *Scammon*, 117 U. S., 634; and note 9 Ann. Cas., 67. The sum of $98.09 applied toward the restoration of the buildings was a proper application of the fund, not only between mortgagor and mortgagee but also as between complainant and the mortgagee. It was not, however, a payment upon the mortgage debt. As to the balance $401.91, the application to other indebtedness as made was within the rights of mortgagor and mortgagee, if no other rights intervened. As between mortgagor and mortgagee, on the one hand and the complainant on the other, the latter's right was to have it applied either to the restoration of the buildings or be applied to, or held for,

application in the reduction pro tanto of the indebtedness. See *Gordon* v. *Ware Savings Bank*, ubi supra; *Larrabee* v. *Lambert*, 32 Maine, 97; *Hitchcock* v. *Fortier*, 65 Ill., 239, 244. At the date of complainant's bill, the notes and interest due and unpaid considerably exceeded the balance of the moneys received from the insurer remaining after the expenditure in restoring the security. Such balance upon accounting should be applied in payment of the defendant's unpaid interest and overdue notes. II Jones Mort., Sec. 1077; See also I Jones Mort., Secs. 409, 410. To do otherwise under the circumstances of the case would be inequitable. See *Larrabee* v. *Lambert*, 32 Maine, 97; *Concord Me. Mut. Fire Ins. Co.* v. *Woodbury*, 45 Maine, 447, 454; See also *Allen* v. *Alden*, 109 Maine, 516, 519. In his account, however, defendant has seen fit to treat all the notes secured by the mortgage as due and payable. We are of opinion that the complainant may also so regard them.

There is, we think, no occasion to direct an assignment of the mortgage to complainant, upon her payment of the mortgage debt upon an accounting nor to determine the rights between the complainant and the defendant, as junior mortgagee by assignment, or the rights of the latter and the mortgagor.

Bill sustained and cause remanded to sitting Justice for further proceedings in accordance with this opinion and the stipulation of the parties.

STATE OF MAINE, By Complaint, *vs.* CHARLES P. DODGE.

Hancock. Opinion June 17, 1918.

R. S., Chap. 45, Sec. 30, interpreted. License fees. Right of State to demand and impose payment of license fees. General rule as to right of each State to pass legislation where interstate commerce is indirectly involved. Right of State to control and protect the property within its borders and to issue licenses for the using thereof. Burden of proving legislation to be unconstitutional. General rule as to when laws are discriminatory and become class legislation.

1. The provision in R. S., Chap. 45, Sec. 30, relating to the necessity of obtaining a license to transport lobsters beyond the limits of the State is a valid and reasonable provision and in accordance with the Constitution of Maine and the Constitution of the United States.
2. The imposition of a license fee for smacks or vessels engaged in the lobster fisheries on waters within the jurisdiction of the State, and moving in interstate commerce, if reasonable, is not a burden on interstate commerce.
3. The general power of police is in the States. And neither the power itself, nor the discretion to exercise it as need may require can be bargained away by the State. All that the federal authority can do is to see that the States do not, under cover of this power, invade the sphere of national sovereignty, obstruct or impede the exercise of any authority which the Constitution has confided to the nation, or deprive any citizen of rights guaranteed by the federal constitution.
4. In regard to the transportation of lobsters beyond the limits of the State, the right to legislate is given even if interstate commerce is indirectly involved, until Congress exercises its authority over the subject.
5. The Fourteenth Amendment does not prohibit legislation special in character. It does not prohibit a State from carrying out a policy that cannot be pronounced purely arbitrary, by taxation or penal laws. If a class is deemed to present a conspicuous example of what the legislature seeks to prevent, the Fourteenth Amendment allows it to be dealt with although otherwise and merely logically not distinguishable from others not embraced in the law.

Respondent was arrested for violation of R. S., Chap. 45, Sec. 30. Respondent was arraigned and entered a plea of not guilty; was adjudged guilty and by agreement case was reported to Law Court upon certain stipulations or agreements. Judgment in accordance with opinion.

Case stated in opinion.

Fred L. Mason, County Attorney, for State.

W. R. Pattangall, and H. E. Locke, for respondent.

SITTING: CORNISH, C. J., SPEAR, HANSON, PHILBROOK, JJ.

HANSON, J. This case is reported to the Law Court upon the following agreed statement of facts:

"This is a criminal prosecution for breach of Section 30 of Chapter 45 of the Revised Statutes, for the failure of the respondent, Charles P. Dodge, to file bond and receive a license from the Department of Sea & Shore Fisheries to transport lobsters for commercial purposes beyond the limits of the State of Maine in the smack 'Grace M. Cribbey,' said respondent being in control of said smack, and said smack not being a common carrier within the meaning of said Statute.

The respondent, Charles P. Dodge, who is a resident of the State of Maine, on the 20th day of June, A. D. 1917, filed with the Commissioner of Sea & Shore Fisheries at Augusta, an application for a license to transport lobsters in said smack 'Grace M. Cribbey' beyond the limits of the State, together with fee of $5.00 for same, but refused and neglected to file a bond as required by said Statute, although requested so to do by said Commission in his letter of June 20th, A. D. 1917.

On June 26th, A. D. 1917, the Commissioner of Sea & Shore Fisheries received from said respondent an application for a license to transport lobsters within the boundaries of said State of Maine in said smack 'Grace M. Cribbey,' as provided in Section 18 of said Chapter 45 of the Revised Statutes, stating that there had been a change in his plans and asking that the fee of $1.00 for same be taken out of the $5.00 still held by said Commissioner, and the balance returned to him, which was done.

The respondent thereafterwards on the first day of July, A. D. 1917, and on other days between said date and August 11th, A. D. 1917, purchased lobsters of legal length and legally caught in Maine and not having obtained a license or filed a bond in compliance with said Section 30, Chapter 45 of the Revised Statutes, transported them in said smack 'Grace M. Cribbey,' from Stonington in the county of Hancock beyond the limits of the State of Maine, for which offense, he was arraigned before the Western Hancock Municipal

Court on a warrant properly drawn and properly charging the offense of transporting lobsters beyond the limits of the State without a license, whereupon he entered a plea of not guilty, was found guilty, and sentenced to pay a fine of $250 and costs $7.87; from which sentence he appealed to the Supreme Judicial Court for Hancock County.

The sole question raised by the respondent is as to whether or not the provisions of Section 30, Chapter 45 of the Revised Statutes, under which the offense of which he is accused of committing is charged, namely, the provisions relating to the procurement of a license to transport lobsters beyond the limits of the State and requiring the applicant to file a bond as set forth therein as a condition of procuring said license, are valid and in accordance with the provisions of the Constitution of the State of Maine, and the Constitution of the United States.

If, on these facts, judgment is for the State, judgment and sentence of the lower court shall be affirmed, otherwise respondent shall be discharged."

Section 30 of Chap. 45, R. S., reads as follows:

"Sec. 30. No lobsters shall be transported beyond the limits of this state, whether of legal length or otherwise, except by common carriers as provided in section seventeen, unless by persons licensed to transport lobsters outside the limits of the state under the following conditions: the commissioner of sea and shore fisheries shall issue a license, which shall not be transferable, to the owner or party in control of any smack, vessel, or other means of transportation, either foreign or domestic, authorizing him to purchase and to transport lobsters within or beyond the limits of the state upon the following conditions: The license in each instance shall state the name of the smack, vessel or other conveyance to be used in so purchasing or transporting lobsters, and will give no authority to purchase or transport in any other smack, vessel or other conveyance except that named in the license. The name of the smack, vessel or other conveyance may, however, be changed by the licensee upon application to said commissioner, within the license period, without further charge. The fee for issuing said license shall be five dollars, and a record shall be kept of the same, similar to that provided for other licenses in section eighteen. Besides the name of the conveyance, the license shall bear the date of taking effect and the termination

thereof, which last named date shall be the last day of November next after it becomes effective, and shall state that such license, together with the bond hereinafter provided for, shall be forfeited upon the violation of any law of this state relating to lobsters; and it shall further provide that such smack, vessel or other conveyance shall, at all times, be subject to inspection and search by the commissioner of sea and shore fisheries, or his wardens or deputy wardens, with warrant or without, in which inspection and search they shall in no way be obstructed. Before said license is issued, the applicant shall file with the said commissioner a bond in the penal sum of five hundred dollars, conditioned that the same shall be forfeited to the state upon conviction of the licensee of any breach of any laws of this state pertaining to lobsters. All licensees under this section shall be required to load all smacks, vessels or other contrivances within the waters over which this state has jurisdiction, and any licensee loading outside the jurisdictional waters of this state, or who refuses to come within the jurisdictional waters of this state when ordered so to do by the commissioners, or any of his wardens or deputy wardens, shall be deemed to have violated the provisions of this section, and his bond shall be forfeited. Any license issued under this section shall become void on conviction for the breach of any law of this state pertaining to lobsters. No new license shall be issued for a period of one year to any party whose license has been revoked because of such conviction. Any license issued contrary to the provisions of this section is void and of no effect."

Counsel for the respondent in argument says that "various constitutional objections to the admissibility of the statute suggest themselves," and considers them in argument in the following order:

1. Is the commerce clause of the United States Constitution violated?
2. Is the license fee illegally discriminatory?
3. Is the penal liability illegally discriminatory?
4. Is the penalty excessive and unreasonable?

The imposition of a license fee for smacks or vessels engaged in the lobster fisheries on waters within the jurisdiction of the State, and moving in interstate commerce, if reasonable, is not a burden on interstate commerce. *License Cases*, 5 Howard, 504. The general power of police is in the States. *Civil Rights Cases*, 109 U. S., 3; Sup. Ct. Rep., 18. And neither the power itself, nor the discretion

to exercise it as need may require, can be bargained away by the State. *Cooley Const. Limitations,* 7th ed. 831. All that the federal authority can do is to see that the States do not, under cover of this power, invade the sphere of national sovereignty, obstruct or impede the exercise of any authority which the Constitution has confided to the nation, or deprive any citizen of rights guaranteed by the federal constitution. Idem 832. The same authority states the guiding rule upon questions of conflict between federal and State authority, thus,—if the power extends only to a just regulation of rights with a view to the due protection and enjoyment of all, and does not deprive anyone of that which is justly and properly his own, it is obvious that its possession by the State, and its exercise for the regulation of the property and action of its citizens, cannot well constitute an invasion of national jurisdiction, or afford a basis for an appeal to the protection of the national authorities; page 833 and note (a). The right to license is not questioned; and it is not claimed that the license fee is intended for revenue or a tax. License laws are of two kinds; those which require the payment of a license fee by way of raising a revenue, and are therefore the exercise of the power of taxation, and those which are mere police regulations and require the payment only of such license fee as will cover the expense of the license and of enforcing regulation.

This court takes judicial notice that the lobster fisheries is one of the great industries of the State of Maine. It is a part of the sea and shore interests of the State that has been the subject of constant investigation by the law making power for nearly a century, and year by year as the legislature has convened the attention of the representatives has been enlisted in the direction of the best means of fostering the industry and protecting the State against means and methods calculated to impair it. Legislation to this end has been enacted from time to time until it is believed that the regulations now in force are sufficient to meet all reasonable requirements, and fully preserve the interest of all concerned. And this is the stated and accepted policy of the State, founded upon experience and conscientious investigation. Has the State the right to so legislate? The State has the right to legislate in this instance even if interstate commerce is indirectly involved, until Congress exercises its authority over the subject. *Sligh* v. *Kirkwood,* 237 U. S., 58. See *Minnesota Rate Cases,* 320 U. S., 352. If the Legislature has the right to legis-

late for the protection of the fishing industry, it follows that it has the power to prescribe rules and regulation, for the proper execution of the laws deemed necessary. *Cooley Const. Lim.*, 98.

Are the established rules and regulations illegally discriminatory, and the penalty excessive? It needs no citation to support the statement that every person and all property in the State are subject to some restraints and burdens in order to secure the general comfort, health and prosperity of the State. From the beginning, our shore fisheries have been important, and have received from the Executive and Legislative Departments the attention their importance demanded. There have been many branches of the industry, and necessarily as many classes, of those engaged in the various branches. The laws and rules intended to control and regulate the fishing business have been passed for the benefit and regulation of the classes in the conduct of the business of each class. No other method is practicable. It is, then, with a class we are dealing—a class engaged in the lobster fisheries, and so long as the regulation is intended to operate upon the class and does not in its operation discriminate against an individual of that class, but affects all alike, it is lawful. It is clear that the asserted discriminations are within the power of classification which the State has made.

The agreed facts show a deliberate intention to evade or violate the statute, the setting up of the individual will against the clearly expressed judgment of the legislature. The respondent did not file a bond, nor did he pay the five dollars required for the license to do an interstate business. He paid the minimum license and attempted to do the maximum business provided by the regulations, without paying the license or filing the required bond. In other words, the respondent desired to carry on the lobster business at the least expense to himself and that meant practically to disregard the law altogether. The position he takes is against the best interest of the people of the State, while the whole course of legislation has been directed to preventing so far as possible the exercise of such individual practice. That a State may so legislate in the exercise of its highest functions is well settled. "A State may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed. . . . If a class is deemed to present a conspicuous example of what the

legislature seeks to prevent, the 14th Amendment allows it to be dealt with, although otherwise and merely logically not distinguishable from others not embraced in the law." *Hall* v. *Geiger Jones Co.*, 242 U. S., 539. The same principle is stated in another leading case, as follows:—"The Fourteenth Amendment does not prohibit legislation special in character. It does not prohibit a State from carrying out a policy that cannot be pronounced purely arbitrary, by taxation or penal laws. If a class is deemed to present a conspicuous example of what the legislature seeks to prevent, the Fourteenth Amendment allows it to be dealt with although otherwise and merely logically not distinguishable from others not embraced in the law." *Central Lumber Co.* v. *South Dakota*, 226 U. S., 157. "A State which, at its own expense, furnishes special facilities for the use of those engaged in interstate and intrastate commerce may exact compensation therefor; and if the charges are reasonable and uniform they constitute no burden on interstate commerce. The action of the State in such respect must be treated as correct unless the contrary is made to appear. . . . . In view of the many decisions of this court, there can be no serious doubt that where a State at its own expense furnishes special facilities for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation therefor. The amount of the charges and the method of collection are primarily for determination by the State itself; and so long as they are reasonable and are fixed according to some uniform fair and practical standard, they constitute no burden on interstate commerce." *Hendrick* v. *Maryland*, 235 U. S., 611, and cases cited; *Cooley Const. Lim.*, 857.

It is clear that the regulations complained of are reasonable, fair and uniform, and reflect the judgment of those best qualified to settle questions of public policy and police regulations, and it is equally clear that the respondent has failed to bring himself within the rule, that the party assailing the constitutionality of a State police statute must clearly show that it offends constitutional guaranties in order to justify the court in declaring it invalid. *Eubank* v. *City of Richmond*, 226 U. S., 137; *Hendrick* v. *Maryland*, 235 U. S., 611.

The entry will be

Judgment for the State.

JAMES EDWARD EASTMAN *vs.* GEORGE I. EASTMAN, et als.

Cumberland. Opinion June 21, 1918.

Procedure in equity to enforce an oral agreement, relating to lands where an action at law could not give just compensation. Rule as to granting specific performance. Rule as to findings of fact by a single Justice in an equitable proceeding being reversed upon appeal.

This is a bill in equity praying for the specific performance of an oral agreement made by James Eastman, father of the plaintiff, to devise his homestead farm in Brunswick to the plaintiff. The cause was heard by a single Justice of this court who sustained the bill. Final decree was made and filed, and the defendants appealed therefrom to the Law Court.

Held:

1. That compensation in damages for the breach of an agreement to convey real estate is not regarded as adequate relief is well settled.
2. The parties directly interested are in court and answering, and the parties who are pointed out as having an indirect interest under the codicil, the other children of James Eastman or their descendants, are not necessary parties to this proceeding. If a remote or contingent interest in the parties named appears later, it would be by right of representation, and they would be bound by any decree made against the defendants under whom they must claim, if they should claim at all. Nor are the executors necessary parties, as they are not in this instance charged with any duty involving the real estate in question.
3. The findings of fact by the sitting Justice are amply sustained by the evidence, and in accord with the cases cited announcing a uniform rule that specific performance may be decreed in such cases against heirs.
4. It is well settled that the decree of a single Justice upon matters of fact in an equity hearing will not be reversed unless it clearly appears that the decree is erroneous.

Bill in equity praying for specific performance of an oral agreement. The case was heard before a single Justice upon bill, answer, replication and proof. From the decree of the single Justice sustaining the bill, defendant entered an appeal to Law Court. Judgment in accordance with opinion.

Case stated in opinion.

Wheeler & Howe, for complainant.

Robert E. Randall, and William A. Connellan, for respondents.

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

HANSON, J. This is a bill in equity praying for the specific performance of an oral agreement made by James Eastman, father of the plaintiff, to devise his homestead farm in Brunswick to the plaintiff. The cause was heard by a single Justice of this court who sustained the bill. Final decree was made and filed, and the defendants appealed therefrom to the Law Court. The sitting Justice found the following facts to be established:

"James Eastman, late of Brunswick in the County of Cumberland, died on the tenth day of June, A. D. 1915, seized and possessed of a certain homestead farm situated in said Brunswick. About nine or ten years before his death the said James Eastman entered into an agreement with the plaintiff, who was his eldest son, that if the plaintiff would remain with the said James Eastman during the remaining lifetime of the latter and assist him in the proper care, cultivation and management of said farm that he would devise the said farm to the plaintiff, together with the stock, tools and other goods and chattels thereon, so that the plaintiff would become the owner thereof in fee simple after the death of said James Eastman. Relying upon said agreement and in fulfillment thereof, the plaintiff remained with the said James Eastman continuously from the time said agreement was made until the death of said James Eastman, fully and faithfully performing all of the duties and obligations imposed upon him by the terms and conditions of said agreement.

"On the seventh day of December, A. D. 1911, the said James Eastman made and executed his last will and testament whereby the said farm was devised in fee simple to the plaintiff, together with the personal property above mentioned.

"On the nineteenth day of December, A. D. 1914, the said James Eastman made and executed a codicil to his said last will and testament whereby the devise to the plaintiff of said farm was revoked and the same was devised to the plaintiff for the term of his natural life only and an estate in remainder in said farm was thereby devised to any of the children of James Eastman who might be living at the death of the plaintiff with the provision that if any of said children should die prior to the death of the plaintiff leaving descendants, the descendants of such child or children would take the share their

parent would have taken if living, per stirpes. By the terms of said codicil the personal property above described was bequeathed to the plaintiff. Both the will and codicil have been duly proved and allowed in the Probate Court for said County of Cumberland.

"Upon the foregoing facts I find and rule that the plaintiff is entitled to receive and retain the personal property bequeathed to him by said will and codicil and is also entitled to a specific performance of the agreement to devise the farm made by said James Eastman as aforesaid and that the defendants should be required to convey to the plaintiff all of the right, title and interest which they have acquired to said premises, the same being all of the real estate owned by the said James Eastman at the time of his decease in the County of Cumberland. A decree may be made and filed to carry out these findings and conclusions.

"Dated this eighth day of January, A. D. 1917."

And thereafter, on the 24th day of January, 1917, made and filed the final decree, which follows:

"This cause came on to be heard this day upon bill, answer, replication and proofs and was argued by counsel; and thereupon, upon consideration thereof, the plaintiff's bill is sustained with costs and it is ordered, adjudged and decreed as follows, viz:

That the defendants, George I. Eastman, Winnie Holbrook, Clara G. Soule and Clarence E. Eastman, shall make, execute, acknowledge and deliver to the plaintiff, James Edward Eastman, a quit-claim deed, with special convenants of warranty against the lawful claims or demands of all persons claiming by, through or under them, of the premises described in the plaintiff's bill and being all of the real estate owned by James Eastman, the father of the parties to this cause, within twenty-one days from the date of this decree.

Dated this twenty-fourth day of January, A. D. 1917."

The defendants in their answer invoke the statute of frauds but waive the same in brief and argument. At the hearing no defense was offered, the appellants relying wholly upon technical objections raised on appeal and urged in their brief. They contend that (1) the plaintiff should be left to pursue his remedy in a court of law, as the circumstances connected with this case do not call for the exercise of equitable powers. (2) If any conveyance of the property should be made to the plaintiff, he must be required as a condition thereof to give up the bequest made to him under the will. (3) All parties

concerned in the property covered by the finding of facts and decree are not parties to this action. (4) No evidence that conditions named in the codicil as to personal property have been performed.

These objections to the complaint and the equity power of the court are not well taken. In such circumstances a complainant is not required to seek redress as in a suit at law. The equity side of the court is open to him as affording the best means of settling rights so involved, and administering adequate relief.

The law defining the power of the court and governing procedure in similar cases is stated in *Nugent* v. *Smith*, 85 Maine, 433, in these words:—"Among the equity powers expressly conferred upon the court is the power to compel the specific performance of written contracts. R. S., Chap. 77, Sec. 6, Clause 3. True, this is a discretionary power; and, generally, it will not be exercised when the party seeking to have it exercised has a full and adequate remedy by an action at law. But an action at law has never been regarded as an adequate remedy for the breach of an agreement to convey real estate; and when such an agreement is founded on an adequate consideration, and is obtained without fraud or oppression, the duty of the court to compel its specific performance is universally acknowledged." That compensation in damages for the breach of an agreement to convey real estate is not regarded as adequate relief is well settled. *Foss* v. *Haynes*, 31 Maine, 89; *Woodbury* v. *Gardner*, 77 Maine, 69; *Twiss* v. *George*, 33 Mich., 253; *Bennett* v. *Dyer*, 89 Maine, 17; *Howe* v. *Watson*, 179 Mass., 30; 36 Cyc., 673, and cases cited; *Howe* v. *Benedict*, 142 N. W., (Mich.), 768.

The second objection has no merit inasmuch as the plaintiff has received and retains the personal property involved in the contract and seeks no other. The third and fourth objections deal only with questions raised in view of the codicil, which in no manner affect the main question involved here. The parties directly interested are in court and answering, and the parties who are pointed out as having an indirect interest under the codicil, the other children of James Eastman or their descendants, are not necessary parties to this proceeding. If there is a remote or contingent interest in the parties named, it would be by right of representation, and they would be bound by any decree made against the defendants under whom they must claim, if they should claim at all. *Morse* v. *Machias Co.*, 42

Maine, 119. Nor are the executors necessary parties, as they are not in this instance charged with any duty involving the real estate in question.

Here as the sitting Justice finds, there was full performance on the part of the plaintiff. The contract was founded on an adequate consideration, was finally put into writing when the will was made, and the plaintiff relied thereon.

In addition to the performance of his obligation, and the payment of the consideration, the plaintiff must be held to have been in possession under the contract for the last three months at least with the knowledge and consent of the decedent, and that on entering upon the contract the plaintiff abandoned other plans and business prospects at the request of his father who well knew that such abandonment caused the plaintiff financial loss. Again the plaintiff from time to time earned money from other work and used the same in the development, use, and improvement of the farm.

The findings of fact by the sitting Justice are amply sustained by the evidence, and in accord with the cases above cited announcing a uniform rule that specific performance may be decreed in such cases against heirs.

It is well settled that the decree of a single Justice upon matters of fact in an equity hearing will not be reversed unless it clearly appears that the decree is erroneous. *Paul* v. *Frye*, 80 Maine, 26; *Sposedo* v. *Merriman*, 111 Maine, 530.

We find no error. The entry will be,

Appeal dismissed with additional costs.

MELVILLE H. REED *vs.* J. BURTON REED.

Lincoln. Opinion June 26, 1918.

Deeds. Necessity of delivery. When delivery becomes effective. Rule as to delivering deed by grantor to grantee to be held by grantee in escrow. General rule regarding conditions preceding delivery of deeds and conditions set up subsequent to delivery. Rule as to permitting parol evidence to show that deed was to take effect only upon the performance of some condition or the happening of some event not expressed in the deed itself.

In an action of forcible entry and detainer to recover possession of certain real estate, where the issue was the efficacy of a certain deed from the father of the plaintiff to the plaintiff's wife, and before this court on plaintiff's motion after verdict for defendant:

Held:

1. That the validity of the deed depends upon the validity of its delivery by the grantor to the grantee.
2. The fact of unconditional delivery is completely established. No other inference can reasonably be drawn from the testimony and the circumstances.
3. When a deed has been manually delivered by a grantor to a grantee with the intention that it shall take effect as his deed, it takes effect in exact accordance with the expressed terms of the deed and it cannot be shown by parol evidence that it was to take effect only upon the performance of some condition or the happening of some event not expressed in the deed itself.
4. A condition may precede delivery, but once delivered by the grantor to the grantee no conditions except those expressed in the deed can postpone the vesting of the title.

Action of forcible entry and detainer. Defendant filed plea of general issue and also brief statement, setting up title in himself, the plaintiff and two others as tenants in common. Thereupon the case was removed to the Supreme Judicial Court. Verdict for defendant. Motion for new trial and also exceptions to certain rulings of presiding Justice filed by plaintiff. Judgment in accordance with opinion.

Case stated in opinion.

McGillicuddy & Morey, and Carl M. P. Larrabee, for plaintiff.

A. S. Littlefield, for defendant.

SITTING: CORNISH, C. J., SPEAR, BIRD, HANSON, PHILBROOK, DUNN, MORRILL, JJ.

CORNISH, C. J. This is an action of forcible entry and detainer to recover possession of certain real estate in Boothbay Harbor. The plaintiff claims to derive title by virtue of a warranty deed dated and acknowledged September 4, 1907, from his father Chapman N. Reed to Bessie L. Reed, wife of the plaintiff, and by deed from Bessie L. Reed of the same date to himself. The defendant denies the passing of the title from Chapman N. Reed during his lifetime and pleads title in his three brothers, one of whom is the plaintiff, and himself as tenants in common, heirs at law of their father. The issue is the efficacy of the deed from the father to Bessie L. Reed, and that depends upon whether or not it was legally delivered by the grantor to the grantee. If it was legally delivered and title passed, then the plaintiff should recover; if it was not delivered then the plaintiff fails.

The jury having rendered a verdict in favor of the defendant, the case is before the Law Court on plaintiff's motion and exceptions. It is only necessary to consider the motion.

It appears that Chapman N. Reed with his wife Sarah A. Reed, at the time the deed was made, was living in this homestead which they had occupied for many years. He was then a man seventy-two or seventy-three years of age. In order to provide an annual income for himself and his wife, he arranged to convey this property to his son, the plaintiff, then living in Cambridge, Massachusetts, who, in consideration of the conveyance, agreed to pay his father the sum of three hundred dollars a year during the father's life, and the same amount to his mother, should she survive her husband. In furtherance of this agreement a local attorney was secured who drafted the warranty deed in question from Chapman N. Reed to Bessie L. Reed, the plaintiff's wife, a bond from Bessie and the plaintiff to Chapman N. Reed, conditioned to make the annual payments, a mortgage to Chapman N. Reed, signed by Bessie and the plaintiff, to secure the performance of the bond, and a warranty deed from Bessie to the plaintiff, subject to the mortgage. These were all a part of one and the same transaction. All these instruments when prepared were taken by the attorney to the Reed homestead, where all the parties were, and were duly executed and acknowledged in his presence. He cannot positively testify that they were delivered by the respective

grantors to the respective grantees, nor could he be expected to do so as a matter of distinct recollection after a lapse of ten years, but he left them at the house with the parties interested. This has been held to be some evidence of delivery. *Lowd* v. *Bridgham*, 154 Mass., 113. To assume that they were not delivered is to conclude that all the labor and expense connected with the transaction were designedly futile. However the plaintiff and his wife, who are the only other living witnesses to the transaction, testify that all the instruments were unconditionally delivered at the time of their execution, the deed by Chapman to Bessie and the bond and mortgage by Bessie and the plaintiff to Chapman. The deed from the father to Bessie as well as the deed from Bessie to the plaintiff were carried by the plaintiff to his home in Massachusetts. None of the documents were recorded until after the father's death, which was in deference to the wishes of the parents. The plaintiff made various payments under the bond, the exact amount being somewhat in controversy. Sarah A. Reed died in February, 1908, and Chapman N. Reed in February, 1913.

If further proof of the completed delivery of the deed is needed, in addition to the uncontradicted testimony of the plaintiff and his wife, and the inherent reasonableness of the transaction, it is to be found in the concurrent acts of the parties which recognized a transfer of the title. The father's intention to convey immediately and unconditionally is shown by the fact that he took back a mortgage of the same premises to secure the performance of the conditions of the bond. This is practically conclusive upon the question of delivery of the original deed, and is so held by the courts. *Creeden* v. *Mahoney*, 193 Mass., 402; *Blackwell* v. *Blackwell*, 196 Mass., 186. If no title had passed to the grantee under the deed, the grantee had nothing which she could convey to the grantor in mortgage, and the grantor knew it. The validity of the mortgage was based on the validity of the deed.

Moreover we have the written and unanswerable admission of Chapman N. Reed himself, made three months after the conveyance. In December, 1907, the plaintiff applied to his father for assistance in raising $1,000. Under date of December 27, 1907, the father replied: "I got your letter last night. I am sorry to hear that you have had such hard luck. I will help you out if I can. But as it stands I can't do a thing. You have a deed (or Bessie has) of this place and in one sense the place is yours while you carry out the agreement (that is the

bond) I can't do a thing with it. If I should go to put a mortgage on it the question would be asked, is it clear of all incumbrances. You see that it would not be while you have a deed of it. Now you send me the deed. None of the papers have been put on record. Then everything will stand the same as if nothing had been done. Then I can answer any questions that may be asked, with a clear conscience. Then I will see what I can do. . . . ."

Acting upon this suggestion the deed was returned by the plaintiff to his father, who thereupon placed a mortgage for $1,000. upon the premises with the Boothbay Savings Bank, in the father's name, the bank supposing that he was still the legal owner, and the money was turned over to the plaintiff by his father. Subsequently the plaintiff met some of the interest payments on this mortgage and also paid a portion of the principal, ceasing payment on advice of counsel after the question of title had been raised. The father had received nothing from the bank and paid nothing to the bank, and as between father and son it was as if the bank mortgage had been placed upon the son's property, while as between the father, son and the bank the mortgage had been placed upon the father's property.

This transaction however had no legal effect as between Chapman N. Reed and Bessie L. Reed or the plaintiff, upon the delivery of the deed of September 4, 1907, or the passing of the title thereunder. That deed not having been placed on record and the holder of the $1,000. mortgage having neither actual nor constructive notice of its existence, the bank's title under the mortgage would be good as against both Bessie and the plaintiff, but as between the father and them his deed had been delivered beyond recall and the son held the title subject to the mortgage for support.

It is needless to discuss the evidence further. The fact of unconditional delivery is completely established. No other inference can reasonably be drawn from the testimony and circumstances. Such was the conclusion reached by this court when the case was first here. *Reed* v. *Reed*, 113 Maine, 522. At nisi prius the presiding Justice had directed a verdict for the plaintiff, and the case was taken to the Law Court upon exceptions to that ruling and also upon a motion for new trial on the ground of newly discovered evidence. Regarding the direction of the verdict the court said: "We shall not discuss the evidence. We need only to say that a careful study of it leads us to

the conclusion that a verdict based on non-delivery of the deed could not be sustained. The exceptions must therefore be overruled."

The motion for new trial on the ground of newly discovered evidence was granted. At the second trial, which included the introduction of the newly discovered evidence, a verdict was rendered by the jury in favor of the plaintiff, but this verdict was set aside on exceptions, because under the pleadings the defendant was not given the right to open and close. *Reed* v. *Reed*, 115 Maine, 441. The merits of the controversy on the delivery of the deed were not considered. At this third trial it is the opinion of the court that the plaintiff's claim is completely established, as was found by the Law Court after the first trial, and as was found by the jury at the second trial. True the defendant seeks to have us infer from certain statements of the plaintiff in testimony given in Massachusetts, and in cross examination at the trials in this State, that some condition was attached to the delivery and that title did not vest. Such an inference is not fairly deducible from the evidence. The plaintiff evidently had in mind the conditions named in the bond and knew that the title was not indefeasible while those conditions remained unperformed. It was precisely the same idea that the father entertained, when in his letter already quoted he said: "You have a deed (or Bessie has) of this place and in one sense the place is yours while you carry out the agreement, (that is the bond) I can't do a thing with it." Both father and son were correct in their views. The rights of the father in the place rested upon the bond secured by the mortgage, and not upon an undelivered deed or a deed conditionally delivered, and that was what was intended by the son's testimony. Carefully analyzed the testimony is not contradictory, and therefore the newly discovered evidence detracts in no wise from the strength of the plaintiff's claim. This deed having been completely and unqualifiedly delivered by the grantor to the grantee title vested ipso facto in the grantee.

Some confusion seems to have arisen over the use of the term conditional delivery, and the distinction between a condition affecting the delivery of a deed and an attempted oral condition modifying the efficacy of a deed once delivered by the grantor to the grantee was overlooked. The former is recognized in law, the latter is not and should not be recognized. This distinction follows from the indispensable element existing in every completed delivery, namely, the absolute relinquishment on the part of the grantor of all dominion and

control over the instrument. There cannot be a joint control of the deed by the grantor and the grantee. Their adverse interests forbid it. It must be within the dominion of the one or the other, and title passes or does not pass, according as the deed has or has not been actually delivered. Once delivered the only conditions affecting the vesting of the grantee's title must be expressed in the instrument itself.

Of course many cases have arisen where a deed has come into the possession of the grantee by mistake or for a special purpose apart from delivery, and the grantee has assumed dominion over it, either without authority or in violation of authority. In such cases there has been no delivery whatever, conditional or otherwise, because there has been no intention on the part of the grantor to lose the right of control over it and it has not come into the possession of the grantee as a conveyance with the consent of the grantor. Illustrations may be found in *Chadwick* v. *Webber*, 3 Maine, 141; *Woodman* v. *Coolbroth*, 7 Maine, 181; *Rhodes* v. *School District*, 30 Maine, 110; *Brown* v. *Brown*, 66 Maine, 316; *Joslin* v. *Goddard*, 187 Mass., 165; the last two cases being cited by the defendant. These authorities have no application here because here the grantor had surrendered all right of dominion and the grantee had lawfully received the instrument into her possession in accordance with the intention and act of the grantor.

Under these circumstances this case falls within the well settled doctrine that when a deed has been delivered by the grantor to the grantee with the intention that it shall take effect as his deed, it takes effect in exact accordance with the expressed terms of the deed, and it cannot be shown by parol that it was to take effect only upon the performance of some condition or the happening of some event not expressed therein. A condition may precede delivery, but once delivered no conditions except those expressed in the deed can postpone the vesting of the title. In this we have made no reference to the cases in equity where a deed absolute on its face is held to be a mortgage. They concern the nature of the title granted, not the vesting or non-vesting of any title, and they have no bearing upon the point in issue here.

In *Warren* v. *Miller*, 38 Maine, 108, a real action, the tenant offered to prove by parol evidence that when the deed introduced by the demandant was made and delivered, the deed was to be void upon the fulfilment by the grantee of a verbal condition subsequent. The evidence was rejected by the presiding Justice and the Law Court sustained the ruling.

In *Hubbard* v. *Greeley*, 84 Maine, 340, a case often cited in this State, the court said: "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. And it is perfectly well settled, by all the authorities, ancient and modern, that an attempt thus to 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."

It should be further said that oral testimony should not be admitted to abrogate the legal effect of a written instrument once intentionally and completely delivered to the grantee. Otherwise the validity of the transaction would depend upon the recollection and truthfulness of human witnesses. "There is manifest wisdom in the rule that in such transactions the law will regard, not what is said, but what is done." *Ordinary of N. J.* v. *Thatcher*, 12 Vroom, 403.

In short, delivery of a deed in its legal sense is one thing, the effect of the deed after delivery is another. A deed does not on its face prove delivery, therefore the evidence of the fact must come from without. But the effect of the deed after delivery is proved on its face, and must come from within. Parol evidence is not admissible to show that a deed actually delivered to the grantee and absolute on its face shall have effect only upon the performance of some condition or the happening of some contingency. This is the settled law. *Mowry* v. *Henry*, 86 Cal., 47; *Whitney* v. *Whitney*, 10 Idaho, 633, 69 L. R. A., 572; *Haworth* v. *Norris*, 28 Fla., 763; *Berry* v. *Anderson*, 22 Ind., 36; *Lawton* v. *Sager*, 11 Barb., 349; *Wipfler* v. *Wipfler*, 153 Mich., 18, 16 L. R. A., N. S., 941, with extended note; 8 R. C. L., 1003. This has been and still is the law of this State.

We have discussed the subject with greater fullness than might seem necessary, especially in view of the fact that there is no evidence of conditional delivery of any sort, because in *Reed* v. *Reed*, 113 Maine, 522-524, and perhaps in *Coombs* v. *Fessenden*, 114 Maine, 347, the court used language, somewhat in the nature of dicta, that might be construed as approving the rule contended for by the defendant. Such is not the law, and we take the first opportunity to correct any misapprehension that may have arisen or might arise, and to reaffirm the doctrine of *Hubbard* v. *Greeley*, 84 Maine, 340, supra, in order that there may be no uncertainty as to so important a legal principle, affecting as it does the stability of titles to real estate.

Motion sustained.
Verdict set aside.

STATE OF MAINE *vs.* WILLIAM A. HOLLAND.

Cumberland. Opinion July 3, 1918.

Intoxicating liquors. Rights of registered apothecaries.

The reference in Section seventeen of Chapter twenty of the Revised Statutes of 1916 to the United States Pharmacopoeia, Dispensatory and National Formulary is to the editions of those works recognized as authority among apothecaries, when Chapter seventy-four of the Public Laws of nineteen hundred and seven became effective.

Respondent indicted for keeping and maintaining a tenement used for the illegal sale of intoxicating liquors. Case tried at Superior Court for Cumberland County and verdict of guilty was returned. Respondent's counsel filed exceptions to certain rulings of presiding Justice relative to the introduction of certain evidence bearing on the question of the rights of the respondent as a registered druggist to keep in his possession certain quantities of whiskey. Exceptions sustained.

Case stated in opinion.

Carroll L. Beedy, for State,

William C. Eaton, and W. C. Whelden, for respondent.

SITTING: CORNISH, C. J., SPEAR, BIRD, HANSON, PHILBROOK, DUNN, MORRILL, JJ.

MORRILL, J. The respondent stands convicted of keeping and maintaining a tenement situated in Portland, used for the illegal sale, and keeping for sale, of intoxicating liquors. The evidence on the part of the State disclosed that the respondent had in his possession on the seventh day of January, 1917, within the period covered by the indictment, in a building owned and operated by him as a drug store, about four gallons of whiskey. He introduced evidence tending to show that during the period covered by the indictment he was a duly examined and registered apothecary, as provided by the laws of the State, and being such registered apothecary he claimed the right, under Sec. 17 of Chap. 20 of the R. S., to keep "all medicines and poisons authorized by the United States Pharmacopoeia, Dispensatory and National Formulary, as of recognized medicinal utility," and that whiskey was among the medicines and poisons so authorized.

In support of this contention his counsel offered in evidence two books, one stated by counsel in making the offer to be "Dispensatory of the United States of America and the National Formulary in one volume, issued in 1894, 7th Edition," and the other likewise stated to be the "Pharmacopoeia of the United States of America, 8th Decennial Revision, published in 1905." The respondent's counsel claimed that the United States Pharmacopoeia and National Formulary, recognized as official in 1907, should be received in evidence; the Justice presiding ruled that the revisions of those works in force at the time of the enactment of the Revised Statutes of 1916 would govern, and excluded the evidence. To which ruling the respondent has exceptions.

We think the exceptions must be sustained. The United States Pharmacopoeia is a book compiled by or under the supervision of an organization of pharmacists and druggists, and is recognized as authority; it is revised from time to time, perhaps decennially, if we may be permitted to so infer from the offer of the book. The National Formulary is a similar publication, also revised from time to time.

The statute in question (R. S., 1916, Chap. 20, Sec. 17), was first enacted in 1877, Chap. 204, Sec. 5 in the form in which it appears in the R. S. of 1903, Chap. 30, Sec. 18; it was amended by Public Laws, 1907, Chap. 74, Sec. 3, and given the form in which it now appears.

We think that when the legislature of 1907 referred to the United States Pharmacopoeia and National Formulary for the guidance of registered apothecaries in this State, it must have referred to the compilations known by those names, then recognized as authority among apothecaries; it is not to be supposed that the legislature intended to adopt compilations not then made and of whose contents, as affecting the law of this State against the illegal sale and keeping for sale of intoxicating liquors, it could have no knowledge. It knew what the books then recognized as authority included; it could not know what the revisers of later editions might include or exclude. If the legislature intended to adopt the later revisions of the works referred to, as they should be made from time to time, that intention should have been made clear by apt words, as was done in The Food and Drug Act of 1911, Chap. 119, Sec. 11, in which the standard of strength, quality or purity of a drug is that laid down in the United States Pharmacopoeia and National Formulary "official at the time of investigation," R. S., 1916, Chap. 36, Sec. 12.

Moreover, the statute, if construed according to the ruling to which exception is taken, may be open to the objection that it is an unauthorized delegation of legislative power, to the revisers of the future editions, as suggested in *State* v. *Emery,* 55 Ohio St., 364; upon that point we express no opinion. It may be noted that in the particular referred to, the language of The U. S. Food and Drug Act of June 30, 1906, Chap. 3915, Sec. 7, (Comp. St. 1916, Sec. 8723) is the same as appears in R. S., 1916, Chap. 36, Sec. 12.

The adoption of the specific language in the later act strongly indicates that the construction which we place upon the earlier act is the true one and accords with the legislative intention. The re-enactment of the law as amended in 1907, in the revision of 1916, does not affect its construction. "When a statute is incorporated in a general revision of all the statutes, and re-enacted along with the re-enactment of other statutes, its purpose and effect are not changed, unless there be some compelling change in the language. Usually a revision of the statutes simply iterates the former declaration of legislative will." *Cummings* v. *Everett,* 82 Maine, 264; *Martin* v. *Bryant,* 108 Maine, 256.

Exceptions sustained.

BRAMAN, DOW & COMPANY

vs.

KENNEBEC GAS AND FUEL COMPANY AND TRUSTEE.

Kennebec. Opinion July 3, 1918.

Corporations. General rule as to Boards of Directors authorizing and designating certain persons to act for and in their behalf. Rule as to authority of general manager to bind his corporation. Powers of general manager. Authority of general manager to ratify acts within the scope of his authority to so contract.

When the directors of a business corporation, authorized by its by-laws "from time to time to provide for the management of the affairs of the company at home or abroad in such measure as they see fit, and in particular, from time to time to delegate any of the powers of the Board in the course of the current business of the company to any standing or special committee, or any officer or agent, and to appoint any person to be the agent of the company, with such powers, (including the power to sub-delegate) and upon such terms as may be thought fit, so far as it may legally do so,"—appoint a general manager of the company, such general manager, although his duties and authority are not expressly defined by vote of the directors, must be held to have been clothed with all the authority which the term implies, and which is ordinarily incident to that position.

A general manager so appointed by the directors of a gas company has authority to purchase pipe and other materials necessary in the operation of the plant, and to arrange payment therefor, although such financial arrangements are made by the general manager through another person not connected with the company.

A general manager may have authority to ratify a contract which is within the scope of his authority to make, when such contract is made by an unauthorized person.

Action on the case to recover damages for failure of defendant to perform the terms of a certain contract relative to the sale of certain property to defendant company. Defendant filed plea of general issue. At close of evidence, case was reported to Law Court upon certain agreed stipulations. Judgment in accordance with opinion.

Case stated in opinion.

Carroll N. Perkins, and Allen & Smith, for plaintiff.

Mark J. Bartlett, for defendant.

SITTING: SPEAR, BIRD, HANSON, PHILBROOK, DUNN, MORRILL, JJ.

MORRILL, J. This is an action to recover damages for failure to accept certain quantities of pipe which plaintiffs claim that the defendant agreed to purchase of them and to accept and pay for, upon presentation at any bank in Waterville of sight drafts with bills of lading attached. The case is before us on report and it is agreed that if plaintiffs are entitled to recover, the damages shall be fixed at $1,048.30.

The position of defendant is thus stated in the brief of its counsel: "The contention of the defendant is that the goods were never purchased or contracted for by it and the shipment was made, in the way it was, without its consent. That the agreement made for the purchase of the goods and shipment was made by a party not connected with the defendant in any way as officer or agent, and whom it had never held out as authorized to act for it in the matter of the purchase and shipment of the goods, and that it never ratified or confirmed any contract of purchase."

The facts are not seriously in controversy. The transaction had its inception upon July 25, 1917, when one Morrill, a salesman of the plaintiffs, called at the office of the defendant corporation in Waterville and asked the general manager of the defendant, one Colton, if they were in the market for anything in his line; inquiries by Mr. Colton for prices on certain amounts of 6 in., 4 in., 3 in. and 2 in. pipe followed; the prices quoted being apparently satisfactory, the salesman, in the presence of Mr. Colton, called by telephone the Boston office of the plaintiffs and ascertained by talking with Mr. Sheldon, one of the plaintiffs, that the firm had in stock the desired amount of 4 in., 3 in., and 2 in. pipe; by direction of Mr. Colton the order was placed by telephone with the assurance that copy would be forwarded that night. Mr. Colton then gave to Mr. Morrill a printed order blank of Kennebec Gas and Fuel Company and the latter then wrote the order and Mr. Colton signed it, "Kennebec Gas and Fuel Co. By Francis Colton, Superintendent." This written order specified the terms of payment to be "60 das. net 2% 10 das.", and the pipe was

to be "F. O. B. Waterville"; these details had not been communicated to Mr. Sheldon, but were inserted in the written order by the salesman.

The next day, July 26, 1917, upon receipt of the written order, plaintiffs wrote defendant as follows:

"In regard to your valued order and conversation over the telephone on Wednesday in regard to the shipment of material, we should want a guarantee for the payment from you from bank or else payment before shipping the material. We will be willing however, to ship the order with sight draft attached to the bill of lading if you will arrange with the bank in Waterville to pay each draft on arrival of each car.

We have the pipe at present in stock and can make shipment at once. There will probably be four car loads of it. Pipe is scarce and some sizes are about out of the market, and we wish you would advise us as soon as possible in regard to the above."

On July 30th Mr. Colton wrote plaintiffs as follows:

"Referring to your letter of July 26th and to our conversation on the telephone at a previous date,

"I have arranged to furnish you ample guarantee for the payment of pipe ordered from your office. Mr. Patrick Hirsch, President of the Constructive Utility Corporation, 149 Broadway, New York, who also represents A. B. Benesch & Co. of New York, will call upon you in your office Thursday and arrange to your satisfaction any payment guarantee necessary.

"In the meantime kindly consider the pipe purchased from this office sold to us. We wish this pipe could be delivered in Waterville as soon as possible."

On the same day plaintiffs wrote the defendant asking, "if you can give us the information and security or guarantee that we desired, and if not, if you wish us to release this pipe on other orders. We have been holding it for you and it is extremely scarce in the market, particularly the 4 inch size. We have an inquiry to-day taking all that you specified; we cannot replace this for some little time and need to know whether or not we are to cancel your order before giving this party the final answer."

And on the next day, July 31, plaintiffs wrote defendant as follows:

"Replying to your letter of 30th inst.; we shall be glad to talk with your representative when he calls on Thursday, and, in the meantime,

understanding that you wish the pipe covered by the original order we are holding the same and letting the other proposition go by as we cannot fill both."

These letters with the order must be regarded as evidence of a completed contract for the sale and purchase of the pipe, in which the defendant by Mr. Colton acceded to the terms of the plaintiffs that satisfactory guarantee be furnished. We have quoted the correspondence at length, because counsel for defendant earnestly contends that the contract was not closed with Mr. Colton but with Mr. Hirsch on August 11, and in support of his position he relies on a letter from his client to the plaintiffs, dated August 7th, as showing that the matter was still open. That letter contains this sentence which is relied upon: "As he (Mr. Hirsch) stated to you we intend to purchase the pipe and if sufficient cash discount is allowed pay for same in this manner; i. e. after pipe has been received and quantity checked." We do not construe this letter in accord with counsel's views; it seems to have been written by Mr. Colton to reassure plaintiffs that the pipe would be taken—a reassurance which might have been considered opportune on account of the failure of Mr. Hirsch to furnish the promised guarantee—and to advise plaintiffs that their suggestion of cash payment was under consideration.

Was Mr. Colton authorized to make this purchase and to arrange terms of payment or guarantee? Did defendant clothe him with such apparent authority that it must be held bound by his acts?

We have no doubt that Mr. Colton had such authority. He had been elected "general manager" of the defendant corporation; the by-laws of the defendant empower the directors "from time to time to provide for the management of the affairs of the company at home or abroad in such measure as they see fit, and in particular, from time to time to delegate any of the powers of the Board in the course of the current business of the company to any standing or special committee, or any officer or agent, and to appoint any person to be the agent of the company, with such powers, (including the power to sub-delegate) and upon such terms as may be thought fit, so far as it may legally do so."

Mr. Colton was not only appointed by the Board of Directors "general manager of the company," but so far as appears was the only executive officer of the company in the State; of the five directors of the company, four resided in New York and one in Waterville, but

the latter does not appear to have exercised any active duties in the management of the corporate affairs. Mr. Colton himself says, "My duties as general manager, as I understand them, are to conduct the local affairs of the company, and to buy materials and pay for materials as necessary in the operation of the plant." While his duties and authority do not appear to have been defined by express vote of the directors, when Mr. Colton was elected general manager, under the authority of the by-laws quoted, the company must be held to have clothed him with all the authority which the term implies, and which is ordinarily incident to that position.

A general manager of a business corporation, such as this defendant corporation is, has general charge of those business matters for the carrying on of which the company was incorporated. These might include the buying of material, the employment of laborers, the supervision of their labor, the manufacture of gas, its distribution, and the general ways and means of accomplishing the object of the corporation.

Washington Gaslight Co. v. *Lansdell*, 172 U. S., 534, s. c. Law. Ed. Bk. 43, page 543.

The term "general manager" of a corporation, according to the ordinary meaning of the term, indicates one who has the general direction and control of the affairs of the corporation, as contra-distinguished from one who may have the management of some particular branch of the business. *Railway Co.* v. *McVay*, 98 Ind., 391, s. c., 49 Am. Rep., 770.

We think that the defendant must be held to be bound by the action of Mr. Colton in purchasing the pipe and arranging for shipment thereof, as he did. It must be conceded that the material was suitable and of a kind required for the company's business, and that the amount was not unreasonably large. We must hold that a general manager of a company of this kind has authority to buy and arrange to pay for such material. The authorities in this State as to powers of general agents are in harmony with this conclusion. *Trundy* v. *Farrar*, 32 Maine, 227; *Heath* v. *Stoddard*, 91 Maine, 499.

But the defendant contends that the agreement for the purchase of the goods and shipment was made August 11th with one Patrick Hirsch, who was not connected with the defendant corporation.

We think that the evidence does not sustain this position. It is true that no arrangements had been closed about shipping the pipe

until the interview between Mr. Sheldon and Mr. Hirsch on August 11th; but, as we have seen, Mr. Colton had closed the trade for the pipe on July 30th; he had arranged the required guarantee with Mr. Hirsch; later, on August 7th, he notified plaintiffs that defendant would pay cash if sufficient discount was allowed. It is very clear that Mr. Colton made the arrangements through Mr. Hirsch for the shipment of the pipe, with sight draft, bill of lading attached. It is a reasonable inference from his testimony and from his letter to plaintiffs of August 16th, acknowledging advice that the pipe was being so shipped, that he knew that Mr. Hirsch, through whom he was making his financial arrangements, had made the arrangements on which the pipe was shipped and that those arrangements were satisfactory to him, and were in accordance with his understanding of the terms of the sale. A general manager may have authority to ratify a contract which is within the scope of his authority to make, when such contract is made by an unauthorized person. *Railway Co.* v. *McVay*, supra. Mr. Colton, as general manager of the company, and not Mr. Hirsch was the active representative of the defendant corporation. Under the broad powers of a general manager appointed under the authority of the by-laws quoted, Mr. Colton had authority to arrange through Mr. Hirsch for the shipment. Indeed it is difficult to understand the object of Mr. Hirsch's call at the office of plaintiffs on August 11th, except to learn from Mr. Sheldon's lips the terms which had already been stated in correspondence and to assure Mr. Sheldon, that the funds would be in Waterville to meet the drafts.

The suggestion now made by Mr. Colton, that he should have had an opportunity to check up the pipe, impresses us as an afterthought. The pipe was in Waterville several weeks, and no request was made, so far as appears, for opportunity to inspect it; Mr. Colton permitted the drafts to be returned twice without any such suggestion.

A careful study of the evidence makes clear that the failure of defendant to accept and pay for the pipe was not on account of want of authority in the person contracting for same, nor for lack of opportunity to inspect the shipment.

Judgment for plaintiffs for $1048.30 with interest from date of writ.

CITY OF BANGOR *vs.* FRED C. RIDLEY.

Penobscot. Opinion July 3, 1918.

R. S., Chap. 4, Sec. 43, interpreted. Right of members of City Government to contract with city. Right of member of City Government to recover compensation for contracts entered into with the city. Duty of persons contracting with municipality. Action for money had and received.

This case comes up on report. The record shows that the defendant, Fred C. Ridley, was an alderman in the City of Bangor for the municipal year of 1915; that, during the year, under contracts with city departments, he furnished teams and drivers who performed certain services for the city; that he received payment in full in due course of business for the services rendered and, by the admission of the plaintiff, "that the city received the benefit of the men and teams furnished by him to said city . . . . and that the prices for said teams and men were just and reasonable."

Under this state of facts the plaintiff city has brought an action for money had and received to recover back from the defendant the amount it had paid him under these contracts, upon the ground that the services were rendered in contravention of the statute, and the payments therefor were illegal.

R. S., Chap. 4, Sec. 43, reads as follows: "No member of a city government shall be interested, directly or indirectly, in any contract entered into by such government while he is a member thereof, and contracts made in violation thereof are void."

The defendant has been paid by the city, with the approval of the department of the city government authorized to approve and pay said bill. The issue is, has he a legal right to keep the money in defense of the pending suit? The test of this question is found in the inquiry, had he a legal right in any form of action to recover from the city for his services?

Held:

1. That he could not have maintained an action under this statute for the services rendered.
2. The payment of the defendant's bill by the city was ultra vires and illegal.
3. A party dealing with a municipality can reap no advantage from the fact that the contract is completed, as all parties dealing with a municipality must take notice, at their peril of its authority to act.
4. The money being paid the defendant in violation of the city's legal rights it can be recovered back in an action for money had and received.

Action on the case to recover of defendant certain sums of money paid to said defendant by the city treasurer of the City of Bangor for the use of certain horses and teams belonging to said defendant, while he, the said defendant, was a member of the Board of Aldermen of said City of Bangor. Defendant filed plea of general issue. At close of testimony, case was reported to Law Court upon certain agreed stipulations. Judgment in accordance with opinion.

Case stated in opinion.

James M. Gillin, City Solicitor, for plaintiff.

George E. Thompson, and Fellows & Fellows, for defendant.

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

SPEAR, J. This case comes up on report. The record shows that the defendant, Fred C. Ridley was an alderman in the City of Bangor for the municipal year of 1915; that, during the year, he furnished teams and drivers who performed certain services for the city; that he received payment, in full in due course of business for the services rendered; and, by the admission of the plaintiff, "that the city received the benefit of the men and teams furnished by him to said city. . . . and that the prices for said teams and men were just and reasonable."

Under this state of facts the plaintiff city has brought an action for money had and received to recover back from the defendant the amount it had paid him under these contracts, upon the ground that the services were rendered in contravention of the statute, and the payments therefor were illegal.

R. S., Chap. 4, Sec. 43, reads as follows: "No member of a city government shall be interested, directly or indirectly, in any contract entered into by such government while he is a member thereof, and contracts made in violation thereof are void."

The defendant has been paid by the city, with the approval of the department of the city government, authorized to approve and pay the city bills. The issue is, has he a legal right to keep the money in defense of the pending suit? We think the test of this question is found in the inquiry, had he a legal right, in any form of action, to recover from the city for his services? Applying this test, we are unable to discover any form of action upon which the defendant

could recover. The meaning of the statute is as broad as language can make it. "Any contract" in violation of the statute is void. "Any contract" embraces every kind of contract, express or implied. No action can be maintained on a void contract. *Goodrich* v. *Waterville*, 88 Maine, 39. This was an action to recover for medical attendance upon a pauper. The physician rendering the services was at the time a member of the common council of the City of Waterville. The nature of his contract of employment was precisely like that of the defendant in the present case, each contract resting upon an implied promise to pay what the services were reasonably worth. In that case the identical statute now involved was under consideration, upon which the court say: "And the statute cited declares that all such contracts shall be void. If the employment of the plaintiffs did not create such a contract, then, of course, their action is not maintainable; for such a contract is the cause of action and the only cause of action declared on. If it did create such a contract it was one in which a member of the city government was directly interested, and, for that reason, one which the statute cited declares shall be void; of course no action can be maintained upon it." Therefore, the defendant could not have recovered, for his services, on a quantum meruit, as this form of action is based upon and implied contract, and comes within the inhibition of the statute.

In view of the statute now under consideration, there is another controlling reason why the defendant should be made liable for the money received for his services. The statute in question was enacted for the express purpose of prohibiting a member of the city government from making contracts with the city. But if he can influence the city government of which he is a member, either as a matter of friendship, or corruptly, to give him employment upon a contract, express or implied, and obtain and retain his pay, for its execution, then both he and the city government can evade and nullify the effect and purpose of the statute with impunity. He has made his illegal contract. He may have influenced the city government to favor him. He has recived his compensation for executing it. If he can keep the money, the statute is dead. He has succeeded by indirection.

This interpretation is fully sustained in the opinion of the court in answer to questions propounded by the governor, found in 108 Maine on page 552, upon the construction of a statute identical in meaning with the one under consideration, in which the court say: "The

legislature must be presumed to have had in contemplation all of the contracts which might have been made by the different State officers, and to have enacted the statute for the purpose of removing any temptation on their part to bestow reciprocal benefits upon each other, and of preventing favoritism, extravagance and fraudulent collusion among them under any circumstances which might be reasonably anticipated as likely to arise under different State governments in the years to follow."

But it may be said the city government has voluntarily paid him for his services, and as such payment was equitable, they cannot recover it back in the equitable action of money had and received. This reasoning might hold good in cases between individuals, but a municipality is a creature of the statute and can do just what the statute, and the necessary execution of the statute, permits, and cannot do what the statute inhibits. It will require no citations to show that the officers of a municipal government cannot contract to pay, expend or pay out, city funds for an illegal purpose or upon an illegal contract. It is not within the scope of their powers, and if paid the city in the proper form of action can recover it back. Otherwise municipalities might be mulcted to the verge of ruin by dishonest or incompetent officials, if having illegally paid the money out the city cannot recover it back.

A party dealing with a municipality can reap no advantage from the fact that his illegal conduct is completed, as it is incumbent upon everyone, dealing with a municipality, to discover its authority to act, or to assume the risk upon failure so to do, and deal with it at his peril. This rule needs no citation in this State, but in *Goodrich* v. *Waterville*, 88 Maine, 39, dealing with this very statute, the rule is thus tersely expressed: "All persons acting under the employment of town or city officers must take notice at their peril of the extent of the authority of such officers."

Nor is the fact that the city received full value for the money paid out, and that no harm came to the public, the test. *Lesieur* v. *Rumford*, 113 Maine, 317, is a case in which a member of the board of health was employed by the board to attend a case of smallpox. In this case no statute expressly forbade such employment; but the court held that such employment was prohibited by the spirit of the law, both the common law and statute, and based upon the rule of sound public policy. After quoting the statute under consideration

and the statute relating to the employment of persons holding places of trust in a state office, the court say: "Assuming, as we do, that these statutory prohibitions do not directly apply to a member of a local board of health, yet the principles on which they are founded are quite as applicable to a contract made by a board of health with one of its members, as to the contracts expressly inhibited in these statutes." It is further said upon page 320: "The test is not whether harm to the public welfare has in fact resulted from the contract, but whether its tendency is that such harm will result.

"Applying this rule to the contract declared on, and testing it by those principles which constitute public policy as recognized by the common law, and asevidenced by the trend of legislation and judicial decisions, we are constrained to hold that the contract does so far contravene public policy that it ought not to be upheld and enforced through the administration of the law."

There is a dictum at the end of this opinion, suggesting that an action of quantum meruit might be sustained; but this case is entirely distinguishable from the case at bar, as there was no express statutory prohibition of employment, by the board of health, of one of their members, and it may be that quantum meruit might lie; but quantum meruit is based upon an implied contract, whereby it is held, when one party knowingly receives the services of another party, and the conditions, circumstances and relations are such, that, in equity and good conscience, he ought to pay for such services, then, although no express contract exists, the law intervenes and implies a contract, that the party receiving the benefit of such services shall be held to pay what they are reasonably worth. But the moment this obligation comes into being by implication, it is an implied contract and falls within the ban of the statute and is made void thereby.

Finally, it should be noted that this statute was not enacted to prohibit the contractor, alone; with equal force it can be invoked to prohibit the city government from making "any contract" with one of its members. The language of the statute—any contract entered into—makes such a contract as void on the part of the city government as on the part of the contracting member. It makes no distinction. The contract is void on both sides. This language was undoubtedly used advisedly, for, from common knowledge, it is well known that there is a great temptation, and sometimes a positive inclination, on the part of a city government, to favor one of its

members. The statute, therefore, wisely holds, if a city government undertakes to transgress its plain duty in this regard, that whatever they do shall be regarded as void. It would, therefore, appear that the implied contract, upon which the city government paid the defendant for his services, was ultra vires on their part, was illegal on his part, and the money paid, was without authority, was in violation of the city's legal rights, and should be recovered back. It should be noted that the statute here invoked and construed applies in its terms solely to cities, and the term "municipality" or "municipal" as here used should be regarded as limited in its application to cities only.

Judgment for plaintiff for $495.20, and interest from the date of the writ.

Justice KING does not concur.

LEON L. LIBBY AND ALICE M. CORNFORTH,
Executors of Will of Semantha C. Jerrard, Appellants from Decree of Judge of Probate,

vs.

ESTATE OF SIMON G. JERRARD.

Penobscot. Opinion July 3, 1918.

Wills. General rule of law where property is left to the widow for life with right to use whatever may be necessary for her support and maintainance. Right of remainderman to balance or remainder of property undisposed of or unexpended. How the rights of remainderman may be enforced. Executors and administrators. General scope and limitation of the authority of executors and administrators.

Where the executrix of her husband's will is directed thereby to give by will in charity a sum not exceeding three-fourths part of what may remain of his estate at her decease and she makes the appointment by a will executed less than four months and confirmed less than forty days before her decease, and her executors find among the papers in her possession at her decease, a note given to her by her husband many years before, the balance due upon which practically equals one-half of what must have remained of her husband's estate at her decease to warrant her devise of the sums given in the exercise of the power in charity; it is held that her wills clearly indicate that she did not consider the note an existing claim against her husband's estate and did not intend to enforce it as such.

Where a testator gives to his widow a life estate in certain property with power of disposal and remainder over, whatever remains at the decease of the widow, upon due and proper accounting by her executors or administrators, should be paid or delivered to the administrator de bonis non with the will annexed of the first testator.

It is the right and duty of an administrator to account in the Probate Court, in behalf of his intestate, as executor or administrator, but the accounting is limited to the acts and doings of the deceased representative in his lifetime and the administrator can proceed no further in the administration of the first intestate and so expressly by R. S., Chap. 68, Sec. 27, with executors.

Whether or not, in view of our statutory provisions regarding the allowance of the private claims of executors and administrators they may still exercise the common law right of retainer, quaere.

Appeal from ruling of Judge of Probate, Penobscot County, relating to allowance of Probate account. Appeal was duly entered at Supreme Court of Probate and at the close of evidence case was reported to Law Court upon certain agreed statements and stipulations. Judgment in accordance with opinion.

Case stated in opinion.

Manson & Coolidge, for appellants.

Matthew Laughlin, for himself, appellee.

A. J. Merrill, for Home for Aged Women.

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

BIRD, J. Simon G. Jerrard of Levant, in the County of Penobscot, died, testate, on the twenty-eighth day of January, 1909, at the age of eighty years, leaving a widow Semantha C. Jerrard and no issue. By his will, which bears the date of January 1, 1898, he appoints his widow executrix, provides for a monument on his burial lot, bequeathes certain personal property to relatives to be delivered at the decease of his wife or during her lifetime, at her election, certain personal property to be delivered the legatee in the usual course of administration, and two money legacies payable on the decease of his wife. The remaining items of the will are as follows:

"Ninth. All the rest, residue and remainder of the property of whatever name or kind of which I may die possessed, together with the use and proceeds during her lifetime of all property embraced in the foregoing bequests, I hereby give, devise and bequeath to my beloved wife, Semantha C. Jerrard for her sole and separate use for and during her natural life, with full power to use, dispose of, sell and convey any or all of it as she may desire, the same as I might do if living, and to dispose of by will, at her discretion, as a memorial fund in her own name and mine to be to be devoted to some charitable, benevolent or educational use, a sum not exceeding three-fourths part of what may remain of my estate at her decease. And I earnestly desire that my said wife during her lifetime shall despose of by gift to such of my relatives as are not specially named in this instrument all my household goods, pictures, silver, glass and crockery ware and all other articles which go to make up the furnishings of our home, so that none of said furnishings shall ever be desposed of by sale. '

"Tenth. Watever may remain of my estate at the decease of my said wife, not disposed of by or under the foregoing proisions of this Will, after paying all her just debts, funeral expenses and the costs of administration, I give devise and bequeath as follows. To my sister Mrs. Jane L. Bennett, to my brother John F. Jerrard, to my brother Anson C. Jerrard, to my sister Mrs. Helen N. Jenkins and to my sister Mrs. Angelia J. Brackett each one seventh part. To my sister Mrs. Sarah G. Crosby the income of one seventh part during her natural life and at her decease said part to be divided equally between her son Ellery C. Crosby and her daughter Mrs. Ada M. Wing, and the remaining seventh part to be divided equally between Sanford C. Jerrard and Eva M. Jerrard son and daughter of my brother George W. P. Jerrard. . . . . ."

This will was duly admitted to probate in the Probate Court of Penobscot County.

After the decease of her husband, his widow Semantha continued to reside upon and operated the farm hereinafter referred to for about a year and a half. She then took up her residence with her niece, and the niece also of her deceased husband, Alice M. Cornforth, with whom she lived until her decease. Under date of August 16, 1911, Semantha C. Jerrard, of Pittsfield, in the County of Somerset, as the widow of Simon G. Jerrard, and avowedly for the purpose of executing the power of appointment given her by the ninth item of the will of her deceased husband, made a will by the first item of which she appointed Leon L. Libby, one of the appellants, executor. The second and remaining item follows:

"Second. I hereby give and bequeath the sum of four thousand dollars to the Home for Aged Women at Bangor, Maine, said amount to be invested in long time securities, more with a view to the safety of the principal than to the income, and said amount as invested to constitute a permanent memorial fund to be known as 'The Col. Simon G. and Semantha C. Jerrard Fund.' The annual income and no more of this fund shall be used for the general purposes of maintaining said Home and carrying out the purposes thereof.

"This legacy is to be paid from the property described in said ninth paragraph of the will of Simon G. Jerrard and is disposed of by authority of said paragraph."

On the twenty-fifth day of October, 1911, she made a second will which confirms that of August 16, 1911, makes sundry bequests of personal property and gives all the remainder of her personal estate to Alice M. Cornforth, whom she appoints executrix.

The widow, Semantha C. Jerrard, died aged eighty years, on the fourth day of December, 1911, without rendering any account as executrix of her husband's estate or filing any inventory thereof.

Both her wills were duly proved and allowed in the Probate Court of Somerset County, as one will, and letters testamentary issued to Leon L. Libby and Alice M. Cornforth, named as executor and executrix in the respective wills.

Subsequently, apparently on January 30, 1912, Mathew Laughlin Esquire, of Bangor, was appointed administrator de bonis non with the will annexed of Simon G. Jerrard.

The inventory of the Estate of Semantha C. Jerrard which was filed July 14, 1913 shows real estate $1000. goods and chattels $118.50 and rights and credits $6696.46 totalling $7814.96.

Without filing any inventory of the Estate of Simon G. Jerrard, as of the date of his decease, which perhaps was neither possible nor possibly needful, the executors of the will of Semantha C. Jerrard filed in the Probate Court of Penobscot County what purports to be the first and final account of Semantha C. Jerrard, as executrix of the last will and testament of Simon G. Jerrard. It bears date of the fourth Tuesday of July, 1913. In Schedule A. they charge the deceased executrix with "property which was in the hands of Semantha C. Jerrard at the time of her decease and had been the property or proceeds of property of the late Simon G. Jerrard." As such appear sundry choses in action aggregating $1030, and further choses in action all substantially deposits in banks in the name of Semantha C. Jerrard and notes to her order aggregating $2698.81 making the total amount of Schedule A. $3728.81.

In Schedule B. the first item of credit is "Delivered to Mathew Laughlin, Administrator de bonis non with the will annexed of Simon G. Jerrard, the following assets listed in Schedule A: standing in the name of Simon G. Jerrard" in the aggregate amount of $1030.

The second item of credit is "Retained by Alice M. Cornforth and Leon L. Libby as Executors of the Estate of Semantha C. Jerrard, the remaining assets listed in Schedule A. towards payment of the following:

"To pay the balance due on the promissory note dated Levant, Jan. 18, 1888 signed by Simon G. Jerrard for value received promising to pay to the order of Mrs. Semantha C. Jerrard the sum of $3667.30 on demand with interest, on the back of which is endorsement of payment of $3200. on April 28, 1891; there being due on said note after computing the interest and deducting said payment, on Jan. 28, 1909, the date of the death of said Simon G. Jerrard, the sum of $2454.31. $2454.31

"To pay as provided for in the last will and testament of said Simon G. Jerrard:

"Debt of Semantha C. Jerrard due James H. Crosby for store bill of $189.56, tax bill of 1910 for $34. and interest $20.34 less credit of $60. for stock and farming tools, $183.90 $2698.81

"Cost of administration of the estate of Semantha C. Jerrard, the commission due the executors of her will on her personal property appraised at $6814.96 at 5%, $340.74

Services and expenses of Manson & Coolidge as attorneys for said executors, 500.00 840.74

$3478.95 $3728.81

"Balance due from the estate of Simon G. Jerrard to the estate of Semantha C. Jerrard, $780.14"

In July, 1916, the accountants moved to amend their account by substituting in Schedule B. for the sums of $340.74 and $500. ($840.74) the sum of $2474.30 according to the statement attached to their motion. With few exceptions, the items in the statement are charges of administration of the estate of Semantha C. Jerrard and many, if not all, incurred since the decease of their testatrix.

The Judge of Probate refused the allowance of the amendment and disallowed the account. From the decree of the Judge of Probate, the executors appealed alleging the following reasons of appeal: because it is their right and their duty to file and have allowed this account of the administration by Semantha C. Jerrard of the goods and estate of Simon G. Jerrard, because each of the items in said account were proper and should by said decree have been allowed,

because the petition for the amendment of said account should have been allowed by said decree, and the items contained in said amendment were proper and should have been allowed by said decree.

The case is before this court upon report from the Supreme Court of Probate.

The first item of Schedule B. in the amount of $1030. should be allowed. The delivery of the specific rights and credits is alleged and the administrator de bonis non acknowledges that he received them.

The second item of Schedule B. in amount of $2454.31 is claimed as a lawful credit by right of retainer of assets to meet the balance due upon the note of the testator, Simon G. Jerrard, to the order of the testatrix, Semantha C. Jerrard, of the accounting executors. It appears that this note, dated Jan. 18, 1888, was given for the sum of $3667.30. April 28, 1891, the testator conveyed to his wife, the payee, his homestead farm and two other parcels of real estate for the recited consideration of $3200, and on the same day the payee endorsed upon the note the payment of $3200. From the date of the note to the day of the death of maker more than twenty-one years had elapsed, from the date of the indorsement to his death nearly eighteen years and to the claim of the right to retain, which was first made manifest to the administrator de bonis non by the filing of the account in July, 1913, more than twenty-five years.

As to the actual consideration for the note, there is no evidence. Whether Mrs. Jerrard was at its date possessed of any property is open to great doubt. Her niece, Mrs. Cornforth, one of the executors, testifies that she once inherited three hundred and some odd dollars and does not know that she ever acquired any other means.

It seems that at the time the note of January 18, 1888 was made, Simon G. Jerrard was liable upon a note of large amount and was holding the office of Sheriff of Penobscot wherein he was liable at any time to be involved in litigation.

The indorsement upon the note of the expressed consideration for the conveyance of the farm by her husband to Semantha C. Jerrard was, as already noted, in her own hand and there is no evidence tending to show that the husband was at any time aware of it.

There is no evidence tending to show that Mrs. Jerrard in her lifetime intended to exercise the right of retainer but there is evidence that her executors claimed to exercise the right.

Under these circumstances, it is at least doubtful if Mrs. Jerrard considered the note an existing liability against the estate of her husband or intended ever to enforce it.

But on the sixteenth day of August, 1911, less than four months before she died, she made a will in exercise of the power of appointment given by the will of her husband whereby she gave the sum of $4000. to the Home for Aged Women of Bangor. This will she confirmed two months later. By his will the sum so given was not to exceed "three fourths part of what may remain of my estate at her decease." If the account of her administration rendered by her executors is correct and she regarded the note enforcible, her husband's estate remaining was but little more than one thousand dollars and her will becomes a reproach to her husband's memory. On the other hand if there be deducted from the rights and credits ($6696.46) shown by the inventory of her estate, the notes and interest thereon received by Mrs. Jerrard upon the sale of her farm ($3455.75) and the bank deposit claimed to be her own ($157.65) there remains the sum of $3083.06. If to this sum be added the assets ($1030) turned over to the administrator d. b. n. c. t. a. we have the sum of $4113.06. If to this be added $500. given the husband of Mrs. Cornforth previously to the making of her second will and the principal of a note for $500. given Mrs. Cornforth on the day the will was executed (112 Maine, 113, which it is agreed may be considered) we have the sum of $5113.06, not far from $5333, the sum to which the husband's estate should have amounted to warrant the exercise of the power of appointment in the sum of $4000. She could, however, have reached these figures only upon the basis of considering the balance of the note of $3667.30 as not to be enforced. We conclude that her wills clearly indicate that she did not consider the note an existing claim against her husband's estate and did not intend to enforce it as such. *Barstow* v. *Tetlow*, 115 Maine, 96, 106.

The administrator de bonis non with the will annexed of Simon G. Jerrard, claims that he is entitled to receive from the executors of the will of Semantha C. Jerrard, the balance of the assets of the estate of the former, as shown by their account, less the amount of $1030. already paid him.

In *Hall* v. *Otis*, 71 Maine, 326, 330, the will under which the controversy arose was not dissimilar to that of Simon G. Jerrard. The wife was given the residue of the estate for life, with power of disposal

with remainder over upon her decease of what then remained to be divided among his surviving brothers and sisters. She was named executrix. Proceedings in equity were commenced by the administrator d. b. n. c. t. a. against the executor of the deceased widow. After a construction of the will to the effect that the brothers and sisters surviving are entitled to what remained the court says; "We think . . . . that his administrator is entitled to all that portion of Daniel E. Hall's [the testator's] Estate (including the proceeds of property sold by his widow) which had not been expended at the time of her decease."

In *Hatch* v. *Caine*, a bill in equity for the recovery of a sum of money in a Savings Bank which plaintiff claimed was a part of the estate of Joseph Storer, deceased testator, whose administrator d. b. n. c. t. a. brings the bill against the executrix of the widow of testator. The will was substantially like those in the foregoing cases and in the case under consideration, with remainder over to a charitable institution. The court concludes its opinion as follows:

"It is settled law in this State that, under wills similar to the one now before us, the widow takes only a life estate, and that whatever remains of the estate at her decease, goes to the beneficiaries named in the will; and that a bill in equity may be maintained by the administrator de bonis non cum testamento annexo, to obtain possession of the remainder." *Hatch* v. *Caine*, 86 Maine, 282, 284.

The case of *Small* v. *Thompson*, arose under a will of very like character in which provision is made for the payment from the property remaining at the decease of the life tenant, the widow of the testator, of her debts and funeral expenses. The appellant in the Supreme Court of Probate was the administrator d. b. n. c. t. a. of the testator and the appellee the executor of the will of the deceased life tenant. The case was before this court upon the exceptions of the appellee. The Supreme Court of Probate found that a portion of the estate of the testator remained in the hands of the life tenant and executrix at the time of her decease and decreed that the appellee be charged with the personal property in question, which may be subjected to the charges of administration not actually paid by the executrix in her lifetime and then paid or delivered to the administrator of the testator de bonis non by him to be applied to the payment of the debts of the life tenant and her funeral expenses,

the charges of administration and then distributed among the heirs at law of the testator as provided in his will. The exceptions were overruled. *Small* v. *Thompson*, 92 Maine, 539, 543, 544.

The right and duty of an administrator of a deceased administrator to account in the Probate Court for the benefit of his intestate, were early recognized by this court. *Nowell* v. *Nowell*, 2 Maine, 75, 81. The same case indicates by fair inference that the accounting is limited to acts done by the deceased representative in his lifetime and that the administrator of the latter can proceed no further in the administration of the estate of the first intestate. In harmony with the case last cited is *Small* v. *Thompson*, 92 Maine, 539, 545.

By statute it is provided that "The executor of an executor has no authority, as such, to administer the estate of the first testator; but on the death of the sole or surviving executor of any last will, administration of said estate not already administered may be granted with the will annexed, to such person as the judge thinks fit." R. S., (1916) Chap. 68, Sec. 27; Laws Mass., 1783, Chap. 24, Sec. 10; Public Laws of Maine, 1821, Chap. LI, Sec. 19; See *Prescott* v. *Morse*, 64 Maine, 422. And by R. S., Chap. 68, Sec. 25, the power and duty of administrators d. b. n. are extended to effects not distributed and are no longer restricted to those unadministered. *Walker* v. *Savings Bank*, 113 Maine, 353, 357.

It may be that the conclusions already reached practically dispose of the appeal, but, as the case is reported for the decision of all questions of law and fact involved, it may be incumbent upon the court to reach further conclusions and to make further suggestions, which will guide the Supreme Court of Probate in passing upon the account to which we must refer the allowance or disallowance of the particular items, as well by reason of lack of evidence to determine as to many of the items, as because we do not think that by reporting an appeal from the decree of the Judge of Probate this court can be called upon, among other things, to pass upon all the items of a disallowed account. It has none of the powers to employ the instrumentalities which other courts may invoke in such cases. See *Crocker* v. *Crocker*, 43 Maine, 561, 562; *Fessenden, Appellant*, 77 Maine, 98, 99.

These conclusions or suggestions involve a construction of the final, or tenth item of the will of Simon G. Jerrard, see *Small* v. *Thompson*, 92 Maine, 537, 544, which provides that "whatever may remain of my estate at the decease of my wife, not disposed of by or under the fore-

going provisions of this will, after paying all her just debts, funeral expenses and the costs of administration, I give, devise and bequeath as follows." Then follow the names of the legatees and the proportions in which they are to take. We conclude upon the whole will and its evident purpose that the testator intended by the tenth item to give to the legatees named whatever of his estate remained in the hands of his wife at her decease, not used and disposed of by his wife, after the payment of the legacies made payable upon her decease and the bequest to the Home for Aged Women less the amount required to pay her just debts, funeral expenses and the costs of administration. Her debts paid by the executors of her will cannot be included in the account of these executors in their account of her administration of her husband's will. This necessarily follows from the conclusion, already reached, that their payment devolved on his administrator de bonis non. In the account no charge of funeral expenses is made.

Numerous charges purporting to be the expenses of the administration of her estate contracted by her executors appear in their account. To what extent they are a charge upon the estate of Simon G. Jerrard depends upon the meaning of the words used in the tenth item of his will, "the costs of administration." Considering, as before, the whole will and the evident purpose of the testator and the circumstances revealed by the evidence, we think the expression quoted refers to the expense of administering his own estate by his administrator de bonis non, any unpaid expense of administration incurred by his executrix in her life time (and there appears to be no charge for such expenses) and the cost of the probate and allowance of such will or wills of his widow as were made in execution of the power of appointment given her by the ninth item of his will and that expenses of the administration under her wills arising from litigation or otherwise concerning her own property and estate were not intended to be included. It is significant that the expenses of the litigation in *Crosby* v. *Cornforth*, 112 Maine, 109, 115, were ordered paid from her estate. The court in that case must have acted with full knowledge and advisedly as it had before it all the wills both that of Simon G. Jerrard and those of his wife. The controversy in that case concerned only her own estate. Be that as it may, we think it clear that what ever expenses of administration arise from the probate and allowance of her wills are not to be allowed, except the nominal fees and expenses attending the allowance of her first will, nor should they appear in the

account of the executrix of Simon G. Jerrard's will rendered by her executors. They are to be paid by, and credited in the account of, the administrator de bonis non.

For the same reasons this court does not pass upon the motion to amend. It comprises many items. The facts should be determined in the Supreme Court of Probate and the various items sought by amendment to be added to the account, be allowed or disallowed in accordance with the law declared in this opinion.

The allusion, necessarily made in the discussion of this case, to the right of retainer, is not to be regarded as a recognition of its existence in this jurisdiction. Whether or not, in view of our statutory provisions regarding the allowance of the private claims of executors and administrators, they may still exercise the common law right of retainer is not decided.

Appeal sustained with costs.
Remanded to Supreme Court of Probate for further action in accordance with this opinion.

G. H. BASS & COMPANY *vs.* WILTON WOOLEN COMPANY.

Franklin. Opinion July 12, 1918.

Water rights. Deeds. Res adjudicata.

This case comes up on report and involves a controversy over water rights. The facts involved under the bill and answer are found in *Woolen Company* v. *Bass*, 112 Maine, 483. The bill and answer contain practically the same facts involved in the former decision of this case. In the former case the Woolen Company, the present defendant, was the plaintiff, and the present plaintiff the defendant. The defendant in that case filed a cross bill, the material prayer of which was in effect, and almost in phraseology, the same as the prayer in the present bill. The defendants in the present bill, in their answer, plead the defense of res adjudicata.

Held:

1. That the issue raised in the present bill was put in issue by the pleadings in the former bill and cross bill, and under the well settled rules of law the plaintiff has had its day in court and the present contention must be regarded as res adjudicata. There is another interpretation of the language of the deed which concludes the rights of the plaintiff. The word "until" is a limiting or restrictive word. It does not negative or limit any right of the Woolen Company to use the water. It does, however, manifestly limit the right of Bass & Company after the water has reached the $4\frac{1}{2}$ foot limit; then Bass & Company are reduced to 100 square inches. And the purpose as well as the effect of the limiting word "until" was to accomplish this reduction. We think this word, when fitted into the background of the transaction, as it must be to give it a fair interpretation, fully determines the plaintiff's rights. It is almost inconceivable, if the parties understood the matter as the plaintiff now says, that they would have employed the language used in this deed to give expression to their purpose, when a single sentence properly phrased would have expressed exactly the meaning for which it now contends. It is further inconceivable that the defendant company, having full power to protect its own business, would intentionally deprive itself, for the indefinite time the water might fluctuate between the top of the dam and the $4\frac{1}{2}$ foot limit, of the use of sufficient water to operate its own mills, and thus leave them idle and unproductive.
2. That the language of the deed does not limit the rights of the defendant to the top of the dam.

Bill in equity to restrain defendant company in the use of certain water rights. Cause heard upon bill, answer and proof. Judgment in accordance with opinion.

Case stated in opinion.

Frank W. Butler, and William M. Bradley, for plaintiff.

C. N. Blanchard, and E. E. Richards, for defendant.

SITTING: CORNISH, C. J., SPEAR, HANSON, PHILBROOK, JJ.

SPEAR, J. On report. This case involves a controversy over water rights. In December, 1912, the Wilton Woolen Company, defendant in the present case, brought a bill in equity against the present plaintiff, to which an answer was duly filed. In May, 1913, the present plaintiff filed a cross bill against the present defendant to which an answer was also duly filed. The Woolen Company bill was sustained and a decree filed. The Bass Company cross bill was dismissed. The defendant contends that the present bill is concluded by the rule of res adjudicata, the whole matter as it claims having been determined or open to determination under the former bill and cross bill. We think this contention must prevail.

The facts involved under the bill and answer are found in *Woolen Co.* v. *Bass Co.*, 112 Maine, 483. Briefly rehearsed they are as follows: In 1898 F. J. Goodspeed of Wilton was the sole owner of all the water rights and privileges now involved. November 12, 1898, he conveyed certain rights to Gardner C. Fernald. This deed is not now involved. January 15, 1903, Goodspeed conveyed to the Wilton Woolen Company all his land, water rights and privileges. September, 1903, the Woolen Company conveyed to the present plaintiff the rights and privileges, upon which his bill is now brought. This deed is as follows: "The saw mill at outlet of Wilson Lake and yard subject to any rights of way hitherto reserved, or other reservations or restrictions of use of land heretofore made, and being the same mill described in deed by R. C. Fuller and George R. Fernald to Hiram Holt by deed of September 13, 1883, and of record book 98, page 352, in Franklin Registry with the following water power and privilege and none other to wit: The right to draw from Wilson Lake water sufficient to furnish forty (40) horse power with latest improved water wheels, after a reasonable development of the privilege, until the water reaches a point four and one-half ($4\frac{1}{2}$) feet below the top of the

dam as now used, but when the water has reached said point his right to use water is limited to one hundred square inches and he is to have that water right, and in case the dam furnishing said power is raised or the power from said lake is in any way increased the said Bass shall be entitled to his full proportionate benefit. In case at any time when the water is below the four foot and one-half mark, and the grantee is not using the full one hundred square inches of water thereof, the grantor reserves the right to draw sufficient water through its own private waste gate to make up the full one hundred inches including that used by the grantee. Said grantee is to bear one-half of the expense of keeping in repair and maintaining canal on land herein conveyed, head gates and dam."

It will be seen, by comparison, that this is the identical deed, the terms and provisions of which were in controversy in the case reported in 112 Maine, 483. All the other facts are precisely the same. The present defendant, was using the water, in 1903, which he conveyed to Bass & Company, just as it was when the former bill and cross bill were filed and determined, and as it is now. The dam, the flumes, the flowage rights are precisely the same. The parties are the same so far as the former and present controversies between the Woolen Company and Bass & Company are concerned, Fernald not having had at any time any interest in the matter. The plaintiff however contends that the point it now raises was not decided nor necessarily in issue in the former cases. The point now is, that under the phraseology of the deed, "after it (the water) ceases to run over the top of the dam and before it reaches a point four and one-half feet below the top of the dam." the defendant must cease to draw any more water for his mills below, so that the water may be conserved and prolonged to the use of the plaintiff while it is falling between the top of the dam and the $4\frac{1}{2}$ foot limit. It claims that the decision in the 112 Maine covered only the question as to who was entitled to the excess of the water after the uses carved out and conveyed by the deeds. But we think the very point now raised was put in issue by the pleadings and discussed in 112 Maine. The court says: "The great contention between the parties, however, arises during the period before the $4\frac{1}{2}$ foot limit is reached. That is the burden of the cross hill brought by Bass & Company in which they claim that the Woolen Company is not entitled to any water before that limit, that they are entitled to it all, except the Fernald grant, and they ask for

an injunction to restrain its use by the Woolen Company. This claim assumes that the Woolen Company retained no water rights after the Bass deed was given, and that assumption we have already shown to be groundless. The maximum ownership of Bass & Company until the four and a half foot level is reached is 40 horse power, and all the power in excess of that (excepting of course the Fernald one hundred square inches) belongs still to the Woolen Company, and can be used by it in connection with its plant still further down the stream. No other reasonable construction can be given to the deed viewed in the light of all the facts and circumstances." The court say "The burden of the cross bill" was, that the Woolen Company is not entitled to any water before that limit," $4\frac{1}{2}$ foot limit.

By comparison it will be seen in the cross bill in the former case, that Bass & Company claimed, even though the water was above the top of the dam, that the Woolen Company were not "entitled to draw any water before that limit" ($4\frac{1}{2}$ feet below) was reached. In the present case, Bass & Company claim that the Woolen Company is not entitled to draw any water "after it ceases to run over the top of said dam and before it reaches a point $4\frac{1}{2}$ feet below the top thereof." The material prayers in the two sets of bills are identical in meaning and nearly so in phraseology. Prayer 1 of the present bill prays: "That said court will grant a permanent injunction restraining the said Wilton Woolen Company, its officers, agents, servants and employees from opening said waste gate and withdrawing from said pond, through said canal, any water contained in said reservoir after it ceases to run over the top of said dam and before it reaches a point $4\frac{1}{2}$ feet below the top thereof." Prayer 2 of the former cross bills prays: "That a permanent injunction issue restraining the said Wilton Woolen Company, its officers, agents, servants and employees from opening said waste gate and withdrawing from said canal any water, until such time as the water in said pond reaches a point $4\frac{1}{2}$ feet from the top of said dam as now constructed."

In fact, as the construction of the same deed is the foundation of all the bills, it is evident that all the clauses of the deed were, or might, by proper pleading, have been put in issue. Accordingly the only difference in the present and the former claim is, that *then* the Woolen Company should not draw any water from any height, until the $4\frac{1}{2}$ foot limit was reached, and that *now* it shall not draw any water after it reaches the top of the dam, until the $4\frac{1}{2}$ foot limit is reached. It

should be here noted that "the power in excess" referred to in the part of the opinion quoted, included the disposition of all the water from the top of the dam, or a higher level, to the $4\frac{1}{2}$ foot limit below. But the greater includes the less, and the claim in the former case, that the Woolen Company should not draw any water when the water was above the top of the dam, included the claim that they should not draw any water when the water was below the top of the dam. Accordingly the issue now raised was clearly placed before the court in the pleadings in the former bill and cross bill, and under the well settled rules of law is res adjudicata.

There is another interpretation of the language of the deed which, we think, concludes the rights of the plaintiff. It is a cardinal rule that words used to give expression to an instrument should be "construed according to the common meaning of the language." The language of this deed confers the right to plaintiff to draw water to furnish 40 horse power. . . . "until the water reaches a point $4\frac{1}{2}$ feet below the top of the dam as now used." The controlling term here used is the word "until." "Until" is defined in Words and Phrases as follows: " 'Until' is a restrictive word; a word of limitations. The word 'until' is a word of limitations, used ordinarily to restrict what immediately precedes it to what immediately follows it. Its office is to point out some point of time, or the happening of some event, when what precedes it shall cease to exist or have any further force or effect. The word 'until', whether found in a contract or in a statute, is the same, and in either case must depend upon the intention of those using it, as manifested by the context, and considered with reference to the subject to which it relates."

Cyc defines it as a "restrictive word; a word of limitation."

The word "until" does not negative or limit any right of the Woolen Company to use the water. It does, however, manifestly limit the rights of Bass & Company after the water has reached the $4\frac{1}{2}$ foot limit. The use of the water by the Woolen Mill and by Bass & Company is a continuing use, expressed by the word "until", which carries them both, not to the top of the dam, but to the $4\frac{1}{2}$ foot point; then Bass & Company are reduced to 100 square inches. And the purpose as well as the effect of the limiting word was to accomplish this reduction. We think this word, when fitted into the background of the transaction, as it must be to give it a fair interpretation, fully warrants the above conclusion. It is almost inconceivable, if the

parties understood the matter as the plaintiff now says, that they would have employed the language used in this deed to give expression to their purpose, when a single sentence properly phrased would have expressed exactly the meaning for which it now contends. It is further inconceivable that the defendant company, having full power to protect its own business, would intentionally deprive itself, for the indefinite time the water might fluctuate between the top of the dam and the $4\frac{1}{2}$ foot limit, of the use of sufficient water to operate its own mills, and thus leave them idle and unproductive.

Bill dismissed with costs.

STATE OF MAINE *vs.* JOHN C. SLORAH.

York. Opinion July 14, 1918.

Criminal law. General rule of law as to exceptions being considered by Law Court before case is fully disposed of.

Exceptions to an order of the Justice presiding at nisi prius directing that a trial for the crime of murder be continued to the next trial term on account of incidents occurring at a view which the presiding Justice considers prejudicial to a fair trial, should not be presented to the Law Court until the determination of the cause at nisi prius; and if prematurely presented, they will be dismissed from the Law Court.

Respondent was indicted for the crime of murder and placed upon trial. The presiding Justice, on account of certain matters arising while the jury was viewing the premises, ordered that the case be continued; to which ruling counsel for respondent filed exceptions. Judgment in accordance with opinion.

Case stated in opinion.

Guy H. Sturgis, Attorney General, for the State of Maine.

Franklin R. Chesley, County Attorney, for the County of York.

Emery & Waterhouse, for respondent.

SITTING: CORNISH, C. J., SPEAR, HANSON, DUNN, MORRILL, JJ.

MORRILL, J. The respondent was indicted for the crime of murder at the September term, 1917, of the Supreme Judicial Court, in York County; on the sixth day of the term he was arraigned and pleaded not guilty; his counsel gave written notice that a plea of insanity would be entered and filed a motion that the respondent be committed to Augusta Insane Hospital for observation; the motion was granted.

At the January term, 1918, the respondent was placed at the bar for trial and a jury was duly impanelled. On motion of the respondent's counsel, and with the consent of counsel for the State, a view of the premises where the alleged crime was said to have been committed, was granted. Upon the return of the jury, respondent and counsel to the court room, the Attorney General made known to the presiding Justice, in open court, that the respondent fell down on the piazza of the house where the view was to be taken, and in the presence and in close proximity to the jury, made something in the nature of a groan, wept and made the remark, "My God! Take me away from here, or I shall be insane again;" it further appeared that this incident occurred as the jury was about to enter the house and that thereupon the respondent was taken by the officer in charge to another house and was not present during the remainder of the view.

The presiding Justice being of the opinion that if the trial were to continue, it would result in a mistrial, made the following order:

"By order of Court, and by reason of incidents arising during the view granted by the Court, on motion of respondent's counsel, consented to by the State, such incidents being, in the judgment of the Court, prejudicial to an impartial trial of the case before this Jury, and it being inexpedient to summon another Jury at this time, the report of such incidents having been made in open court through the counsel and officer in charge of the prisoner, such report being made a part of this order, it is ordered that this Jury be excused from further consideration of this case, and that the respondent be remanded to await trial at the May Term of this Court in Alfred."

To the foregoing order directing a continuance of the case, the respondent has exceptions, which have been presented and argued by his counsel at the present term of the Law Court. The respondent was therefore not tried at the term to which the continuance was ordered.

We are of the opinion that the exceptions have been prematurely presented. Exceptions should not be sent to the Law Court until the case is fully disposed of in the trial court. In accordance with the opinion in *State* v. *Brown*, 75 Maine, 456, which rules this case, the entry must be,

Exceptions dismissed from this court.

BRIGGS HARDWARE COMPANY

vs.

AROOSTOOK VALLEY RAILROAD COMPANY.

Aroostook. Opinion July 17, 1918.

Common carriers. Interstate commerce. Initial carriers. Warehouseman Liability of Warehouseman. Rule as to liability of initial carrier for the acts of the warehouseman. Rule as to when a common carrier becomes a warehouseman. Burden of proving negligence of warehouseman.

Where the interstate bill of lading of the form approved by the Interstate Commerce Commission, provides, among other conditions, "that property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot, or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only" . . . . and the property transported remains in the car at its destination nine days after notice given of its arrival and is then destroyed by fire, the liability of the terminal carrier is that of warehouseman, and the initial carrier is liable for the damages negligently arising therefrom, under the provisions of the Federal Act of 1906 to amend "the act to regulate commerce."

The care required of a warehouseman of the property in his charge is ordinary care. He is liable only for neglect.

The plaintiff asserting the negligence of the warehouseman has the burden of establishing it. This burden does not shift. As it is the duty of the warehouse-

man to deliver upon proper demand, his failure to do so, without excuse, has been regarded as making a prima facie case of negligence. If, however, it appears that the loss is due to fire that fact in itself, in the absence of circumstances permitting the inference of lack of reasonable precautions, does not suffice to show neglect, and the plaintiff having the affirmative of the issue must go forward with the evidence.

Where the only evidence as to the cause and circumstances of the fire destroying property in the hands of a warehouseman is a statement agreed upon by the parties to the effect that the contents of a car "were damaged by fire originating either from defective heating apparatus or from a stove placed in the car without the knowledge of the terminal carrier," the cause was thus stated disjunctively, or in the alternative, and such statement excludes the operation of both as the cause. In such a case neither the statement agreed upon nor the inferences to be drawn therefrom are sufficient to justify the conclusion that the plaintiff has sustained the burden of proof imposed upon him to show neglect on the part of the warehouseman.

Action on the case for alleged negligence on part of defendant's carrier or its connecting carriers. Case was reported to Law Court upon agreed statement of facts. Judgment in accordance with opinion.

Case stated in opinion.

Cyrus F. Small, for plaintiff.

Powers & Guild, for defendant.

SITTING: SPEAR, BIRD, HANSON, PHILBROOK, DUNN, MORRILL, JJ.

BIRD, J. This case is before us upon the following agreed statement of facts:

"On Jan. 24, 1916, the plaintiff delivered to the defendant, which is a common carrier engaged in interstate commerce, a carload of potatoes loaded in an Eastman Heater Car, upon receipt of which the defendant issued a bill of lading, a copy of which is hereto annexed.

"The car was transported to its destination by the defendant and connecting carriers, arriving at Atlantic Terminal, Brooklyn, Feb. 2, 1916.

"The Terminal Carrier gave notice of the arrival of the car to E. Waterman & Co., the notify party named in the bill of lading, on Feb. 4, 1916, and the car was placed for delivery on Feb. 5, 1916.

"The car remained on the track of the Terminal Carrier until the night of Feb. 14, when its contents were damaged by fire originating

either from defective heating apparatus or from a stove placed in the car without the knowledge of the Terminal Carrier. The contents of the car were damaged to the amount of $487.31.

"It is agreed that a reasonable time for unloading the car had elapsed after notice of arrival was given and before the occurrence of the fire.

"It is agreed that the plaintiff made claim against the defendant for its loss within the four month period provided for in the bill of lading.

"Immediately upon receipt of the bill of lading, the plaintiff drew a draft upon the notify party for the purchase price of the car of potatoes, attached the bill of lading, properly endorsed thereto, and forwarded the draft through its bank for collection. At the time of the fire the draft and bill of lading were in the possession of the collecting bank of New York City and had not been surrendered to the carrier.

"The parties agree that if the defendant is liable upon the above facts, judgment is to be rendered for the plaintiff for the amount of damages specified, with interest from the date of the writ. If the defendant is not liable upon these facts, judgment is to be . . . rendered for the defendant."

The bill of lading referred is of the standard form approved by the Interstate Commerce Commission. Section 5 thereof is as follows: "Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot, or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only, or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage."

The action is an action on the case for negligence whereby the car "containing said potatoes—caught fire and completely destroyed said potatoes"—

By the Act (1906) to amend the Act to Regulate Commerce, transportation is defined as including among other things "all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of

property transported." 34 Stats. at Large, Chap. 3591, Sec. 1. By a later section of the amendatory act, it is provided "That any common carrier, railroad or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed. . . ."

We think in view of Section 5 of the conditions of the bill of lading there can be no question upon the facts of this case, that defendant, as the initial carrier, is liable to plaintiff for all damages caused by the terminal carrier in the "transportation" of the potatoes, if any, and that the liability, if any, for the acts done by the latter must arise from his acts as warehouseman and not as carrier. Discussion is unnecessary, however, as we regard *Southern Railway* v. *Prescott,* 240 U. S., 632, 637, 640, as decisive of the question.

The care required of a warehouseman over the property in his charge is ordinary care. He is liable only for negligence. In *Southern Railway Co.*, supra, it is said: "The plaintiff asserting neglect had the burden of establishing it. This burden did not shift. As it is the duty of the warehouseman to deliver upon proper demand, his failure to do so without excuse, has been regarded as making a prima facie case of negligence. If, however, it appears that the loss is due to fire, that fact in itself, in the absence of circumstances permitting the inference of lack of reasonable precautions, does not suffice to show neglect, and the plaintiff having the affirmative of the issue must go forward with the evidence."

This case presents no evidence as to the cause and circumstances of the fire or the precautions taken by the terminal carrier, as warehouseman except the statement agreed upon by the parties to the effect that the contents of the car "were damaged by fire originating either from defective heating apparatus or from a stove placed in the car without the knowledge of the terminal carrier." The cause is thus stated disjunctively, or in the alternative, and such statement excludes the operation of both as the cause. *Austin* v. *Oakes,* 48 Hun., 492, 498.

The court has, in the absence of other evidence or other statement, no means of determining whether the defective heater or the stove was the cause of the fire and, as that which would constitute lack of ordinary care in the one case would not necessarily be lack of ordinary care in the other, it is difficult to see how the court can find negligence or lack of ordinary care on the part of the terminal carrier as warehouseman. In regard to the alleged defective heater, there is no evidence as to the nature of the defect, the period of its existence, the care actually exercised by defendant, or the time when the fire developed after the last visit of defendant's employees to the car. Nor does the agreed statement show when the stove was placed in the car "without the knowledge of the terminal carrier," nor whether or not the circumstances were such as to warrant the inference that the warehouseman did not exercise ordinary care in preventing its introduction into the car or in ascertaining its presence there. We conclude that neither the statements agreed upon nor the inferences to be drawn therefrom are sufficient to justify the conclusion that plaintiff has sustained the burden of proof imposed upon him. *De Grau* v. *Wilson*, 17 Fed., 698, 701; *Southern Railway Co.* v. *Prescott*, 240 U. S., 632, 641.

Judgment must be entered for defendant.
So ordered.

CHARLES P. WEBBER, et als., *vs.* RICHARD MCAVOY.

Penobscot. Opinion August 21, 1918.

Deeds. Mortgages. General rule as to adverse possession. Burden of proving title by adverse possession.

An action of trover for the recovery of damages for the conversion of certain logs cut from the locus described below, in the year 1909 and 1910. The parties admit that the alleged conversion was of lumber cut from the sixty acres lying next easterly of a one hundred acre lot located in the southwestern portion of Benedicta, or the west corner of lot No. 1, according to Caleb Leavitt's plan.

Held:

1. To maintain an action for the conversion of logs, plaintiffs must establish that they had either actual or constructive possession of the premises. If they did not have the title, they must show actual possession, the gist of the action being the invasion of the plaintiff's possession.
2. Where the plaintiff claims title and possession under a mortgage with full covenants of warranty which has been fully foreclosed, such warranty deed and deraignment of title thereunder afford prima facie evidence of title and seizure and entitle the plaintiff to recover against a mere trespasser, or one who cannot prove better title than the mortgagor, who had no title.
3. Evidence to the effect that the mortgagor giving such mortgage received from the mortgagee his quitclaim deed of same date as the mortgage, of all the right, title and interest of the grantor in the same property described in the mortgage, falls far short of proving no title in the plaintiff or party holding under the foreclosed mortgage, or that his title is inferior to that of the defendant who claims title by adverse possession. Such quitclaim deed conveys, it is true, only the grantee's right, title and interest but it by no means proves that the grantor did not possess a complete and impregnable title. If the fact be otherwise the defendant must proceed further with his proof.
4. The burden of proof of title by adverse possession is upon him who alleges it.
5. In proof of adverse possession of the locus by the defendant, he produced evidence tending to show acts of occupation in 1862, in 1878, in 1890, in 1895 and in 1902, but it is the conclusion of the court that the defendant fails to show thereby that continuity of possession or occupation which is required by the common law or which comports with the ordinary management of a farm. They appear, rather, to be acts of trespass long separated in time and fugitive in nature.

Action of trover to recover the value of certain logs converted by defendant. Defendant filed plea of general issue. At close of testimony, case was reported to Law Court to render such judgment as the law and evidence require. Judgment for plaintiff. Case stated in opinion.

Ryder & Simpson, for plaintiff.

Bertram L. Smith, and E. A. Atherton, for defendant.

SITTING: SPEAR, BIRD, HANSON, PHILBROOK, DUNN, MORRILL, JJ.

BIRD, J. On report. An action of trover for the recovery of damages for the conversion of certain logs cut from the locus described below in the years 1909 and 1910. "It is admitted that the alleged conversion was of lumber cut upon the sixty acres lying next easterly of a one hundred acre lot located in the Southwestern portion of Benedicta or the west corner of lot No. 1, according to Caleb Leavitt's plan."

As the right to the logs depends upon the possession of the locus from which they were cut, the plaintiffs, to maintain the action, must show that, at the time of the alleged conversion, they had either actual or constructive possession of the premises. If they did not have the title, they must show actual possession; the gist of the action being the invasion of the plaintiff's possession. This is familiar law. *Thurston* v. *McMillan,* 108 Maine, 67, 68; *Stevens* v. *Gordon,* 87 Maine, 564, 566, 567; III Wash., Real Prop., Sec. 1945.

The plaintiffs claim title and possession under a mortgage with full covenants of warranty given by Fayette Shaw and others to the Bishop of the Diocese of Portland. This deed of mortgage, in terms, includes the locus or sixty acre lot. The mortgage has been foreclosed and the title thereunder, by reason of certain assignments and other mesne conveyances, is in the plaintiffs. Such being the case the warranty deed and deraignment of title thereunder are prima facie evidence of title and seizure and entitle the plaintiffs to recover against a mere trespasser or against one who cannot prove better title or that the mortgagor had no title. *Thurston* v. *McMillan,* 108 Maine, 67, 71, 72; *Smith* v. *Sawyer,* 108 Maine, 485, 487; *May* v. *Labbe,* 112 Maine, 209, 210; *Smith* v. *Booth Bros., etc., Co.,* 112 Maine, 297, 306; See also *Chandler* v. *Wilson,* 77 Maine, 76, 82.

The defendant in disparagement of the plaintiffs' title offers the quitclaim deed of the Bishop of the Diocese of Portland to Fayette Shaw and others, of the same date as the mortgage given by the latter and already referred to, and to which reference is made in the mortgage, of all the right, title and interest of the grantor in the same property described in the mortgage given by the grantees to the grantor. This deed falls far short of proving no title in plaintiff or a title inferior to that of defendant, whose claim of title is considered later. The deed conveys, it is true, only the grantor's right, title and interest, but it by no means follows that the grantor did not possess a complete and impregnable title. If the fact be otherwise, the defendant must proceed further with his proof. See *Jones* v. *Webster Woolen Co.*, 85 Maine, 210. The situation of the plaintiff is not that of the defendant in *Thurston* v. *McMillan*, 108 Maine, 67, 72. Nor do we find in the reference in the deed of mortgage to the deed of Shaw, et als., to the Bishop of Portland, aught but assistance to determine the source of title, not an intention to determine the quantity or quality of title. *Perry* v. *Buswell*, 113 Maine, 402.

The defendant shows no title by deed but claims title by adverse possession and that the sixty acre lot or locus was and is a part of a lot originally laid out as a one hundred and sixty acre lot, the other one hundred acres, constituting the remainder of such one hundred and sixty acre lot, lying westerly of the sixty acre lot. The evidence does not satisfy the court that the one hundred and sixty acres in question were laid out in one lot but rather that they constituted two lots; one of one hundred acres and another of sixty, or more, acres.

The evidence tends to show that the grandfather of defendant settled upon the one hundred acre lot in the southwest corner of Benedicta, cleared and cultivated about forty acres of land upon its westerly side, and that at his death in 1853, there had been built upon it a log house, a barn and other outbuildings, all of which had disappeared at the time the case was reported. The easterly line of the one hundred acre lot does not appear to have been indicated or established upon the face of the earth, nor do we find the contention of the defendant that the easterly line of the sixty acre lot was so established sustained by a preponderance of the evidence. Neither the one hundred acre lot nor the sixty acre lot were enclosed by fences and both were wild and uncultivated lands, except the westerly forty acres of the former which are now partly grown up to trees or

bushes. Upon the death of the grandfather his son, Thomas McAvoy, second, took possession of and occupied the one hundred acre lot until his death in 1886. Since the latter date the defendant, son of Thomas McAvoy, second, appears to have occupied and used the one hundred acre lot as his own, or quoting his own language has "worked it off and on all his life time," claiming title by gift from his father, and not only to the hundred acre lot but also to the alleged sixty acre lot adjoining. *Martin* v. *M. C. R. R. Co.*, 83 Maine, 100, 103. The plaintiffs make no claim to the one hundred acres.

Upon the 60 acre lot there is evidence of a witness, then ten years old, that in 1862 the father of defendant cut "quite a large amount of pine." There is also evidence tending to prove that in 1878 the defendant, then a boy of fourteen, helped his father to haul cedar therefrom, the operation consuming a week's time; that in 1890 the defendant sold the stumpage for bark from the whole of the 160 acres; that in 1895 the defendant sold the stumpage of juniper knees upon the whole 160 acres (but there is no evidence that any bark or knees were removed from the 60 acre lot, under these permits or licenses); that in 1902 the defendant cut cedar from the south-easterly corner of the 60 acre lot and thence westerly to the westerly line of the 100 acre lot, cutting along the south line of the town. Defendant testifies that in his occupation of the premises he always worked up to the east line of the sixty acre lot. These are the only acts done by the father and defendant upon the locus, relied upon by defendant in his counsel's brief.

The burden of proof of title by adverse possession is upon him, who alleges it. *Batchelder* v. *Robbins*, 95 Maine, 59, 67; *Brown* v. *King*, 5 Met., 173, 180; *Lawrence* v. *Doe, etc.*, 144 Ala., 524, 527. Assuming the acts done upon the so-called sixty acre lot to have been adverse (*Alden* v. *Gilmore*, 13 Maine, 178, 182; *Morse* v. *Williams*, 62 Maine, 445, 446;) and that all were open and notorious, we think there is a failure to show that continuity of possession or occupation which is required by the common law or which comports with the ordinary management of a farm. In the mind of the court they appear rather to be acts of trespass long separated in time and fugitive in nature. *Rangeley* v. *Snowman*, 115 Maine, 412, 416; See *Little* v. *Megquier*, 2 Maine, 176, 178; *Tilton* v. *Hunter*, 24 Maine, 29, 33, 34; *Proprietors, etc.*, v. *Laboree*, 2 Maine, 275, 283; *Worcester* v. *Lord*, 56 Maine, 265, 269; *Fleming* v. *Paper Co.*, 93 Maine, 110, 113;

Hill v. *Coburn*, 105 Maine, 437, 446, 447; *Smith* v. *Sawyer*, 108 Maine, 485, 486; *Smith* v. *Booth Brothers*, 112 Maine, 297, 306; *Rollins* v. *Blackden*, 112 Maine, 459, 464, 465; *Daly* v. *Children's Home*, 113 Maine, 526, 528; See also *Roberts* v. *Richards*, 84 Maine, 1, 9, 10; *Adams* v. *Clapp*, 87 Maine, 316, 322. The law does not undertake to specify the particular acts of occupation by which alone a title by adverse possession can be acquired, Id. The following cases indicate what have not been considered such acts. *Frye* v. *Gragg*, 35 Maine, 29, 32; *Chandler* v. *Wilson*, 77 Maine, 76, 83; *Hudson* v. *Coe*, 79 Maine, 83, 93; *Richards* v. *Roberts*, 84 Maine, 1, 10; *Smith* v. *Sawyer*, 108 Maine, 485, 486.

The localities of the various acts of alleged occupation are not shown. Equally barren is the case of evidence that any one or more of such acts were upon the same locality. See *Proprietors of Kennebec Purchase* v. *Springer*, 4 Mass., 416, 418.

The conclusion is that the defendant has not sustained the burden of proof imposed upon him.

Judgment for plaintiff for the sum of one hundred and twenty-five dollars, as agreed by the parties.

CHARLOTTE W. THATCHER, et als., Trustee

vs.

CHARLOTTE W. THATCHER, et als.

Penobscot. Opinion August 26, 1918.

Rule as to disposition of stock dividends in trust estates.
Rule where the dividends are cash.

A bill in equity asking the instructions of the court as to the disposition, between life tenants and remaindermen, of a stock dividend declared by the directors of a corporation from its earnings upon its stock, sundry shares of which were held by complainant trustees.

Under all ordinary circumstances stock dividends belong to capital and go to the remainderman, while cash or money dividends are the property of the life tenant.

In the instant case the fifty shares of stock issued to the trustees as a stock dividend are to be held by them as part of the corpus or capital of the trust estate, the income alone thereof to be paid to the life tenants.

Bill in equity asking for the construction of certain clauses of the will of Benjamin B. Thatcher, late of Bangor, in so far as they relate to the disposition of certain stock dividends. Cause was heard upon bill and answers and by agreement of parties case was reported to Law Court. Judgment in accordance with opinion.

Case stated in opinion.

Charles H. Bartlett, for plaintiffs.

Charlotte W. Thatcher, pro se.

George T. Thatcher, pro se.

Charlotte M. Thatcher, pro se.

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

BIRD, J. In equity. The plaintiffs are trustees under the last will and testament of Benjamin B. Thatcher, deceased. The will was executed March 26, 1906. After sundry bequests the residue and

remainder are given in trust to the plaintiffs, who, after the payment of certain annuities therefrom, are directed to pay the balance of the income in equal shares to Charlotte W. Thatcher, wife of the testator, George T. Thatcher, his son, and Charlotte M. Thatcher, his daughter. The will further provides that the trust for these last named beneficiaries shall cease on the first day of January, 1920, if any of them live so long, and, if not, upon the death of the last survivor, and upon the determination of the trust "as a whole" the remainder is disposed of by giving the widow one-third for life discharged of the trust, and the other two-thirds outright to the said son and said daughter, or to the survivor, or his or her heirs outright in case either should die without lineal descendants.

Of the three annuitants, one is already dead and the two surviving are unaffected by the solution of the question presented.

The plaintiff trustees received from the testator as part of the trust estate and are owners of one hundred and fifty shares of the capital stock of the Orono Pulp and Paper Company. On the sixteenth day of November, 1916, the directors of that company declared from earnings a stock dividend of $33\frac{1}{3}$ per cent, and fifty shares of its capital stock, representing that percentage, have been delivered to the trustees. The trustees expressing doubt as to the disposition of this stock dividend, as between life tenants and remaindermen, ask the instructions of the court. Such briefly are the allegations and prayer of the bill of complaint. The defendants by their joint and several answer admit the allegations of the bill of complaint and join in its prayer. The case is reported to this court upon bill and answer.

As in other cases, the intention of the testator must govern. *Gibbons* v. *Mahon*, 136 U. S., 549, 559. But we find in the will no indication of the intention of the testator, either express, or implied from any of its terms.

Under such circumstances, the court must be governed by such rules of law as have been established to meet the circumstances of the case. Unfortunately the courts are not in agreement. But it would be unwise, in the face of such disagreement, for this court to endeavor to declare a new rule or discover a new method of dealing with the situation. We conceive our duty to be to ascertain the rule supported by the most authoritative decisions and best supported by reason.

Three so-called rules have been evolved to meet the situation—the Kentucky rule, the Pennsylvania rule and the Federal or Massachu-

setts rule. Roughly, the Kentucky rule gives to the life tenant all dividends accruing from earnings whenever made and in whatever form declared, while the Pennsylvania rule makes the same disposition of such dividends except those accruing from earnings made before the death of the testator, when apportionment is made. The third rule, known as the Massachusetts rule, holds that ordinarily cash or money dividends are the property of the life tenant, and that stock dividends belong to the remainderman. *Minot* v. *Paine*, 99 Mass., (1868) 101; *Rand* v. *Hubbell*, 115 Mass., 461, 475. In this rule, the courts of Connecticut, Rhode Island, Illinois, Ohio, the Supreme Court of the United States and the English Courts concur. *Brimley* v. *Grou*, 50 Conn., (1882) 66, 76; *Mills* v. *Britton*, 64 Conn., (1894) 4, 12; *Smith* v. *Dana*, 77 Conn., (1905) 543, 550; *Boardman* v. *Boardman*, 78 Conn., (1905) 451, 455; *Boardman* v. *Mansfield*, 79 Conn., (1907) 634, 639; *Green* v. *Bissell*, 79 Conn., (1907), 547, 551; *Boardman* v. *Mansfield*, Id., (1907) 634, 639; *Brown et al., Pet'rs*, 14 R. I., (1884) 371, 372; *Green* v. *Smith*, 17 R. I., (1890), 28, 30; *Newport Trust Co.* v. *Van Renssalaer*, 32 R. I., (1911) 231, 237; *Bouch* v. *Sproule*, L. R., 12 App., Cas. (1887), 385, 389; *Jones* v. *Evans*, L. R. 1., Ch. Div. (1918) 23, 32; (See *Re Heaton's Estate*, 89 Vt., pages 561-2) *Gibbons* v. *Mahon*, 136 U. S., (1889) 549, 559, 564; *Towne* v. *Eisner*, 245 U. S., (1918), 418, 426; *DeKoven* v. *Alsop*, 205 Ill., (1903) 309, 314, 315; *Billings* v. *Warren*, 216 Ill., (1905) 281, 287; *Wilberding* v. *Miller*, 85 Ohio St., 609 (Opinion, 90 Id.) (1913), 28, 54, 55.

In *Richardson* v. *Richardson*, 75 Maine, (1884), 570, 574, PETERS, C. J., states that the decided preponderance of authority probably concedes the point that dividends of stock go to the capital under all ordinary circumstances. If the decided preponderance of authority probably conceded this point in 1884 in the opinion of the learned Chief Justice, we think we are justified in saying now that, we believe the Massachusetts rule is supported by the weight of authority, and, we need not say, of the most respectable and highest character.

These so-called rules have been the subject of many decisions of the courts and have received treatment at the hands of numerous text writers and authors of legal literature. To analyze those opposing the Massachusetts rule and give the reasons upon which they are based would be of little profit and far exceed the limits of an opinion of the court. To give the reasons for the adoption of the Massachu-

setts rule would be a work of supererogation. They are found and fully discussed in the cases above cited, and this court feels that it needs do no more than call attention to them. It is our conclusion that the Massachusetts rule is sustained by reason as well as by authority.

Attention has been called to the case of *Gilkey* v. *Paine,* 80 Maine, 319. This was a proceeding in equity by a life tenant under a trust created by will in which the life tenant claimed certain shares of stock in the hands of the trustee under a pro rata distribution by a corporation of sundry shares of its own stock. The court held that the shares were purchased by the corporation by an issue of its interest bearing bonds, and that these shares were therefore no part of the net annual income to which plaintiff was entitled under the will and dismissed the bill. The court refers to the Massachusetts rule as a very elastic rule in the state of its origin, and cites a departure therefrom in that State. But all rules in equity must necessarily be sufficiently elastic to do equity in the case which may be under consideration. There are few rules that have no exceptions, and equity will not adhere to and apply a rule or principle which manifestly and clearly will not result in doing equity; *Daland* v. *Williams,* 101 Mass., 571, 573; especially when it is necessary to determine the true character of a transaction. *Leland* v. *Hayden,* 102 Mass., 542; see also *Gifford* v. *Thompson,* 115 Id., 478, 480. *Gilkey* v. *Paine,* supra, while citing *Richardson* v. *Richardson,* 75 Maine, 570, already referred to, does not overrule it, and the expressions in the opinion relied upon as affecting its authority, we regard as obiter dicta merely. Neither case decides the point at issue in this case.

The income of a corporation is one thing, that of a trust estate another.

In answer to the request of the plaintiffs for instructions, it is the opinion of the court that the fifty shares of stock issued by the corporation are to be held by the trustees as part of the corpus or capital of the trust estate in their hands, the income thereof alone to be paid to the life tenants.

Decree accordingly.

IDA LECLAIR,
Otherwise known as Ida LeClaier, Petitioner,

vs.

T. HERBERT WHITE, Sheriff.

Penobscot. Opinion August 28, 1918.

Habeas corpus. Sentence in criminal cases. Rule as to what constitutes the actual punishment and what is incidental thereto. Rule as to jurisdiction of court where Statute calls for imprisonment for one year.

The Fifth Amendment to the Constitution of the United States does not apply to the courts of the several States.

A statute which authorizes punishment for the commission of crime by fine within the inclusive limitations of one hundred dollars and five hundred dollars, plus costs of prosecution, and imprisonment for not less than two months nor more than six months, with supplementary imprisonment, in the event of omission of payment of the fine and costs, for six months more, neither purports to empower the infliction of the equivalent of sentence to absolute imprisonment for one year nor denominates the crime infamous within the meaning of the Constitution of Maine.

It is competent for the Legislature to invest municipal and other subordinate courts with jurisdiction to try and punish offenders against the statute. Such statute is not inconsistent with the interdiction of the Fourteenth Article of Amendment to the Constitution of the United States in respect of due process of law and the equal protection of the laws.

Petition for writ of habeas corpus, to obtain the release of the petitioner from the jail in the County of Penobscot. Upon hearing, the petition was dismissed; to which ruling exceptions were filed. Exceptions overruled.

Case stated in opinion.

Thomas F. Gallagher, and O'Connor & Conquest, for petitioner.

Albert L. Blanchard, County Attorney, for defendant.

SITTING: BIRD, HANSON, PHILBROOK, DUNN, MORRILL, JJ.

DUNN, J. A statute forbids any person to deposit intoxicating liquor, or to have it in his possession, with intent on his part to sell it in this State in violation of law. The penalty is a fine within the inclusive limitations of one hundred dollars and five hundred dollars, plus costs of prosecution, and imprisonment for not less than two months nor more than six months, with supplementary imprisonment, in the event of omission of payment of the fine and costs, for six months more. R. S., Chap. 127, Sec. 27, as amended by Laws of 1917, Chap. 291. Municipal and other subordinate courts have jurisdiction, original and concurrent with the supreme judicial and superior courts, to try and punish offenders. R. S., Chap. 127, Sec. 40.

On the thirty-first day of December in the year of one thousand nine hundred and seventeen, on proceedings instituted against her by written complaint, Ida LeClair, of Bangor, was convicted in the municipal court in that city of violation of the legislative enactment. She was sentenced to pay a fine of two hundred dollars and costs, to be imprisoned in the county jail for the term of sixty days, and, should she default payment of the fine and costs, to be imprisoned as aforesaid for six months additionally. This sentence was vacated by appeal. For non-compliance with an order of the court of first instance to recognize for the prosecution of her appeal before the appellate tribunal, and to abide its judgment thereon, the respondent was committed to jail. In April, 1918, at a Penobscot session of this court, she petitioned for writ of habeas corpus, which petition was denied. In argument of exceptions the petitioner contends, that the punishment provided for violation of the statute on which the proceedings against her were founded, authorizes the equivalent of sentence to absolute imprisonment for one year; and forasmuch as the Legislature has commanded, subject to an exception unnecessary to be particularly stated here, that all imprisonments for one year or more shall be executed in the state prison (R. S., Chap. 137, Sec. 3), therefore the transgression whereof she was accused is a felony (R. S., Chap. 133, Sec. 11). Expressed somewhat differently, she insists that, within the meaning of the fifth of the amendments to the Constitution of the United States, and of a similar provision in the Declaration of Rights in the Constitution of the State of Maine

(Con. of Maine, Art. I, Sec. 7), the crime charged against her is an infamous one for which she should be held to answer on presentment or indictment of a grand jury, and not otherwise.

The assignment of inconsistency with the provision of the Fifth Amendment to the Constitution of the United States is based on a misapprehension. That amendment is obligatory only on the Federal government, and does not apply to the courts of the several States. *Hunter* v. *City of Pittsburgh*, 207 U. S., 161; *Brown* v. *New Jersey*, 175 U. S., 172; *Capital City Drug Company* v. *Ohio*, 183 U. S., 238; *Ohio* v. *Dollison*, 194 U. S., 445.

On this branch of the case, the crucial query is: whether, in view of the guaranty of the supreme organic law of the State of Maine, the prosecution should have been begun by or before a grand jury instead of by complaint to the municipal court. The liability to punishment upon conviction for the commission of crime, rather than the punishment actually inflicted, is the criterion which, as a general rule, renders the offender infamous at common law. *Butler* v. *Wentworth*, 84 Maine, 25. Is the crime, measured by the standard of liability to punishment for its commission, an infamous one? Was the petitioner accused of misconduct for which the statute empowers the court to impose a sentence to be fulfilled in no other manner than by the incarceration of the convict in a penal institution for one year? If the answer shall be in the affirmative, then no court had jurisdiction to try and punish her, unless upon presentment or indictment by a grand jury. It is easy to discern, that if a criminal were sentenced to the maximum term of imprisonment, and, that punishment endured, he should be detained in jail six months beyond, for failure to pay his fine, he would be debarred from personal liberty for one whole year. But no judge in any court prerogative has to say, when he pronounces sentence in such case, that the culprit shall stay one year in jail or prison, unconditionally, positively, and absolutely. There is the test. Detention of a condemned person in jail for failure to pay a fine is only a means provided for the enforcement of the pecuniary penalty imposed by the sentence. Actual payment of the fine itself is the punishment. Imprisonment for default of payment is a mere incident of the fine. It is within the common law authority of the court to order a sentenced respondent to stand committed pending payment of an imposed fine. The statute fixes the duration of such imprisonment. This "imprisonment" is not a part of the punishment by

imprisonment authorized as a penalty for the commission of the crime. Payment of the fine, and imprisonment for not paying it, cannot exist at the same time. Of his own elective preference the convict may remain in jail for non-payment of the fine. In effect the statute is, that if the malefactor fails or neglects to pay the fine and costs, then, after the expiration of the sentence to unconditional imprisonment, he shall continue imprisoned until payment shall be made, but not longer than six months, when he shall go quit. He can sooner discharge himself by paying the fine. At the expiration of the sentence to absolute imprisonment, which at most cannot be prolonged more than six months, if the convict shall have paid, or if at any time within six months afterwards he shall pay, the fine and costs, he will find the prison door ready to swing open to his touch. So, the answer is obvious. The crime is not an infamous one. The statute does not presume to authorize unconditional imprisonment for the term of one year.

Nor is the statute, as the petitioner further claims, inconsistent with the interdiction of those clauses of the Fourteenth Article of Amendment to the Constitution of the United States which are in these words:

"Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

"Due process of law," as that expression is used in the Fourteenth Amendment, does not necessarily require that a State shall prosecute even for felony by presentment or indictment of a grand jury. *Hurtado* v. *California*, 110 U. S., 516. Those words shield the citizen's rights to life, liberty, and property from the exercise of arbitrary governmental power, but do not restrict the State to any particular mode of procedure. They afford protection which the proceedings against the present petitioner fully respected. The statute which creates the offense, and provides for the prosecution of offenders and their punishment, derives its authority from the reserved powers of the State, and violates none of the fundamental elements of liberty and justice which underlie our civil and political institutions. With reasonable certainty it defines what shall constitute infraction of the law. The nature and cause of the accusation against the petitioner as a respondent appear to have been effectively set forth in due form; the respondent had notice thereof, and knew for what she was to be

tried. Adequate opportunity was afforded for her hearing and defense. Her trial proceeded in accordance with recognized procedure, agreeably to the rules of evidence. She was convicted by the decision of a competent court, and sentenced to a punishment sanctioned by law. Law, regularly administered through courts of justice, is due process, and satisfies the constitutional requisition. 2 Kent Com., 13; *Hurtado* v. *California*, supra; *Frank* v. *Mangum*, 237 U. S., 309-326.

The statute is not arbitrary. It is not partial. It deals to each his proper share, and fits alike the case of every person within the extent of its authority, who, since the enactment, has violated or may violate its inhibitions. It does not deny to any person within its jurisdiction the equal protection of the laws. *Tinsley* v. *Anderson*, 171 U. S., 101.

The petitioner took nothing by her exceptions.

Exceptions overruled.

ERNEST A. GOODWIN,
Treasurer of the City of Biddeford,

vs.

HASSAN NEDJIP, et als.

York. Opinion August 30, 1918.

Action of debt. Rule as to breach of victualer's bond where obligors have been guilty of the sale of intoxicating liquors. Rule as to whether the provisions of such bond apply to a certain locality or shall be treated generally.

Action of debt upon a victualer's bond.

Held:

1. The permission to conduct an inn is not granted to all who may apply for a license; it is not a right to be exercised by one at will, but a privilege to be exercised when granted by municipal officers. The last named officers may not at will grant such license; their duty is defined by statute, and they may issue licenses to such persons only as are of good moral character. The licensee must possess such character to be entitled to a license. To maintain such

license, he must continue to be of good moral character. If during the term of the license he engaged in the sale of intoxicating liquor in this State, then he violated his license; there was a breach of the bond for which both principal and sureties are liable.

2. If the Legislature did not intend to include territory beyond the confines of the inn, and the only purpose was to guard the integrity of the license, then the language used was wholly unnecessary, for other provisions of the statute wou d serve that purpose as effectually.
3. The words are of broader scope and can mean only that the defendant will sell no liquor anywhere in Maine during the term of his license. The bondsmen agreed to this, and all the parties are bound by the rule that when persons under no disability enter into a contract on a sufficient consideration, an action will lie for its breach. This doctrine is applicable to bonds equally with other contracts.

Action of debt upon a victualer's bond. To the rulings of the presiding Justice defendant filed exceptions. Exceptions overruled.

Case stated in opinion.

Leroy Haley, for plaintiff.

Clarence Webber, and Robert B. Seidel, for defendants.

SITTING: SPEAR, HANSON, PHILBROOK, DUNN, MORRILL, JJ.

HANSON, J. Action of debt upon a victualer's bond, before the court upon the following bill of exceptions:

"This was an action of debt upon a victualer's bond for which provision is made in Chapter 31, Section 2, of the Revised Statutes. The defendants appeared severally and jointly craved oyer of the declaration and the conditions of the bond. The conditions of the bond were recited in defendants' plea, thereupon defendants pleaded performance of such conditions. The plaintiff replied assigning as a breach of such conditions that the principal in the bond had been convicted of the offense of a single sale of intoxicating liquor subsequent to the date of the bond and prior to the date of the writ. Defendants rejoined as follows:

"The said defendants, as to the said replication to their said plea, say that he, the said Hassan Nedjip, has not at any time since the execution of the writing obligatory declared on in the plaintiff's writ, violated any law of this State relating to intoxicating liquors in, about or around the premises mentioned in said writing obligatory, or any of the appurtenances thereof, and this they are ready to verify."

"To which rejoinder plaintiff demurred and the demurrer was joined by defendants. The presiding Justice sustained the demurrer to which ruling the said defendants except and pray that their exceptions may be allowed."

The condition of the bond is that "whereas the above bounded Hassan Nedjip has been duly licensed as a common victualer at No. 1 Main Street within said City (Biddeford) until the day succeeding the first Monday of May next; now if in all respects he shall conform to the provisions of law relating to the business for which he is licensed, and to the rules and regulations as provided by the licensing board in reference thereto, and shall not violate any law of the State relating to intoxicating liquors, then this obligation shall be void, otherwise shall remain in full force."

The contention here is over the following clause in the condition of the bond, "and shall not violate any law of the State relating to intoxicating liquors", and but one question is raised: Does the bond apply to the place licensed, only? The defendants claim that such clause is to be interpreted as meaning "in, about or around the premises licensed," and cite and rely upon *Clements* v. *Smith*, 129 App. Div. 859, N. Y., Sup. 55, where action was brought against the principal and the Federal Surety Company under a bond issued by the latter under the provisions of the liquor tax law. The bond was in the usual form, and, after reciting the purpose and location of the business, provides "that if the said liquor tax certificate applied for is given unto the said principal, and the said principal will not, while the business for which such liquor tax certificate is given shall be carried on, suffer or permit any gambling to be done *in the place* designated by the liquor tax certificate in which the *traffic in liquors is to be carried on*, or in any yard, booth, garden or any other place appertaining thereto or connected therewith, or suffer or permit such premises to become disorderly, and will not violate any of the provisions of the liquor tax law, then the above obligation to be void; otherwise to remain in full force and virtue." The trial court directed a verdict for the defendant, and the decision of the appellate court sustained the action of the lower court, upon the ground "that any other ruling would tend to defeat the very purpose of the liquor tax law as a revenue measure by making it practically impossible for any man to get sureties. The bond clearly related and was confined in its operations to the premises for which the liquor tax certificate was

issued. This was the fair contract of the surety company. It undertook to guarantee that as to the premises which were to be licensed for the traffic, there should be no gambling and no disorderly conduct, and generally that there should be no *violations of the conditions of the license.*"

We have stated enough of that opinion to demonstrate that the cases are not similar in fact or principle. The difference in the wording of the bond, and the decided difference in public policy, in the two jurisdictions, touching sources of state revenue, makes clear the distinction drawn by us, that while that ruling has the support of the case quoted, we cannot so hold it to be the law governing the case at bar. We are in agreement with the finding that the clause in the bond in that case which reads, "and will not violate any of the provisions of the liquor tax law," was one of the conditions of the license, and a *condition* of the bond. So we must hold here. The like clause in the bond in suit was one of the conditions of the bond, and was violated by the defendant by the sale of intoxicating liquor at another place within the State. The permission to conduct an inn is not granted to all who may apply for a license; it is not a right to be exercised by one at will, but a privilege to be exercised when granted by municipal officers. The last named officers may not at will grant such license, their duty is defined by statute, and they may issue licenses to such persons only as are of good moral character. The licensee must possess such character to be entitled to a license. To maintain such license he must continue to be of good moral character. If during the term of the license he engaged in the sale of intoxicating liquor in this State, then he violated his license, there was a breach of the bond for which both principal and sureties are liable. Our conclusion proceeds from different premises; not revenue, but the safety and security of the public. Good moral character is a prerequisite; the defendant could receive no license without it. He must be presumed to have been of good moral character at the date of the bond. In any event the condition of the bond relating to intoxicating liquors was known to the sureties as it was to the principal. It was in the bond, and related to the contract he was making with the public, that during the period of his license he would conform to the law relating to the business of an innholder, and to the rules and regulations as provided by the licensing board in reference thereto; *and* "shall not violate any law of the State relating to intoxicating liquors."

If the legislature did not intend to include territory beyond the confines of the inn, and the only purpose was to guard the integrity of the license, then the language used was wholly unnecessary, for other provisions of the statute would serve that purpose as effectually. We cannot read into the bond in suit the words written in *Clement* v. *Smith*, supra, and say that the bond related to the inn alone. The words are of broader scope and can mean only that the defendant will sell no liquor anywhere in Maine during the term of his license. The bondsmen agreed to this, and all the parties are bound by the rule that when persons under no disability enter into a contract on a sufficient consideration, an action will lie for its breach. This doctrine is applicable to bonds equally with other contracts. 4 R. C. L., 55; *Carey* v. *McKay*, 82 Maine, 516. See *Dexter* v. *Blackden*, 93 Maine, 473.

The entry will be, exceptions overruled. In accordance with the stipulation in the exceptions,

Judgment for the plaintiff for fifty dollars.

STATE OF MAINE *vs.* BENJAMIN BUCKWALD.

Cumberland. Opinion August 30, 1918.

Indictments. Criminal pleading. Meaning and scope of words "then and there" as used in the Statute. Evidence.

This was an indictment for accepting money from a prostitute contrary to the provisions of R. S., Chap. 126, Sec. 16. The case was tried before a jury at the May term, 1917, of the Superior Court for the County of Cumberland; a verdict of guilty was returned, and the case is before the court on exceptions.

Held:

1. Various offenses are mentioned in Chap. 126, R. S., in any one and all of which Section 20 applies, its clear purpose being to make use of and make admissible reputation of ill repute, in the highest interest of society, to the end that such practices as are here in question, and kindred offenses, shall be stamped out. The testimony was properly admitted.
2. Testimony of similar acts was adm ssible for the purpose of showing intent; and this, with all the other testimony and circumstances in the case, was submitted to the jury, and properly so.
3. The indictment follows the statute, and at the beginning, and again at the conclusion, uses the words "then and there," which can have but one meaning, and in our criminal proceedings have had but one meaning for a century. As used in the indictment, no doubt can arise in the mind of any person as to the exact meaning of the words being that the money in question was from the earnings of a prostitute while engaged in prostitution.

Indictment for accepting money contrary to provisions of R. S., Chap. 126, Sec. 16. After verdict of guilty, respondent filed motion in arrest of judgment. Motion was overruled; to which ruling and also to the admission of certain testimony, respondent filed exceptions. Exceptions overruled.

Case stated in opinion.

Carroll L. Beedy, County Attorney, *and Jasper H. Hone*, Asst. County Attorney, for State.

William C. Eaton, W. C. Whelden, and Henry N. Taylor, for respondent.

SITTING: CORNISH, C. J., SPEAR, BIRD, HANSON, PHILBROOK, DUNN, MORRILL, JJ.

HANSON, J. This was an indictment for accepting money from a prostitute contrary to the provisions of R. S., Chap. 126, Sec. 16. The case was tried before a jury at the May term, 1917, of the Superior Court for the County of Cumberland; a verdict of guilty was returned, and the case is before the court on exceptions.

The indictment follows: "The Grand Jurors for said State upon their oath present that Benjamin Buckwald of said Portland, on the fifteenth day of June, A. D. 1915, at said Portland, feloniously did accept, receive, levy and appropriate, without consideration, from the proceeds of the earnings of Sadie Cohen of said Portland, a woman then and there engaged in prostitution, money, to wit, certain gold, silver, nickel, and copper coins and divers national Bank bills, United States Treasury notes and certificates, current as money in the United States of America, a more particular description and the value and amount of which is to your Grand Jurors unknown, the said Buckwald then and there knowing that said money was from the earnings of the said Sadie Cohen and that she was a woman then and there engaged in prostitution, against the peace of said State and contrary to the form of the statute in such case made and provided."

The first exception was to the admission of the following question and answer: "Q—What was the reputation of 63 Commercial Street with reference to purposes of prostitution during the summer of 1915, between the first of May and last day of November? Answer. It is a disorderly house." Second: Sadie Cohen, named in the indictment, was allowed to testify against objection that on the day of her arrival May first or May second, 1915, she engaged in prostitution, (before the day alleged in the indictment) and that after May 15 on various occasions she engaged in prostitution at the place above named, which place was occupied by the defendant and herself, and that she paid over one-half the proceeds thereof to the defendant. Other witnesses testified to similar acts on the part of Sadie Cohen subsequent to the day alleged in the indictment, and the payment by her of money to the defendant. Third: After verdict of guilty and before judgment the defendant filed a motion in arrest of judgment upon the ground that "said indictment is bad in that it does not set out any offense against the common law or any statute of this State."

As to the first exception: Section 20 of the Act provides; "In any prosecution under the six preceding sections, evidence of the general reputation or common fame of a house or place shall be admissible for the purpose of proving that the house or place is one of ill fame, prostitution or assignation." The language used needs no construction by us to show the intention of the legislature. Various offenses are mentioned in the "six preceding sections," in any one and all of which Section 20 applies, its clear purpose being to make use of, and make admissible such reputation of ill repute, in the highest interest of society, to the end that such practices as are here in question, and kindred offenses, shall be stamped out. The testimony was properly admitted, and the respondent takes nothing from this exception.

As to the second exception: The respondent claimed as matter of law that the offense charged in the indictment was a single and not a continuing offense, and that while the State was not bound by the date laid in the indictment, but could introduce evidence tending to prove the commission of the offense on any date within six years prior to the finding of the indictment, having introduced evidence tending to prove the commission of the alleged offense on a particular occasion, further testimony relative to separate and subsequent alleged commissions of the offense was not admissible. The cases do not so hold, and such has not been the practice in similar cases. Here the presiding Justice ruled, if he ruled at all, as follows: "My ruling would be that the State may show any similar acts at or about the time alleged in proof of the intent." Following this, counsel for the respondent asked: "Within a period of six months, that is the question here, from May 1st to November 1st," and the court replied, "Within that period, yes." The rule is universal that such testimony is admissible for the purpose offered. Moreover it appears that the presiding Justice was very careful to so limit the testimony, which with all the other testimony and circumstances in the case, were submitted to the jury, and properly so. We find nothing in the case to show error prejudicial to the respondent, and he can take nothing by this exception. *State* v. *Acheson*, 91 Maine, 240; *State* v. *Bennett*, 117 Maine, 113.

The third exception calls in question the validity of the law itself, and counsel says that it does not set out "any offense against the common law or any statute of the State." His reasoning is that the

indictment, which is in the exact words of the statute, does not state definitely that the money claimed to have been paid was, within the meaning of the law, money actually received from the proceeds of the earnings of Sadie Cohen as a prostitute; that while she may have earned money as a prostitute, she might possess other money from legitimate sources from which she could have paid the respondent, and, if so, the proper construction of the statute justifies his claim under this exception, because the indictment nowhere states that such money was earned by prostitution. The indictment follows the statute, and at the beginning, and again at the conclusion, uses the words "then and there," which can have but one meaning, and in our criminal proceedings have had but one meaning for a century. As used in the indictment, no doubt can arise in the mind of any person as to the exact meaning of the words being that the money in question was from the earnings of a prostitute while engaged in prostitution.

It is held in *State of Washington, Respondent,* v. *Felix Crane, Appellant,* 88 Wash., 210, 1915, the only case before us dealing with a like question under a similar statute, that "An information charging in the language of the statute the accused with accepting the earnings of one G. B., she then and there being a common prostitute, sufficiently charges the offense of accepting the earnings of a prostitute, it not being necessary to specify that the earnings so given were unlawful earnings accepted for an unlawful purpose, or to state specifically what was received."

The motion was properly overruled. The entry will be,

Exceptions overruled.

CHARLES A. PREST

vs.

THE INHABITANTS OF THE TOWN OF FARMINGTON.

Sagadahoc. Opinion September 11, 1918.

Action of assumpsit. Rule as to bringing an action in the nature of assumpsit for damages caused by deceit and misrepresentation. Rule of procedure in case where party has entered into a contract and claims fraud and misrepresentation. Rights of the parties where the fraud is discovered. Rule as to where false expressions do not generally constitute fraud in law. Right of recovery where party relying upon the alleged misrepresentation had the same or better means of knowledge than the party making the same.

The plaintiff made a contract with the defendants to construct certain lines of sewers for a fixed price. He brings this action of indebitatus assumpsit upon an account annexed to the writ, to recover an alleged balance of the contract price, and includes in his account a charge for extra labor of men and teams along and within the limits of lines of sewers covered by the special contract. Recovery is claimed upon the ground that certain material misrepresentations as to the character of the excavation were made to him by the selectmen, and that in this form of action he is entitled to recover for the extra cost occasioned thereby.

Held: that where a party agrees to do work for a specified sum under a fraudulent representation, he can only recover in an action of indebitatus assumpsit according to the terms of the contract, although, when he discovered the fraud, he might have repudiated the contract and sued for deceit.

The duty to pay damages for a tort, does not imply a promise to pay them, upon which assumpsit can be maintained.

The evidence fails to show any attitude or action on the part of the selectmen recognizing, or undertaking to pay, the charges for so-called extra work on the sewers, except in relation to an old well and an extension in Perham Street.

Action of assumpsit to recover for certain labor and materials furnished defendant town. Defendant filed plea of general issue and also brief statement. Verdict for plaintiff in sum of $1347.88. Defendant filed motion for new trial. Judgment in accordance with opinion.

Case stated in opinion.

McGillicuddy & Morey, for plaintiff.

Frank W. Butler, and Sumner P. Mills, for defendants.

SITTING: CORNISH, C. J., SPEAR, HANSON, PHILBROOK, DUNN, MORRILL, JJ.

MORRILL, J. This action is brought to recover a balance of $2241.61 alleged to be due the plaintiff under three independent contracts between plaintiff and defendants, and for extra labor and materials on each piece of work. The aggregate of the contract prices was $4425; this is agreed to by both parties. The plaintiff gives credit for items aggregating $4383.70; the defendant claims credit for items aggregating $4457.20, and it is admitted that the latter amount is correct. In the account annexed to the writ the amounts claimed for extra work and materials on each job are stated in lump sums; it appears, however, from reading the record that a bill of particulars was prepared and used at the trial before the jury, but it was not made part of the record and no copy has come to the possession of the court. The jury found a general verdict for $1347.88, which the defendants now move to set aside, insisting as stated in their brief statement filed under the general issue "that no further liability was incurred by them in regard to either piece of work than the contract price." The contracts were not reduced to writing; it is therefore necessary, in passing upon the contentions of the parties, to ascertain from the evidence what were the actual terms of the contracts for each piece of work.

1. The Sewer Contract. At the annual town meeting in March, 1913, the inhabitants of the town of Farmington appropriated $3500 for the construction of certain lines of sewers. In July of that year the plaintiff came to Farmington "to look up the job—to learn what they wanted done;" at that interview the selectmen told him "something about what they had to do, just about the same knowledge that I had before I went there," as the plaintiff says in his testimony, page 16; at that time the selectmen and the road commissioner showed him over the proposed line. At that visit of the plaintiff to Farmington or a short time later (the exact date does not appear) the plaintiff made a contract with the defendants to construct an 8 inch, 10 inch and 12 inch sewer in Front Street and Broadway and from a

point at Main Street and Broadway Southerly to the Exchange Hotel; also to construct a 6 inch sewer from an existing 8 inch sewer in High Street extension, along the North and West side of the old Tannery Brook to Perham Street; the contract price was to be thirty-five hundred dollars, the amount appropriated by the town for that work. Both parties agree that such a contract was made; the part relating to the extension Southerly in Main Street was modified by mutual agreement; no claim for extra work and materials is made on account thereof and that change does not enter into this case. When the first interview was had the lines of the sewers had not been surveyed and Mr. Prest agreed to obtain an engineer and to throw in his time in assisting the engineer. He accordingly engaged Mr. Pierce of the Sanders Engineering Company to run out the lines. At some time a contract for the work was drafted but never signed. In offering this paper in evidence plaintiff's counsel said: "This paper I offer, not for the purpose of a contract, because they never agreed. There are some things left out, but as far as establishing the course, it is in here, and there is an admission that the parties were together. That makes the courses admissible. Upon that point there is no disagreement. I offer it for that purpose and no other." It is to be noticed that counsel said, "they never agreed," yet he brings his action to recover an amount due upon a contract price of thirty-five hundred dollars. What, then, were the terms of the contract upon which plaintiff now sues? What were the specifications of that contract, which determine the line between work under the contract and alleged extra work?

If the unsigned contract is evidence only of the courses of the proposed sewers, for which purpose only it was offered, there is no evidence whatever of any details or specifications of the contract as made, save only in the particular that the contractor was to connect up existing sewers with the new lines. The case does not show what agreement, if any, the parties arrived at as to the grades, depth, depth of covering, location of manholes or exact location of intercepted sewers,—no specification of location of the sewer as to the water pipes which were known to be in the ground. The conclusion is irresistible that after looking over the ground, with the knowledge which he had when he first came to Farmington, Mr. Prest agreed to construct the proposed sewers for the amount of the appropriation. In fact he substantially says as much. On page 55 of the record he

testifies: "Q. When did you make your trade with them? A. I don't remember the date. Q. Now what was your trade? What trade did you finally make with the selectmen? A. Well, I agreed to lay those two sewer lines for $3500."

This is likewise the version of the selectmen. Mr. Prest's actions are consistent therewith; he offered to procure for the town an engineer to run the lines, and to give his own time as an assistant; he thus had the opportunity to make all tests and to obtain all knowledge of the location which would enable him to do the work properly and profitably to himself. He now brings suit to recover, under the account annexed, the contract price. In addition to the item for the contract price he claims in the account annexed the following items:

"To extra on 8 inch, 10 inch and 12 inch line, Front and Broadway Street to High Street	$336.95
Plus 15% profit on $336.95,	50.50."

An examination of this claim as tabulated in the brief of plaintiff's counsel shows that it is all for labor of men and teams along and within the limits of lines of sewers covered by the special contract. Recovery is claimed upon the ground that certain representations as to the character of the excavation were made to him by the selectmen, that these representations were material and were false and that in this form of action he is entitled to recover for the extra cost occasioned thereby. It may well be doubted whether the alleged misrepresentations, if made, were anything more than honest expressions of opinion, or honest statements of fact not purporting to be of knowledge. *Holbrook* v. *Connor*, 60 Maine, 578; *Gordon* v. *Parmalee*, 2 Allen, 212. "Where the whole subject, in fact, rests in the opinion of the parties, and cannot reasonably be understood otherwise, false expressions on either hand do not generally constitute fraud in law." *Thompson* v. *Ins. Co.*, 75 Maine, 55, 61. It may well be claimed that the plaintiff did not rely and had no right to rely upon the alleged misrepresentations because they related to facts of which he had equal or better means of knowledge than the selectmen had under the circumstances of this case. *Patten* v. *Field*, 108 Maine, 302; *Savage* v. *Stevens*, 126 Mass., 207. See cases cited in *Long* v. *Athol*, 196 Mass., 503, 504.

However that may be, and we express no opinion in relation thereto, upon the plaintiff's claim he cannot recover in this form of action.

Where a party agrees to do work at a specified sum under a fraudulent representation, he can only recover in an action of indebitatus assumpsit, according to the terms of the contract, although, when he discovered the fraud, he might have repudiated the contract and sued for deceit. *Selway* v. *Fogg*, 5 M. & W., 83.

So when a party purchases goods on credit fraudulently intending at the time of the contract not to pay for them, and the vendor brings assumpsit for the goods sold before the time of credit has expired, the action cannot be maintained although the vendor might have treated the contract as void and have sued the vendee immediately in trover to recover the value of the goods. By bringing the action in assumpsit, the plaintiff affirmed the contract. *Ferguson* v. *Carrington*, 9 B. & Cr., 59.

Where the parties have made a contract for themselves, covering the whole subject matter, no promise is implied by law. *Phelps* v. *Sheldon*, 13 Pick., 52; *Whiting* v. *Sullivan*, 7 Mass., 107; *Steam Mill Co.* v. *Westervelt*, 67 Maine, 446, 449.

The duty to pay damages for a tort does not imply a promise to pay them, upon which assumpsit can be maintained. *Cooper* v. *Cooper*, 147 Mass., 370.

The evidence fails to show any attitude or action on the part of the selectmen recognizing, or undertaking to pay, the charges for so-called extra work on the sewers, except in relation to an old well and an extension in Perham Street, of which we shall speak later. The items appear to have been kept by the plaintiff as showing his loss on account of the alleged misrepresentation. The right of action arises not on a failure to keep and perform a promise, but upon a false representation. Why then should an action of assumpsit be brought? See *Noyes* v. *Loring*, 55 Maine, 408, 411.

Mr. Prest discovered the true character of the excavation at an early stage of the work, and if his present contention is true, he might then have repudiated the contract and recovered the fair value of the work done and materials furnished. *Selway* v. *Fogg*, supra; *Long* v. *Athol*, 196 Mass., 497. And it has been held that a municipality may be charged with responsibility for misrepresentations which have been made by its agent to induce a person to enter into a contract with it. *Sharp* v. *Mayor, etc., of New York*, 40 Barb., 256.

But an action in indebitatus assumpsit upon an account annexed, to recover damages arising from false representations as to the subject matter of a contract, which has not been repudiated, is beyond the "furthest venture" noted in *Tukey* v. *Gerry*, 63 Maine, 151, 153. See *Brown* v. *Starbird*, 98 Maine, 292; *Gilmore* v. *Bradford*, 82 Maine, 547.

Included in this charge of $336.95 are certain items amounting to $28.59 for labor and materials in filling up an old well or reservoir which was found in the line of the sewer on Broadway. There is some evidence that the selectmen directed the plaintiff to fill this well, and in the absence of any testimony on the point from the selectmen, we think that the jury would have been warranted in finding a promise to pay for that work.

Also in addition to the item for the contract price, the plaintiff claims in the account annexed, the following items:

"To extra work on sewer through the hill from Station Four to Station Nine, B line and extra around the hill Station Nine, C line to Station Nine, B line and to Perham Street, 200 feet of six inch pipe, $1062.63

To 15% profit on the $1062.63, 159.30."

Reference to the tabulation in the brief of plaintiff's counsel shows that this item of $1062.63 is made up of three parts:

(a) Charges for labor of men and for material on 6 inch Sewer line through Clay Hill, August 5 to August 15, 1913, $568.75.

This work was unquestionably a part of the work which was to be done under the contract for $3500. The line of sewer through the clay hill from station four to station nine, B line, was on the course first laid out by Mr. Pierce. The plaintiff bases his claim for this item upon the alleged misrepresentations before considered. It must be rejected.

(b) Charges for labor of men and for material on 6 inch Sewer line around the hill, station 9 C line to station 9 B line August 18 to August 26, 1913 $272.80

The plaintiff claims that the original line through the hill, called line B, was changed by order of the selectmen to the line around the hill, called line C, and he gives this item of $272.80 as the cost of lay-

ing the sewer for the additional distance. Mr. Prest says that the course of the sewer was changed by the selectmen on account of the depth and the consequent difficulty and expense of repair, if the sewer should become obstructed. This contention rests on his testimony alone; it is contradicted by three selectmen, and is not supported by the foreman, Mr. Lowery, or the engineer on the work, Mr. Fish. The claim is highly improbable in that the depth of the sewer on the original B line was known to the selectmen when the work was first laid out. Without discussing it in detail, we may say that the evidence falls far short of sustaining the reason given by plaintiff for the change, and overwhelmingly preponderates against any liability on the part of the town for the additional expense. The difficulty of the digging furnishes the far more probable reason for the change of of course. We think that the jury was not justified in including this amount of $272.80 in their verdict, if they did include it.

(c) Charges for constructing the 6 inch sewer within and along Perham Street a distance of 200 feet, $221.08.

The jury was warranted in allowing this item. The Northerly end of the 6 inch sewer was given to Mr. Prest, as at Perham Street. It is true that he was to connect up all the sewers in the Tannery Brook section; but it appears by the testimony of Mr. Titcomb that none of the selectmen knew the exact location of the sewers; to connect with the sewer on Perham Street it was necessary to lay the 6 inch pipe for a distance of two hundred feet in the street. We think that Mr. Prest should have compensation for that work; the witnesses agree that one dollar per lineal foot was a fair price, and the charge does not greatly exceed that estimate.

2. The Pier Point on Center Bridge. There was a sharp conflict of testimony as to this piece of work. Mr. Prest claims that the selectmen agreed to pay him five hundred dollars to put in a concrete pier point after his own design, and that later Mr. Marble, the selectman who had the oversight of this particular piece of work, directed him to enlarge the structure substantially increasing the amount of labor and material. Mr. Marble claims that the pier point was to be constructed of specified dimensions; that Mr. Prest began to build a smaller pier than he had agreed to build and upon complaint being made, voluntarily extended the point up stream. Upon this controverted issue the jury would have been warranted in finding for

Mr. Prest; but while they might so find, there seems to be no reliable basis for estimating the amount of extra work and material, because neither the jury nor the court has any definite knowledge of the size of the pier point which Mr. Prest proposed to build. The only method of arriving at the amount of extra work with approximate accuracy is to take Mr. Prest's estimate of eighty cubic yards for the entire work, and his estimate of the cost at $8.045 per cubic yard. The total cost would then be $643.60, of which $143.60 would be for extra work and material in excess of the contract. This, we believe, would be a liberal finding. Mr. Prest's estimate of cost per cubic yard includes his own time at ten dollars per day; and his estimate of cubic contents is substantially the same as given by Mr. Mallett, a witness for the defendants, and twenty cubic yards in excess of the estimate given by Mr. Fish who was in the plaintiff's employment.

3. Fairbanks Bridge Job. Here again it is only necessary to say that there was a sharp conflict of testimony and the jury would be warranted in sustaining the plaintiff s contention. The item includes a charge of $25 for keeping the bridge open to travellers during the repairs, which appears reasonable. We may assume, therefore, that the jury allowed this entire item.

Thus stating the account it stands:

Sewer Job. Contract,	$ 3500.00
Extra-Perham Street,	221.08
Filling old Well,	28.59
Pier Point Job. Contract,	500.00
Extra,	143.60
Fairbanks Bridge. Contract,	425.00
Extra,	220.85
	$5039.12
Admitted Credits,	4457.20
	$581.92

To this amount should be added interest from the date when the work was completed in the winter of 1913-14, to the date of the verdict, substantially four years and two months, $145.48, making a

total of $727.40. Giving the verdict of the jury the full consideration to which it is entitled, the verdict should not have exceeded above amount. The entry will therefore be:

Motion sustained, unless within thirty days after notice of this decision is received by the Clerk of Courts for Sagadahoc County, the plaintiff remits all of said verdict in excess of $727.40, in which case motion overruled.

LEON B. STROUT *vs.* MILDRED STROUT, et als.

Cumberland. Opinion September 11, 1918.

Rule of perpetuities. General rule as to its application to the time of the vesting of an estate rather than the termination thereof. Rule where the gift is absolute but payment of same deferred or postponed. Rule where a fund is given to a class as to each sharing equally. Meaning of word "descendants" when used in a will. Rule as to allowing counsel fees and expenses in cases relating to construction of wills.

The will of Viola Phipps, late of Brunswick, contains the following residuary clause:

"I give and bequeath to Mildred Strout to hold in trust all the rest and residue of my personal property, and I wish it to be distributed to the children of Leon B. Strout and herself or their descendants at such times as she sees fit for their best benefit."

At the death of the testatrix three children of Leon B. Strout and Mildred Strout were living.

Upon consideration of the entire will, it is held: that the testatrix intended that the three children should share equally in the legacy so bequeathed; that the shares of the children were fixed beyond the power of the trustee to change; that the time of payment only was postponed; that the trustee took the legal estate; that the three children took the beneficial or equitable estate; that no other interests were bequeathed; that all interests, legal or equitable, vested at the death of the testatrix; and that the residuary clause does not violate the rule against perpetuities.

The words "or their descendants" when used in a will are construed to include only lineal heirs in the direct descending line; by the use of these words, the testatrix intended to provide, independently of the statute, R. S., Chap. 79, Sec. 10, that if a child died in her lifetime leaving lineal descendants, such descendants should take the share of the deceased parent.

The plaintiff, having instituted this action to wrest the trust estate from the possession of the trustee and to divert the fund to his personal benefit, is not entitled to have his expenses, costs and counsel fees paid from the trust fund.

Bill in equity asking for the construction of certain provisions of a will. Cause was heard upon bill, answers and replication. By agreement of parties case was reported to Law Court. Judgment in accordance with opinion.

Case stated in opinion.

Woodman & Whitehouse, for complainant.

Clarence E. Sawyer, Exr., pro se.

W. R. & E. S. Anthoine, and Paul E. Donahue, for respondents.

SITTING: CORNISH, C. J., SPEAR, HANSON, PHILBROOK, DUNN, MORRILL, JJ.

MORRILL, J. Viola Phipps, late of Brunswick, died on the eighteenth day of February, 1913, leaving a will, which has been duly proved and allowed. The residuary clause of that will is as follows:

"I give and bequeath to Mildred Strout to hold in trust all the rest and residue of my personal property, and I wish it to be distributed to the children of Leon B. Strout and herself or their descendants at such times as she sees fit for their best benefit."

On October 28, 1914, prior to the commencement of the present action, the executor of this will filed a bill asking for instructions and for the construction of certain portions of said will; to that bill the present plaintiff was a party; a Justice of this court entered a decree that one of the preceding clauses of said will was invalid as contrary to the rule against perpetuities and directed the executor, after paying certain legacies, to pay and deliver the remainder of the property mentioned in the clause so held to be invalid, to the residuary legatee. Acting under this decree Mr. Sawyer, the executor, paid and delivered to Mildred Strout, who had qualified as trustee, cash and securities to the amount of $14718; the executor has about $700 in his hands for further distribution.

The plaintiff, who is the father of the three beneficiaries named in the residuary clause, and the next of kin and sole heir of the testatrix, now claims that the residuary clause is void and contrary to the rule against perpetuities, and that Mildred Strout, the mother of his children, shall account to him for the fund held by her. In other words, he now endeavors to deprive his children of the benefit of a fund which the testatrix entrusted to their mother, and not to him, "for their best benefit."

Without expressing any opinion as to whether this contention is now open to the plaintiff after the decree in the former suit to which he was a party, we proceed to examine his claim which his counsel

states as follows: "The sole question for construction and determination by the court is whether said residuary clause contained in the fourteenth paragraph of the will is void as violating the rule against perpetuities."

It should be borne in mind that the rule against perpetuities is not, like a rule of construction, a test more or less artificial, to determine intention. Its object is to defeat intention. Therefore every provision in a will is to be construed as if the rule did not exist, and then to the provision so construed the rule is to be applied. Gray on Perpetuities, page 378. In so construing the provision in question the intention of the testatrix is to be gathered from the entire will and not from the residuary clause standing alone.

The rule concerns itself only with the vesting, the commencement of estates, and not at all with the termination. It makes no difference when such a vested estate or interest limited terminates. *Pulitzer* v. *Livingston*, 89 Maine, 359, 365, 372.

Moreover, when the gift of a legacy is absolute, and the time of payment only is postponed, the time not being of the substance of the gift is held to postpone the payment, but not the vesting of the legacy. *Kimball* v. *Crocker*, 53 Maine, 263, 271. And the discretionary power in the trustee as to time of payment does not prevent the vesting of the legacy. *Nares' Executors* v. *Van Shaick*, 20 Wend., 565; *Kimball* v. *Crocker*, supra.

The will in this case is, in some respects, inartificially drawn; the scrivener evidently did not have in mind the rule against perpetuities, nor the distinction between vested and contingent interests; he appears not to have realized, or to have disregarded the care which should be observed in the creation of trust estates; nor does he appear to have considered the various changes which might arise after the death of the testatrix.

Yet carefully considering the entire will we think that it is not difficult to ascertain the intention of the testatrix. At her death three children of Leon B. Strout and Mildred Strout were living, Marjorie, Marian and Roger. In the preceding paragraphs of the will, wherever provision is made for them, the testatrix makes it clear that there is to be no discrimination between them; they are to "share and share alike," or to "share equally."

Referring to the residuary clause we see no reason to doubt that the children were to share equally in the legacy thereby bequeathed.

The law presumes that a testator, when he bequeaths a fund generally to a class, intends that the members of the class shall share equally in the fund bequeathed; and such is the legal meaning of such a bequest. *Tucker* v. *Bishop*, 16 N. Y., 402, 406. Mildred Strout has no power over the legacy except to fix a proper and discreet time for payment, "as she sees fit, for their best benefit." The will does not say that the legacy is to be distributed "at such times *and in such sums and proportions* as she sees fit," but only "at such times;" the time of payment only was postponed; the shares of the children were fixed beyond the power of the trustee to alter. Counsel for the plaintiff in attempting to distinguish this case from the case of *Haley* v. *Palmer*, 107 Maine, 311, and the prior case of *Holcomb* v. *Palmer*, 106 Maine, 17, says; "But the Trustee here is given power to distribute to the children, if she sees fit and not to the descendants, or if she prefers, all to the descendants and none to the children, or part to some of the children and none to the others, or a part to some of the descendants and none to the rest;" and upon this construction he bases his argument that "it is inconceivable under these circumstances how any interest in a residuum can be said to have vested in any definite beneficiary." We cannot accede to this construction, and our construction of the residuary clause distinguishes this case from *Whelan, Trustee,* v. *Reilly*, 5 W. Va., 356, cited in support of counsel's position.

Applying then the rules and principles hereinbefore referred to, and having in mind the familiar principle that a legacy or devise should be considered as giving a vested rather than a contingent interest, (*Kimball* v. *Crocker*, 53 Maine, 263, 267), we think that the residuary clause of the will of Viola Phipps does not violate the rule against perpetuities. The words, "I wish" are equivalent to a command; they are mandatory. *Clifford* v. *Stewart*, 95 Maine, 38, 46. The trustee took the legal estate; the three children Marjorie, Marian and Roger, took the beneficial or equitable estate; no other interests were bequeathed; all interests legal and equitable vested at the death of the testatrix. The bequest is present and absolute; the time of payment only is postponed.

In *Manice* v. *Manice*, 43 N. Y., 303, on page 369, it is said, "Where the terms of a bequest import a gift and also a direction to pay at a subsequent time, the legacy vests and will not lapse by the death of the legatee before the time of payment has expired; but will pass

to his personal representatives." The words "or their descendants," when used in a will are construed to include only lineal heirs in the direct descending line; *Baker* v. *Baker*, 8 Gray, 101, 119. So under the statute, R. S., Chap. 79, Sec. 10; *Morse* v. *Hayden*, 82 Maine, 227. In harmony with the idea of an equal division among the children, which we adopt, we think that the testatrix intended by the use of these words to provide, independently of the statute, R. S., Chap. 79, Sec. 10, that if a child died in her lifetime leaving lineal descendants, such descendants should take the share of the deceased parent. Perhaps she was not advised of the existence of the statute. The construction that by the use of these words the testatrix intended that the share of one of the children dying after her death and before distribution, would pass to such deceased child's lineal descendants, cannot be adopted. It is inconsistent with the view that the children of Leon B. Strout and Mildred Strout, living at the death of the testatrix take absolutely. Since the will fixes no other period to which the fact of the death of any child can be referred, the death of such child must occur in the lifetime of the testatrix. *Traver, et al.*, v. *Schell, et al.*, 20 N. Y., 89; *Tucker* v. *Bishop*, 16 N. Y., 402, 404.

A provision very similar to the provision in the case before us was sustained in *Morton* v. *Southgate*, 28 Maine, 41. The case of *Rogers* v. *Rogers*, 11 R. I., 38, 72, et seq., is also very instructive. The bill must be dismissed.

In the agreed statement which is made part of the case, the parties request and agree "that the reasonable expenses, costs and counsel fees of the parties both plaintiff and defendant in the cause be allowed and ordered by the court to be paid out of the fund now in the custody of the Clerk of this Court, and for that purpose the parties by their attorneys shall file their bills for such expenses, costs and counsel fees with the Clerk of this Court, to be passed upon by the single justice reporting the cause, after mandate by the Law Court, and incorporated in the final decree rendered in said cause, pursuant to mandate." The fund in the custody of the Clerk referred to in above agreement consists of the securities which have been turned over to the trustee, Mildred Strout, by the executor of the will pursuant to a decree entered upon the earlier bill in equity filed by the executor and mentioned in the early part of this opinion; the securities were so deposited to abide the final decree and order in this cause.

We think that the plaintiff is not entitled to have his expenses, costs and counsel fees paid him from the trust fund. This is not the ordinary case of a bill in equity for the construction of a will; such a bill had already been filed by the executor and proceeded to final decree; nor is it a bill for the protection and preservation of the trust fund, in the interest of all the beneficiaries. This litigation instituted by the plaintiff, is of a highly adversary character; it has for its object to wrest the trust estate from the possession of the trustee, to deprive the children of the plaintiff of all benefit of the fund, and to divert the fund to the personal benefit of the plaintiff. In such a case the defeated party must bear the expense which he has incurred in his own interest alone. The trust estate is chargeable only with that expense which is incurred in the interest of all the cestuis que trustent. *Somerset Railway* v. *Pierce*, 98 Maine, 528. The judgment must be:

Bill dismissed. The securities of the trust, deposited with the Clerk of Courts, are to be restored to the Trustee. The reasonable expenses and counsel fees of the Trustee, Mildred Strout, incurred in the protection of the trust may be allowed and paid from the fund. The Executor may be allowed his reasonable expenses and for his services in this cause, the same to be retained from the funds in his hands.

STATE OF MAINE *vs.* ALICE CROUSE.

Knox. Opinion September 19, 1918.

Indictments. Necessary allegations in an indictment for arson. General rule as to the certainty and precision required in indictments. Rule as to setting out the crime in a statutory indictment. Rule where under the statute a mere general or generic term is used.

A charge in an indictment may be made in the words of the statute, without a particular statement of facts and circumstances, when, by using those words, the act in which an offense consists is fully, directly and expressly alleged, without any uncertainty or ambiguity.

An indictment under Sec. 3, Chap. 121 of the Revised Statutes for burning a "building" should, to fix the identity of the offense, describe what was burned.

Indictment for arson brought under R. S., Chap. 121. After verdict of guilty, and before sentence, respondent filed a motion in arrest of judgment, setting forth that the indictment did not name or describe the kind or location of the building alleged to have been burned and because no judgment could be legally rendered on said indictment. The motion was overruled by the presiding Justice, to which ruling respondent filed exceptions. Exceptions sustained. Judgment arrested.

Case stated in opinion.

Henry L. Withee, County Attorney, for State.

Philip Howard, for respondent.

SITTING: CORNISH, C. J., SPEAR, HANSON, DUNN, MORRILL, JJ.

DUNN, J. Arson and kindred crimes are defined by Secs. 1, 2, and 3 of Chap. 121 of the R. S., the section last mentioned reading: "Whoever wilfully and maliciously burns any building of another not mentioned in the preceding section, ... shall be punished by imprisonment for not less than one, nor more than ten years."

Having been convicted upon an indictment, containing a single count, wherein it is charged, "that Alice Crouse, of Rockland, in the

County of Knox, aforesaid, on the first day of April, A. D. 1918, at Rockland, feloniously, wilfully, and maliciously did burn a certain building the property of Lucy Farnsworth, said building being then there situate on Pleasant Street, in said Rockland," with conclusion in usual form, the defendant moves in arrest of judgment, for the assigned reasons, that the indictment does not name or describe the kind or nature of the building alleged to have been burned, and because no judgment can be lawfully rendered on said record.

The memorable and time-honored declaration, that, in all criminal proceedings, the accused shall have a right to demand the nature and cause of the accusation (Con. of Maine, Art. 1, Sec. 6), entitles him to insist that the facts alleged to constitute a crime shall be stated in the indictment with that certainty and precision of designation requisite to enable him to meet the exact charge, and to plead the judgment, either of acquittal or conviction, which may be rendered upon it, in bar of a later prosecution for the same offense. *State* v. *Moran*, 40 Maine, 129; *State* v. *Learned*, 47 Maine, 426; *State* v. *Mace*, 76 Maine, 64; *State* v. *Doran*, 99 Maine, 391. He is of right entitled in the beginning to know, and in after time to point out, if he shall so desire, without going beyond the written record, the distinct crimination. The description of the offense must be certain, positive, and complete.

Speaking broadly, an indictment for a statutory crime is sufficient where it charges in the words of the statute. But this applies only in cases where in the statute itself there is a sufficient description of the offense intended to be created by the legislature. With admirable accuracy it is stated in *Commonwealth* v. *Welsh*, 7 Gray, 324: "A charge in an indictment may be made in the words of the statute, without a particular statement of facts and circumstances, when, by using those words, the act in which an offense consists is fully, directly and expressly alleged, without any uncertainty or ambiguity." Mr. Bishop, in his work on Criminal Procedure, Vol. 1, Sec. 98, says: "Under every sort of constitution known among us an indictment which does not substantially set down, at least in general terms, all the elements of the offense,—everything which the law has made essential to the punishment it imposes,—is void; and, besides this, under most of our constitutions the allegation must descend far enough into the particulars and be sufficiently certain in its form of words to give the defendant reasonable notice of what is meant."

"Where," as this court said in *State* v. *Doran*, 99 Maine, 329, "a mere general or generic term is used or the statute does not sufficiently set forth the crime, the use of the statutory language is not sufficient." The rule is, that, in some instances, in addition to the statutory words of general description, it is necessary to set forth such further statement of facts and circumstances as may be essential to identify the particular doing. There must be such a description of the crime, that the defendant may know just what it is he is called upon to answer; that the jury may be warranted in its finding, and the court, looking at the record after conviction, may impose the punishment which the law prescribes.

Does the indictment in this case meet the requirements that it must, either in the language of the statute or other apt words, so identify the offense as to comply with the Declaration of Rights in the Constitution? It is our opinion that the indictment does not sufficiently inform the accused of the nature and cause of the accusation against her, and that there is legal ground for an arrest of judgment. The word "building" is not the distinctive name of a particular structure. It is a comprehensive term. It comprises any edifice erected by the hand of man of natural materials, as wood or stone, brick or marble. As commonly understood, a building is a house for residence, business, or public use, or for shelter of animals or storage of goods. A structure of considerable size intended to be permanent or at l ast to endure for a considerable time. 9 Corpus Juris. 683; Bouvier Law Dict. Any permanent building or edifice, usually occupied by any person by lodging therein at night, is a dwelling-house, R. S., Chap. 121, Sec. 8. A building may constitute an entire block, consisting of separate and independent tenements, one of which may be occupied for a dwelling house and another for a store. *State* v. *Spencer*, 38 Maine, 32. The gravamen of the indictment is, that the respondent feloniously, wilfully and maliciously did burn a building, situate on Pleasant Street in Rockland, and owned by Lucy Farnsworth. The accused well may be in doubt, from a reading of the indictment, as to the precise act against which she is called to defend herself; whether, ineffectively, for arson as that crime is defined in section one; or for having set fire, feloniously, wilfully and maliciously, to any of the buildings told of one after another in the next succeeding section of the chapter, or for likewise burning "any building of another not mentioned in the preceding section." If, as

the case is argued, it was the intention to indict the respondent for a violation of the third section of the chapter, then, having reference to the manner in which the crime is defined in and by the statute, a more particular statement of facts than there is contained becomes necessary to bring the defendant precisely within the inhibition of the law. All substantive allegations should be specifically and definitively set out. A description of what was burned is essential to fix the identity of the offense. *Com.* v. *Smith*, 151 Mass., 491.

Exceptions sustained.
Judgment arrested.

ROYAL INSURANCE COMPANY *vs.* ARTHUR W. NELKE.

Androscoggin. Opinion September 23, 1918.

Replevin. Exceptions. Rule of court as to filing exceptions. General rule as to right of Justice presiding to extend time for filing of exceptions.

The rule of the Superior Court for Androscoggin County requires that exceptions must be presented to the presiding Justice at the term at which they are taken, or within ten days after the adjournment of the term. In the present case the exceptions were not filed until sixty-three days after adjournment of the term. No waiver was made and no entry upon the docket of exceptions filed and allowed. There being neither a waiver nor agreement to extend time, nor an entry upon the docket of exceptions filed and allowed, the exceptions were filed too late and must be dismissed.

Action of replevin to recover possession of an automobile. Defendant filed plea of general issue, together with brief statement. Verdict for plaintiff. Defendant filed exceptions to certain rulings of the Justice presiding. Exceptions overruled.

Case stated in opinion.

Ralph W. Crockett, for plaintiff.

McGillicuddy & Morey, for defendant.

SITTING: CORNISH, C. J., SPEAR, HANSON, PHILBROOK, DUNN, MORRILL, JJ.

SPEAR, J. This is an action of replevin for the possession of an automobile. The facts are briefly as follows: Mr. William T. Ruhl of Boston was the owner of a Buick car. On the 4th day of December his sister drove the car into the city, left it in the street, unlocked, and it was stolen. The car was insured against theft in the Royal Insurance Company. The company was notified, investigated, and at the time for payment paid the policy, and took from the owner a subrogation receipt, and also an absolute bill of sale of the car. This bill of sale vested the title of the car in the plaintiff company. It is contended that the failure of Miss Ruhl to lock the car, as required by the Massachusetts statute, was an act of negligence that would have excused the company from paying the policy.

It is further contended that the car was not licensed and was a trespasser on the road.

These defenses were urged as conclusive of the plaintiff's right of recovery.

The presiding Justice, however, overruled these contentions and the defendant excepted. While the decision of the case is necessarily based upon other grounds, it is a satisfaction to observe that the verdict was warranted upon the testimony.

But the ground upon which the case must be considered involves the rule of fixing the time of presenting exceptions. The plaintiff filed a motion to dismiss the exceptions because they were not seasonably filed or presented to the presiding Justice. There is no dispute about the facts stated in the motion, viz: "Under Rule XXII of the Superior Court for Androscoggin County, exceptions must be presented to the presiding justice at the term at which they are taken or within ten days after the adjournment of the term. The case was tried and verdict rendered April 12th. The April Term adjourned April 15th. The exceptions were not filed or presented to the presiding justice for allowance or to counsel for the plaintiff for examination until June 17th, sixty-six days after verdict and sixty-three days after adjournment of the term. Neither does the docket show any entry of the filing of them up to June 17th. Counsel for the plaintiff expressly stated immediately after the trial that he would waive no right to object to the allowance of exceptions on account of delay.

The exceptions were allowed only as far as the discretion of the presiding justice extended. This all appears as a part of the bill itself." The rule must be regarded as controlling. The discretion of the presiding Justice could not extend beyond the ten day limitation prescribed by the rule, otherwise the rule would have no force against his unlimited discretion. It may be competent for parties to waive the provisions of the rule, as by an entry on the docket in term time "exceptions filed and allowed" or some other minute of agreement; but waiver is expressly negatived in the case before us, as the facts stated in the motion show.

This conclusion is supported by all the decisions which have been rendered upon a similar state of facts. *Fish* v. *Baker*, 74 Maine, 107; *Howard* v. *Folger*, 15 Maine, 447. The Massachusetts cases are to the same effect. *Dunn* v. *Motor Co.*, 92 Maine, 165, is clearly distinguishable from the case at bar. It does not disclose a similar state of facts.

The exceptions, accordingly, were not seasonably presented and approved by the presiding Justice, and the entry must be:

Exceptions dismissed.

WILLIAM S. CURRAN *vs.* E. EUGENE HOLT, JR.

Cumberland. Opinion October 2, 1918.

Action for malpractice. General rule fixing liability of physician or surgeon.

In an action of tort against a surgeon for malpractice it is

Held:

1. It is not claimed that the defendant did not possess the ordinary skill of members of his profession in like situation.
2. The law required him to exercise that skill and to use reasonable care and diligence in his treatment of the case and his best judgment in the application of that skill.
3. The evidence does not show that the defendant failed to measure up to the legal requirement in a single particular, either in the care and treatment prior to the two operations, in performing the operations or in the care and treatment subsequent thereto.
4. A jury would not have been justified in drawing from the evidence an inference of legal liability on the part of the defendant and therefore the nonsuit was properly ordered by the presiding Justice.

Action on the case for alleged malpractice. Defendant filed plea of general issue. At the conclusion of the testimony, in behalf of the plaintiff, counsel for defendant filed a motion for nonsuit, which motion was granted. To the granting of said motion plaintiff filed exceptions. Exceptions overruled.

Case stated in opinion.

Dennis A. Meaher, for plaintiff.

Hinckley & Hinckley, and Edward S. Taylor, for defendant.

SITTING: CORNISH, C. J., SPEAR, HANSON, PHILBROOK, DUNN, MORRILL, JJ.

CORNISH, C. J. Action against a surgeon for alleged malpractice. Plaintiff was treated by defendant from November, 1911, until January, 1913. On January 28, 1913, the defendant performed an opera-

tion for cataract on plaintiff's right eye. The operation was not successful and sight was not restored. As the left eye subsequently became involved from what was apparently sympathetic inflammation, the right eye was removed by the defendant on April 14, 1913. This removal however did not allay the trouble with the left eye and after further treatment for several months vision in that eye was also lost.

The plaintiff in his writ alleges many negligent acts on the part of the defendant which he says might have produced the blindness. These he summarizes in his brief as follows: "Such as general negligence, that the incision on the eyeball of the right eye was within what is called the danger zone, that the defendant did not make a proper diagnosis of the eyes, and did not understand the real condition of the eyes before he operated, that he did not use proper methods in preparing the eye for the operations and in treating the eyes before and after the operations of January 28 and April 14, 1913."

The evidence introduced by the plaintiff, including that of an eye specialist, failed utterly to substantiate a single one of the many claims set forth in the writ. True, the operation proved unsuccessful and upon that fact alone the plaintiff seems to rest his case. But that is not sufficient to establish negligence on the part of the operator. The surgeon cannot insure recovery and the testimony shows that, with all due care, loss of sight results in five or six per cent of the cases in operations for cataract, depending in large measure upon the condition of the patient. It was shown here that the plaintiff's trouble was of long standing. His vision had been more or less affected for forty years.

It is not claimed that the defendant did not possess the ordinary skill of members of his profession in like situation. The law required him to exercise that ordinary skill and to use reasonable care and diligence in his treatment of the case, and his best judgment in the application of that skill to the case in hand. *Coombs* v. *King*, 107 Maine, 376; *Merrill* v. *Odiorne*, 113 Maine, 424; *McCann* v. *Twitchell*, 116 Maine, 490.

The evidence does not show that the defendant failed to measure up to the legal requirement in a single particular, either in the care and treatment prior to the operations, in performing the operations or in the care and treatment subsequent thereto. The defendant was not called upon to offer any testimony. A jury would not have been

justified in drawing from the evidence an inference of legal liability on the part of the defendant, and therefore the nonsuit was properly ordered by the presiding Justice.

Exceptions overruled.

SAUL H. FEINGOLD, et als., *vs.* HARRY SUPOVITZ, et al.

Androscoggin. Opinion October 10, 1918.

Principal and agent. General rule to be applied to the question as to whether the principal is bound by the acts of his agent when dealing with third persons who do not know the extent of the agent's authority.

In an action of trover to recover the value of certain sample garments sold by a traveling salesman of the plaintiffs to the defendants, the sale was claimed by the plaintiffs to have been without authority and void. The verdict was in favor of the defendants.

Upon plaintiff's motion and exceptions it is

Held:

1. Whether or not a principal is bound by the acts of his agent when dealing with a third person, who does not know the extent of his authority, depends not so much upon the actual authority given or intended to be given by the principal as upon the question, what did such third person, dealing with the agent, believe and have reason to believe as to the agent's authority from the acts of the principal.
2. Under the evidence in this case the jury were justified in holding that the plaintiffs were bound by the acts of their traveling salesman in making this sale.
3. That the requested instruction was properly refused as it called upon the court to pass upon disputed questions of fact.

Action of trover to recover the value of certain garments which were known as "sample garments" sold to the defendants by the traveling salesman or representative of plaintiff. Defendant filed plea of general issue and also brief statement. Verdict for defendant.

Plaintiff filed motion for new trial, and also exceptions to certain rulings of presiding Justice. Judgment in accordance with opinion.

Case stated in opinion.

Frank T. Powers, for plaintiff.

Harry Manser, for defendant.

SITTING: CORNISH, C. J., SPEAR, HANSON, PHILBROOK, DUNN, MORRILL, JJ.

CORNISH, C. J. The plaintiffs are manufacturers of women's garments in Worcester, Massachusetts. The defendants are retail dry goods merchants in Lewiston, Maine. One Edinburg was in the employ of the plaintiffs as a traveling salesman or commercial traveler from 1912 to August 3, 1917, empowered to solicit orders from the retail trade, and was furnished by them with samples of the various garments to be exhibited to the customers in soliciting that trade. Payment for goods so purchased was made directly to the plaintiffs on bills duly presented. The title to these samples was in the principals and not in the agent. Edinburg in the course of his business was well acquainted with the defendants, and had taken their orders for goods at various times during his five years on the road.

On August 6, 1917, after he had practically finished his last trip for the sale of goods of that particular season and was on his way back to Worcester, he called at the defendants' store and asked them if they desired to purchase any of his discarded samples. The defendants thereupon went to the hotel where the samples were, examined them, selected certain articles of the list value of $196.75, gave Edinburg a check therefor payable to his order at the agreed price of one-third discount, and took the articles to their store. On August 19, 1917, Edinburg absconded, having disposed of all his samples, of the value of about five hundred dollars, and converted the proceeds to his own use. He was subsequently apprehended in Chicago, and returned to Massachusetts. On September 11, 1917, this action of trover was brought against the defendants to recover the value of the samples so purchased, the plaintiffs claiming that Edinburg had neither real nor apparent authority to sell the same.

The verdict was in favor of the defendants and the case is before this court on plaintiffs motion and exception.

MOTION.

Two questions of fact were submitted to the jury under proper instructions, first, whether the agent had actual authority from his principals to sell the samples under the existing circumstances, and, second, whether he had apparent authority which the principals knowingly permitted him to assume or held him out to the public to possess.

As to actual authority the evidence is conflicting. On this point the defendants of course could offer no direct evidence. The plaintiffs deny such authorization, but Edinburg, introduced by them as their witness, testified that his instructions were to return the samples to his employers, and that he had done so except in a few instances where he had sold samples at the end of the season, which sales he had reported to the firm and they had approved and had themselves collected therefor.

But as this court has said: "Whether or not a principal is bound by the acts of his agent when dealing with a third person who does not know the extent of his authority, depends, not so much upon the actual authority given or intended to be given by the principal, as upon the question, what did such third person, dealing with the agent, believe and have a right to believe as to the agent's authority from the acts of the principal." *Heath* v. *Stoddard*, 91 Maine, 499, 504.

That the defendants believed in the authority of the agent can hardly be controverted. They acted in good faith, paying for the samples what appears to be the usual price under the circumstances, the garments, through the season's use in display, and in packing and repacking having become more or less worn and wrinkled, and needing pressing and repair. As further proof of their good faith it is admitted that in early September they sent to the firm duplicate orders from the purchased samples, on three different occasions, and it was from this information that the plaintiffs discovered to whom Edinburg had made the sale. They certainly would not have taken this course had they been conscious of a dishonest transaction.

That they had a right to believe in Edinburg's authority the jury were justified in finding from the evidence. This was a matter of inference from all the facts and circumstances. The transaction

itself was not a novel one. It may well be that in the ordinary course of commercial business the soliciting of orders from samples would not be held as a matter of law to carry with it the implied authority to sell the samples themselves and collect therefor. *Kohn* v. *Washer*, 64 Tex., 131, 53 Am. Rep., 745; *Hibbard* v. *Stein*, 45 Or., 507, 78 Pac., 664. But the facts here show a different situation. The transaction was a natural one. It was the end of that particular season. The samples had, in a sense, outlived their usefulness, they were not in fresh and first-class condition. It was not an unusual thing for them to be sold in this particular trade, under these circumstances. Edinburg testifies that he had sold them before on several occasions, although the pay therefor had been made directly to the house, and one of the plaintiffs admits that he himself, on one occasion when on the road, and under like circumstances, sold a few samples at discount to these very defendants. It was obviously a business like proposition.

But the most convincing proof in favor of the defendants' contention arises from the fact that between Edinburg and the plaintiffs there was not merely a business but a family connection, a fact which was well known to the defendants and which had been talked over between the plaintiffs and them. As early as 1914 Edinburg was attentive to the daughter of one of the plaintiffs, and on July 3, 1915, was married to her. He thereby became son-in-law of Saul H. Feingold and brother-in-law of other members of the plaintiff firm. The defendants testify that at one time one of the brothers-in-law, while on a business trip and in their store at Lewiston, told the defendants of the marriage and that Edinburg was then a member of the firm. This brother-in-law admits the conversation so far as reporting the marriage is concerned, but denies that he said that Edinburg was a partner. If Edinburg was a partner he had a right as a part owner to sell the samples. If one of the plaintiffs led the defendants to believe that Edinburg was a partner, even though in fact he was not, then the defendants had the right to believe in Edinburg's authority to make such a sale.

This question of disputed fact was within the province of the jury and their finding under the testimony before us should not be disturbed. The motion must be overruled.

EXCEPTIONS.

The plaintiffs requested the following instruction which was refused:

"That as there is no evidence that the agent sold samples to the defendants, the fact that he might have sold a few samples before to other customers, Supovitz Brothers not knowing of the sales, this could not be a holding out of authority to them that would bind the plaintiffs."

This request was properly refused. It called upon the court to pass upon disputed facts as a basis for legal instruction, Edinburg himself having testified that he had occasionally sold samples to these defendants before the transaction of August 6, 1917.

Moreover in the light of all the evidence and of the full and comprehensive instructions in the charge, we do not think that the plaintiffs were harmed by the refusal. Harmless error affords no ground for sustaining exceptions.

Motion and exceptions overruled.

PATRICK J. FLAHERTY *vs.* THE MAINE MOTOR CARRIAGE COMPANY.

Cumberland. Opinion October 10, 1918.

Sales of manufactured articles. Rule in Maine in regard to warranty of same.

In an action for money had and received to recover the amount paid toward the purchase price of an auto truck, the plaintiff claiming a breach of implied warranty on the part of the defendant in the sale of the truck and a valid rescission on his own part, a verdict was rendered in favor of the plaintiff.

Upon defendant's exceptions it is

Held:

1. The defendant was a dealer in machines of standard and well known types manufactured by others. Under the written contract he was bound to supply a certain described and defined type of truck well known in the general market.
2. The contract carried with it no guaranty or warranty or representation of suitableness nor of adaptability to the plaintiff's business. The plaintiff had made his own selection as to type and the responsibility for the wisdom of the choice rested on him, not on the seller.
3. An instruction that there was an implied warranty on the part of the seller that the truck was suitable for the business and adapted to the purpose for which it was purchased by the plaintiff was reversible error.

Action on the case to recover certain money paid by plaintiff to defendant on account of the purchase price of a certain automobile truck, plaintiff alleging that there was a breach of warranty in the sale thereof. Defendant filed plea of general issue. Verdict for plaintiff in the sum of $1692.99. Defendant filed motion for new trial and also exceptions to certain rulings and instructions of the presiding Justice.

Case stated in opinion.

D. A. Meaher, for plaintiff.

Chapman & Brewster, for defendant.

SITTING: CORNISH, C. J., SPEAR, HANSON, PHILBROOK, DUNN, MORRILL, JJ.

CORNISH, C. J. The plaintiff, who carried on a trucking business in the city of Portland under the name of the Portland Trucking

Company, on March 2, 1912, ordered of the defendant corporation, a dealer in motor vehicles, a three ton Pope-Hartford truck. The order was in writing and by its terms the truck was to be of the model of 1912, with demountable rims, gas head lights, and a body of certain dimensions with adjustable sides. The agreed price was $3400 f. o. b. factory, of which $1,000 was to be in cash when the vehicle was ready for delivery, and the balance in a note for $2400 payable $200 each month, the truck to remain the property of the defendant until the note was fully paid.

There were no other specifications, and there were no express representations or guaranties of any kind. At the end of the order was this statement: "Note: No verbal agreement or promise not specified in this order will be recognized." It is not claimed however that any oral guaranty was made. The order was signed by both parties and by it their rights must be governed.

The truck arrived from the factory and was delivered to the plaintiff on April 4, 1912. The cash payment of $1,000 was then made and the note for $2400 was given. Soon after the employes of the plaintiff began to use the vehicle they discovered various defects in it, and these were remedied more or less satisfactorily by the defendant. At one time a machinist came from the plant of the Pope-Hartford Company and sought to correct the difficulties, but the plaintiff claims that the truck at no time operated properly, especially on country roads, and that it was not adapted to the purpose for which he purchased it. The plaintiff, in addition to the $1,000 initial payment, made certain other payments in cash and rendered service to the defendant in trucking, which was credited as cash, to the amount of $610 during the Summer and early Fall, as found by the Auditor, and he drove the truck in his business about four thousand, five hundred miles during that time.

On October 24, 1912, the defendant began foreclosure proceedings for default of the amount due on the note instalment and the foreclosure was completed without redemption.

Two years later, in September, 1914, the plaintiff brought this action for money had and received, to recover the amount paid toward the consideration, claiming a breach of implied warranty on the part of the defendant in the sale of the truck and a valid rescission on his own part. The jury returned a verdict in the sum of $1692.99, and the case is before the Law Court on defendant's motion and exceptions.

We need consider only the exceptions. In the course of the charge, the jury were explicitly instructed in various forms of expression, that there was an implied warranty on the part of the seller that this auto truck was suitable for the business and adapted to the purpose for which it was purchased by the plaintiff. This instruction went farther than the law warrants, under the facts of this case.

The rules of law governing warranties accompanying the sale of manufactured articles are well settled in this State, and the rights of the parties are clearly defined. The defendant here was not a manufacturer to whom application had been made for the construction of a particular machine for a special and designated purpose, but he was a dealer in machines of standard and well known types manufactured by others. Under the contract he was bound to supply a certain described and defined type of truck well known in the general market, to wit, a three ton Pope-Hartford of the model of 1912. Of course it must be of that pattern with its parts properly constructed and assembled so as to meet the requirement of a merchantable or marketable machine. Further than that he was not bound. The contract carried with it no guaranty or warranty or representation of suitableness nor of adaptability to the plaintiff's business. The plaintiff had made his own selection as to type and the responsibility for the wisdom of the choice rested on him, not on the seller. *White* v. *Oakes*, 88 Maine, 367; *Lombard Water Wheel Co.* v. *Great Northern Paper Co.*, 101 Maine, 114, 6 L. R. N. S., 180 and note; *Philbrick* v. *Kendall*, 111 Maine, 198; *Armour Fertilizer Works* v. *Logan*, 116 Maine, 33.

The grounds on which the plaintiff based his claim for breach of warranty were two, first that the machine was not properly constructed, and second that it was not adapted to his work, especially in the sand and mud of country roads. The first element was involved in this action, the second was not. The jury however were instructed to consider both propositions on the question of breach of warranty. This was reversible error as it related to a vital point in the case.

Exceptions sustained.

EDWARD B. BLAISDELL *vs.* THE INHABITANTS OF YORK.

York. Opinion October 10, 1918.

Cities and towns. Scope of authority of Committees appointed by cities or towns. General rule governing the question of the liabilities of cities and towns.

In an action of assumpsit to recover $1394.71 for plans and specifications for new bridge and way across York River, alleged to have been prepared and furnished by him as an "architect" to the Special Committee appointed by the town to construct the bridge, it is

Held:

1. That the Special Committee elected another party as Engineer in connection with the work.
2. That the plaintiff was the contractor in building the bridge and any preliminary plans or specifications prepared by him were prepared at his own instance and in his own interest in order to secure the contract, and not at the charge and expense of the town.
3. That the Special Committee were dismissed by the town on March 11, 1907, and after that date the Committee had no power to secure plans or specifications from the plaintiff at the expense of the town, even if any were in fact supplied.

Action on the case to recover for services claimed to have been rendered defendant town. Defendant filed plea of general issue and also brief statement. By agreement case was reported to Law Court upon certain stipulations and agreements. Judgment in accordance with opinion.

Case stated in opinion.

Cleaves, Waterhouse & Emery, and John C. Stewart, for plaintiff.

E. P. Spinney, and James O. Bradbury, for defendant.

SITTING: CORNISH, C. J., SPEAR, HANSON, PHILBROOK, DUNN, MORRILL, JJ.

CORNISH, C. J. This is an action of assumpsit brought upon the following account annexed:

"York Village, Maine, Jan. 11, 1907.

TOWN OF YORK,
To E. B. BLAISDELL, Architect,

To plan and specifications for new bridge and way across
York River, 1394.71."

The case is before the Law Court on report. It is an echo of the somewhat famous York bridge litigation which has been before this court at various times and in various forms. *Bliss* v. *Junkins*, 106 Maine, 128; *Same* v. *Same*, 107 Maine, 425; *Blaisdell* v. *York*, 110 Maine, 500; *York* v. *Stewart*, 110 Maine, 523; *Bliss* v. *Blaisdell*, 110 Maine, 527; *Blaisdell* v. *York*, 115 Maine, 351.

A detailed history of the facts connected with the litigation may be found in *Blaisdell* v. *York*, 110 Maine, 500. It is sufficient for the purposes of the present case to state, that a special town meeting of the inhabitants of York was held on October 13, 1906, "to see if the town will vote to build the bridge and approaches as laid out by the County Commissioners across York River at York Harbor." The proposition was carried by a vote of 174 in favor to 123 opposed. At the same meeting "On motion of Mr. Gifford, a committee of four was chosen to act in conjunction with the selectmen in building the bridge, said Committee as suggested by Mr. Gifford, to consist of Charles H. Young, Joseph W. Simpson, Charles E. Weare and J. Perley Putnam, said Committee to serve without pay." Trouble arose between the three selectmen on the one side and the committee of four on the other as to their respective powers and duties, and on October 22, 1906, the selectmen informed the other members that they would no longer act with them and withdrew from all further participation in the matter. The committee of four however continued to serve. On December 5, 1906, a written contract in the sum of $39,500 for the building of the bridge was entered into between the plaintiff and the town of York, signed in behalf of the town by the four members of the committee only. The selectmen sent various communications to the committee and to the contractor, protesting against the carrying out of the contract, denying its validity and all liability on the part of the town in connection therewith.

At the annual town meeting held on March 11, 1907, one article in the warrant read "to see what action the town will take relative to

the committee of four appointed at a town meeting held October 13, 1906, in connection with the proposed construction of said bridge." Upon this it was voted, "that the Committee be dismissed from further service." Neither the four members nor the contractor paid any attention to the protests of the selectmen nor to this vote of dismissal. On October 17, 1907, a supplemental contract was entered into between the plaintiff and the committee, making a net increase of $6,990.43 in the cost of the bridge, due to certain changes required by the War Department. The work progressed and the bridge was completed in May, 1908, but was not accepted by the town.

The plaintiff subsequently brought suit against the town for the balance alleged to be due him under the contract of December 5, 1906, and the supplemental contract of October 17, 1907, together with certain payments made by him to A. W. Gowen the engineer in charge. This court held the town liable under the original contract, but not under the supplemental contract, nor for the payments voluntarily made by the plaintiff to the engineer. That decision was announced July 1, 1913. *Blaisdell* v. *York*, 110 Maine, 500.

The plaintiff then brought another action of assumpsit to recover the amount claimed under the second contract, and judgment was ordered for the defendants November 2, 1916, on the ground that the claim was res judicata. *Blaisdell* v. *York*, 115 Maine, 351.

The present suit was begun on November 13, 1912, and embraces a charge not contained in either of the other suits, namely, for plans and specifications, which the plaintiff claims were prepared and furnished by him as an "architect" to the committee, some of the plans and specifications at their request shortly after their appointment, for use by them in securing proposals and bids for the construction of the work, and the remaining plans and specifications prepared by him for the committee later on to conform to the changes as required by the War Department. This divides the claim into two branches, the plans and specifications at the inception of the work, and those prepared to meet the changes by the War Department. We will consider these branches separately.

It is obvious, as a matter of law, that under the appointing vote of October 13, 1906, the bridge committee were both authorized and instructed to build the bridge. As was said in the opinion in the former suit, "They were to take the necessary steps to carry out the vote of the town and obey instructions by building the way and the

bridge. It was their duty to select an engineer, obtain plans and specifications, advertise for bids, make the award and execute a contract." *Blaisdell* v. *York*, 110 Maine, 500, 518. And this is what the committee proceeded to do; but Mr. Blaisdell was not the man selected as engineer, nor to make the plans and specifications. His name is not mentioned in that connection. The records of the meeting of the committee held on October 25, 1906, which was the first meeting held after the controversy with the selectmen had resulted in their withdrawal, and only three days after that event, contain the following vote: "The committee voted to engage Mr. R. W. Libby of Saco, Maine, to take levels, prepare specifications and make changes in the plans according to the ideas of the Committee." What is meant by the term "plans" is explained by the action taken at the next meeting held on October 30, 1906, viz: "It was reported by the secretary of the committee that Mr. R. W. Libby declined to act as engineer for the Committee."

"Voted to engage A. W. Gowen to take levels, change plans and take charge of the construction of the bridge."

"Voted, to adopt the plans, with some changes, that were offered for inspection at the special town meeting of October 13, 1906."

This leaves no room for doubt or discussion as to the plans which the engineer, Mr. Gowen, was to modify. They were the plans offered for inspection at the special town meeting called for the purpose of ascertaining whether the town would or would not build the bridge. Those plans had been made by Mr. Blaisdell in anticipation of that meeting, and were exhibited by him there as sketches of his idea of how the bridge and approaches should be constructed. His purpose is evident. He wished to obtain the contract for the construction, and the first step was to convince a majority of the voters as to the wisdom and practicability of the work. This is often done, but it is hardly to be expected that the town is to pay therefor. The plan or sketch which is before the court bears out this conclusion. It was Mr. Blaisdell's plan, not the town's. It was prepared at his own instance for his own use at the town meeting, not at the instigation of the town, nor its committee, for the committee had not been appointed when the plan was made. It served its purpose, a favorable vote was secured, and the committee under that vote selected their own engineer who was instructed to take levels and change plans and take charge of construction, and he continued in service until the work was completed.

On November 5, 1906, the committee voted to prepare proposals and advertise for bids. The plaintiff was one of the bidders, and to him the contract was awarded for $39,500 on November 30, 1906. It would be strange indeed if the same person should be both the engineer or "architect" to act for the committee, and the bidder to secure the contract. It is evident that no such incongruity existed here. The plaintiff is not entitled to compensation for the preliminary plans.

As to any plans made by the plaintiff to meet the requirements of the War Department calling for certain changes in the work, another point in defense arises, in addition to what has been said above. The four members of the Committee were dismissed by vote of the town on March 11, 1907. Their authority then ceased and all acts on their part after that date were unauthorized and void. *Blaisdell* v. *York*, 110 Maine, 500, 520. The changes were directed by the War Department after that date and the committee had then no power to employ the plaintiff to make plans and specifications at the expense of the town even if they had desired to do so. But it is difficult to conceive why they should have employed him for that purpose. The committee already had selected its own engineer, Mr. Gowen, who was still in service, and the interests of the plaintiff as the contractor were really adverse to those of the committee, in case of any controversy. The true situation is revealed by the vote of the committee passed October 17, 1907, viz: "The changes ordered by the War Department were further discussed and the extra work and cost thereby entailed as given by the engineer and the contractor were considered. In view of the reduction made in the figures heretofore given it was voted to proceed under the fifth and sixth articles of the contract of December 5, 1906, to instruct the engineer, A. W. Gowen, to require the contractor to make the changes made necessary by order of the War Department, said changes and the agreed price therefor being as hereinafter set forth in an order executed of which the following is a copy." Evidently Mr. Gowen was the engineer who was preparing all necessary plans and specifications and who was representing the committee in dealing with Mr. Blaisdell the contractor. Mr. Blaisdell was not acting in the double and absurd capacity of contractor and "architect."

It should be further observed that prior to the institution of the suit at bar the plaintiff has at different times brought three suits

against the town of York to recover for services rendered and in none of them has he included any charge for plans and specifications. The first suit was brought to recover the amount due under his contract, and in that case he took a voluntary nonsuit. A second writ was brought for the same cause and included certain sums alleged to have been paid by the contractor to the engineer, Mr. Gowen. That suit recognized Mr. Gowen as the engineer in charge. These sums were disallowed as were also his claims under the second or supplemental contract, and judgment was entered in his favor for the amount found due, with interest, under the first contract, $44,536.99. Another suit was then begun to recover the amount claimed under the second contract, and in this judgment was rendered for the defendant.

Now for the first time is the claim made for services in preparing plans and specifications. We cannot resist the conclusion that in view of all the facts and circumstances, and the prior conduct of this plaintiff, this claim is in the nature of an after-thought. It lacks merit, and is not substantiated by convincing proof.

Judgment for defendants.

JOHN C. STEWART *vs.* THE INHABITANTS OF YORK.

York. Opinion October 10, 1918.

Attorneys at Law. Cities and Towns. Authority of Agents or Committees to bind municipality. Burden of showing the authority of the town to contract.

In an action of assumpsit brought by an attorney to recover for professional services alleged to have been rendered to the defendants and for expenses incurred between November 17, 1906, and July 14, 1911, it is

Held:

1. It was incumbent upon the plaintiff to show that he was employed by the defendant town or by some duly authorized agent thereof.
2. The Special Committee appointed by the town on October 13, 1906, and dismissed on March 11, 1907, had no power during the term of their service nor afterwards to employ counsel at the expense of the town to take part in the litigation that arose over the construction of the bridge. It was no part of their duty and was beyond the scope of the power conferred upon them.
3. It was the duty of the plaintiff to ascertain the extent of their power to bind the town and if the parties assuming to act, did so without authority he cannot recover of the town.
4. Moreover the evidence shows that in a part of the l tigation, for which charges are made, the town of York was not a party, and in other cases where the town was a party, it was represented by other counsel, while the plaintiff appeared as counsel for the adverse party.

Action on the case by an attorney at law to recover for professional services alleged to have been rendered in behalf of defendant town. Defendant filed plea of general issue and case was reported to Law Court upon certain stipulations and agreements. Judgment in accordance with opinion.

Case stated in opinion.

John C. Stewart, for plaintiff.

E. P. Spinney, and J. O. Bradbury, for defendants.

SITTING: CORNISH, C. J., SPEAR, HANSON, PHILBROOK, DUNN, MORRILL, JJ.

CORNISH, C. J. This suit is brought by an attorney to recover for professional services alleged to have been rendered to the defendant

town, and for expenses incurred in connection therewith, between November 17, 1906, and July 14, 1911, aggregating $1514.76. There is no controversy over the fact that the plaintiff was employed from time to time by the majority of a Committee chosen by the town at a special town meeting held October 13, 1906, to construct a bridge and approaches across York River as laid out by the County Commissioners, that he rendered the services charged for and that the charges are fair and reasonable. The single point at issue is whether the town of York is liable therefor.

The building of this York bridge has been fruitful in litigation. It is apparent from the history of the entire transaction that the inhabitants of the town were divided into two earnest and at times warring factions over the advisability of constructing the bridge, and the proposition was bitterly fought step by step.

It is needless to enter upon the details, which have been set forth in full in *Blaisdell* v. *York*, 110 Maine, 500, further than to say that at a town meeting held on October 13, 1906, the pro-bridge faction prevailed by a vote of 174 in favor, to 123 opposed, and a committee of four was chosen to act in conjunction with the selectmen in building the bridge, said committee to act without pay. This was the only vote passed by the town directing the construction of the bridge, and the only authority given to this joint committee of seven under this vote was to build the bridge. Friction at once arose between the selectmen, who were apparently of the anti-bridge faction, and the remaining four members who represented the pro-bridge faction, as to their respective powers and duties, and the result was the withdrawal of the selectmen on October 22, 1906, from further participation in the work of the committee. The remaining four however continued to exercise the authority given by the town, and on December 5, 1906, entered into a written contract with one Blaisdell to construct the bridge and approaches for the sum of $39,500. The opposition seems to have gained in strength during the winter, because at the annual town meeting held on March 11, 1907, it was voted that the committee of four appointed on October 13, 1906, be dismissed from further service. This committee paid no heed to this vote, continued to act as before in pushing forward the construction of the bridge, and made a supplemental contract in connection therewith on October 17, 1907, remaining in charge until the completion of the work in the Spring of

1908. Litigation arose in various forms and at various times, and for his professional services in connection with this litigation the plaintiff has brought this suit against the town.

It is obvious that the action cannot be maintained because the plaintiff has failed to show his employment by the town or by any authorized agent thereof. The question of employment of counsel in this litigation was never considered by the municipality itself. The only action taken by the municipality is expressed in the vote of October 13, 1906, before recited, which merely authorized the committee to build the bridge and the approaches. This vote undoubtedly empowered the committee to take such steps as might be necessary and incidental to their main duty, the material construction of the bridge, such as the selection of an engineer, the obtaining of plans and specifications, the advertising for bids, and the awarding and executing of the contract of December 5, 1906, as was held in *Blaisdell* v. *York*, 110 Maine, 500, 518. But by no stretch of legal intendment can that vote be held to authorize the committee to employ counsel and incur expenses for legal services in behalf of the town in connection with litigation which might arise in the future. That was no part of their duty, and was beyond the scope of the power conferred upon them. *Butler* v. *Charlestown*, 7 Gray, 12; *Fletcher* v. *Lowell*, 15 Gray, 103.

The very terms of the vote passed by the municipality negatived the incurring of any expense outside the material construction of the bridge and approaches. It expressly provided that the committee should serve without pay. Care was taken to avoid expense. It cannot with reason be urged that such a restrictive vote conferred upon the committee the power to incur counsel fees at the expense of the town.

The committee having no legal power to employ counsel it is equally true that the plaintiff in dealing with them was bound to take notice of their limited authority. He dealt with them at his peril and as it was his duty to ascertain the extent of their power to bind the town, if the persons assuming to act did so without authority he cannot recover of the town. *Goodrich* v. *Waterville*, 88 Maine, 39; *Blaisdell* v. *York*, 110 Maine, 500, 521; *Morse* v. *Montville*, 115 Maine, 454, 458.

This rule of law applies to and annihilates the plaintiff's entire bill, but it should be observed that whatever limited power had been given

to the committee by the vote of October 13, 1906, was revoked by the town by the vote of March 11, 1907, when the committee was dismissed from further service. All acts on their part in behalf of the town after that date were unauthorized and void. *Blaisdell* v. *York*, 110 Maine, 500, 520. The amount of the charges prior to March 11, 1907, is $227.29, and the amount subsequent thereto is $1287.47. The plaintiff does not claim a single employment by the committee covering the entire time, but simply separate employments from time to time as the various occasions arose for legal services.

The foregoing principles would prevent recovery in this case as a matter of law even if the services charged had been rendered in behalf of the town and had been beneficial to the town as a matter of fact. But the record shows the contrary. In part of the litigation, the town of York was not a party, and in those cases where the town was a party it was represented by other counsel, while the plaintiff appeared as counsel for the adverse party.

Thus the first litigation for which the plaintiff claims compensation was a bill in equity brought by the selectmen against the four members of the special committee in November, 1906, to restrain those members from proceeding. That was a controversy between the two factions in the joint committee of seven. The plaintiff appeared as counsel for the four, and other counsel appeared for the selectmen, the remaining three. The town was not a party.

The second group of charges cover services before a legislative committee February 14-18, 1907, in securing an act ratifying the action of the town at its meeting of October 13, 1906, and authorizing the construction of the bridge. The plaintiff admits that there was no vote of the town authorizing him to appear in its behalf, and it is evident from the history of the case that the securing of this legislation was the act of the pro-bridge faction of the joint committee.

The third group of charges embrace services and expenses in connection with a bill in equity brought in April, 1907, by Elizabeth B. Bliss, an abutting owner, against the County Commissioners of York County, the selectmen of the town, the special committee of four and the contractor Blaisdell, praying for an injunction. In this litigation the plaintiff admits that he represented the committee of four and Mr. Blaisdell. The selectmen had their own counsel, the County Commissioners their, and no one appeared for the town of York as it

was not a party to the proceedings. This case found its way to the Law Court twice, *Bliss* v. *Junkins,* 106 Maine, 128; *Same* v. *Same,* 107 Maine, 425.

The fourth group of charges relate to mandamus proceedings brought by Blaisdell, the contractor, against the County Commissioners, in which the plaintiff appeared as counsel for Blaisdell. The town of York was no party to these proceedings.

The fifth group pertains to services rendered in connection with mandamus proceedings brought by Blaisdell against the Town Clerk of York to compel him to change his record. In these proceedings the plaintiff represented the petitioner Blaisdell, and the town was not a party.

There are other small charges for services before the United States Engineers in July, 1907, at the request of the Committee after they had been dismissed, for services in a trespass suit brought by Bliss against Blaisdell in which the plaintiff appeared for Blaisdell, *Bliss* v. *Blaisdell,* 110 Maine, 527, and in the first suit brought by Blaisdell against the Town of York, in which also the plaintiff appeared for Blaisdell and against the town. All services and charges however come within the characterization above given. None were rendered in behalf of the municipality nor for its benefit. The plaintiff admits that he was counsel for the four of the committee during the entire period, and for Mr. Blaisdell continuously after July 17, 1907. He acted for Blaisdell in all his litigation against the town, recovering in one case a judgment in the sum of $44,536.99. These parties were his clients, not the Town of York, and the municipality should not be compelled to pay for the services rendered.

Judgment for defendants.

FRANK D. MARSHALL *vs.* THE INHABITANTS OF YORK.

York. Opinion October 10, 1918.

Cities and Towns. Attorneys at Law. Burden of showing authority to bind city or town. Limitation and scope of the authority of special committees appointed by towns.

In an action of assumpsit brought by an attorney to recover for professional services alleged to have been rendered the defendants between November 1, 1906, and April 28, 1908, in connection with the building of the York bridge, it is

Held: That the plaintiff cannot recover having failed to show that he was employed by the defendant town or by some duly authorized agent thereof.

Action on the case by an attorney at law to recover for professional services alleged to have been rendered defendant town. Plea of general issue and brief statement filed by defendant. By agreement of parties case reported to Law Court. Judgment in accordance with opinion.

Case stated in opinion.

Cleaves, Waterhouse & Emery, and John C. Stewart, for plaintiff.

E. P. Spinney, and James O. Bradbury, for defendant.

SITTING: CORNISH, C. J., SPEAR, HANSON, PHILBROOK, DUNN, MORRILL, JJ.

CORNISH, C. J. The plaintiff seeks to recover the sum of $455.93 for legal services alleged to have been rendered the defendant town, between November 1, 1906, and April 28, 1908, in connection with the building of the so-called York bridge. For the full facts connected with the transaction reference may be had to the cases of *Blaisdell* v. *Inhabitants of York,* 110 Maine, 500; and to *Blaisdell* v. *Inhabitants of York* and *Stewart* v. *Inhabitants of York* decided herewith.

No question is raised as to the performance of the services charged for nor the reasonableness of the amount. The sole basis of the plaintiff's claim is his employment by the four members of the building

committee of seven chosen at the town meeting held on October 13, 1906. No other authorization is asserted. If that committee had no authority to employ counsel at the expense of the town then the plaintiff cannot recover in this case.

In *Stewart* v. *Inhabitants of York*, decided and announced herewith, the identical question was presented, and this court distinctly held that the committee did not possess this power which they assumed to exercise, and therefore did not bind the town by their acts. The same principle applies here and for the reasons stated in that opinion, which reasons it is unnecessary to repeat. No facts appear in this case to differentiate it from that, and none which either enlarge the authority of the committee or the legal rights of the plaintiff.

The entry must therefore be,

Judgment for defendants.

BENJAMIN F. HARRIS *vs.* OLIVER MOSES, et als.

Cumberland. Opinion October 14, 1918.

Wills. Trust estates. Disposition of stock dividends as between life tenants and remaindermen. Rule to be applied where the intention of testator cannot be ascertained.

A bill in equity brought by one of the trustees under the will of Oliver Moses, deceased, against his two co-trustees and the children and other descendants of the testator asking the instruction of the court as to the disposition of a stock dividend declared from earnings upon the stock of the Worumbo Manufacturing Company held by the trustees as part of the trust estate.

In ascertaining the rights of life tenants and remaindermen as to the disposition of dividends declared from the earnings of corporations upon stock held as part of the corpus of a testamentary trust estate, the intention of the testator so far as manifested by him must of course control, but when he has given no special direction upon the question as to what shall be considered principal and what income, he must be presumed to have had in view the lawful power of the corporation over the use and apportionment of its earnings, and to have intended that the determination of that question should depend upon the regular action of the corporation with regard to all its shares.

The stock dividend declared by the Worumbo Manufacturing Company is to be held in trust as part of the corpus of the trust estate and not distributed as income.

In view of decisions in other jurisdictions and the dictum of *Gilkey* v. *Paine*, 80 Maine, 349, we think the complainant was justified in seeking the instructions of the court and that it is reasonable that the fund arising from the dividend contribute towards the costs and expenses of the litigation, the latter to include the reasonable counsel fees of the solicitors of the complainant and respondents to be fixed by the sitting Justice. The respondents, however, are to be allowed but one bill of costs.

Bill in equity by trustees asking the instructions of the court relative to the disposition of certain stock dividends. Cause was heard upon bill and answers, and by agreement was reported to Law Court with certain stipulations. Judgment in accordance with opinion.

Case stated in opinion.

Symonds, Snow, Cook & Hutchinson, for complainant.

Payson & Virgin, and John H. Pierce, for respondents.

SITTING: CORNISH, C. J., SPEAR, BIRD, HANSON, PHILBROOK, DUNN, MORRILL, JJ.

BIRD, J. This bill in equity is brought by one of the trustees under the will of Oliver Moses, deceased, against his two co-trustees and the children, grandchildren and the great and great great grandchildren of the testator asking the instructions of this court as to the disposition of a stock dividend declared upon stock of the Worumbo Manufacturing Company held by the trustees as part of the trust estate.

Answers have been filed by all the defendants except one of the remaindermen against whom the bill has been taken pro confesso. The general effect of the answers is to admit the allegations of the bill, at least in so far as to enable the court to reach the conclusion at which it has arrived.

The case is reported upon the bill as amended, the answers of the defendants, the exhibits annexed to bill and answers, together with the stipulation of counsel as to facts and the order of court reporting the case.

The provisions of the will of Oliver Moses instituting and regulating the trust are as follows:

"6. All the rest and residue of my estate, real, personal and mixed, whether now in possession or hereafter acquired, I give, devise and bequeath unto the said Galen C. Moses, Frank O. Moses and Benjamin F. Harris in trust to the uses following: that is to say. I devise and direct that out of the net income remaining, after paying all proper charges and expenses, the trustees shall pay to my said wife such sums of money as she shall from time to time desire, and the residue thereof divide in quarter annual payments equally among my children, Frank O. Moses, Galen C. Moses, Harriett S. Knight, wife of George H. Knight, Annie E. Harris, wife of Benjamin F. Harris, and Wealthy C. Hinds, wife of Rev. John W. Hinds, so long as they all shall live.

"7. In case the share of the said income falling to each of my children living shall in any year fall below two thousand five hundred dollars, the trustees at the end of the year are to make the shares up to that sum out of the principal of the trust estate.

"8. If during the period of the said trust any of my said children shall die without issue the division of the income is to be made among the survivors of them. But if the child so dying without issue shall leave a husband or wife, I give, bequeath and devise unto such surviving husband or wife one fourth part of that portion of the trust fund or estate corresponding to the portion of the income to which such deceased child was entitled at the time of his or her demise, the income of the residue to be divided as above provided, except as hereinafter to be provided."

Item 9 of the will provides for the disposition of the trust fund upon the decease of the children of the testator.

The trustees or their predecessors in the trust received from the estate of the testator and retained as part of the trust fund sundry shares of the corporation named above, which at the date of the vote of the stockholders, quoted below, numbered eight hundred and eighty-six. On the twenty-third day of February, A. D. 1917, the stockholders of the corporation passed the following vote:

"VOTED: that five thousand shares (5000) of new Capital Stock be issued at par to stockholders of record this 23rd day of February 1917, in proportion to their present holding; one share of new stock for each share now owned, and that an extra dividend of 100 per cent, payable in stock, be paid to stockholders of record of February 23rd, 1917, on March 15; 1917."

The vote was carried into execution and the number of shares held by the trustees was seventeen hundred and seventy-two at the time of the filing of the bill.

The complainant claims that the stock dividend was declared from earnings of the corporation. This is not seriously questioned by respondents, and we find such to be the fact. The complainant urges that consequently the shares representing the stock dividend be so apportioned that the value of the trust fund be unimpaired and the remainder be divided among the life beneficiaries—the three and only surviving children of the testator.

The will gives no indication of any intention entertained by the testator as to whether a stock dividend declared from earnings of the corporation be distributed as income among the life tenants or be held by the trustees as part of the corpus of the estate for the benefit of the remaindermen.

"In ascertaining the rights of such persons, the intention of the testator, so far as manifested by him, must of course control; but when he has given no special direction upon the question as to what shall be considered principal and what income, he must be presumed to have had in view the lawful power of the corporation over the use and apportionment of its earnings, and to have intended that the determination of that question should depend upon the regular action of the corporation with regard to all its shares." *Gibbons* v. *Mahon*, 136 U. S., 549, 559.

The complainant evidently relies upon the dictum in *Gilkey* v. *Paine*, to the effect that the integrity of the capital should be maintained and all surplus earnings, in whatever form distributed, be given to the life tenant. 80 Maine, 319, 325. This expression was unnecessary for the determination of that case. See *Thatcher* v. *Thatcher*, 117 Maine, 331.

The case under consideration cannot, we think, be distinguished from the case of *Thatcher* v. *Thatcher*, supra.

And the court takes this opportunity to state that in the determination of that case not only did the court have the assistance of the admirable and exhaustive brief of the solicitor for the complainant trustees but also of the like briefs of the solicitors in the instant case.

In conformity with the opinion in that case we must hold that the stock dividend declared by the Worumbo Manufacturing Company

is to be held by the Trustees in trust for the remaindermen and not distributed, as may the dividends thereon, as income among the surviving life tenants.

In view of the decisions in other jurisdictions rejecting the so-called Massachusetts rule, see *Thatcher* v. *Thatcher*, supra, and the dictum with which the opinion in *Gilkey* v. *Paine*, supra, closes, we think the complainant was justified in seeking the instructions of the court, and that it is reasonable and, as and for the reasons stated in *Richardson* v. *Richardson*, 75 Maine, at page 577, that the fund arising from the dividend contribute towards the costs and expenses of the litigation, the latter to include the reasonable counsel fees of the solicitors of the complainant and respondents to be fixed and allowed by the sitting Justice. The respondents, however, are to be allowed but one bill of costs. See also *Bailey* v. *Worster*, 103 Maine, 170, 178.

Decree accordingly.

PATRICK B. PEMBROKE

Appellant from Decree of Judge of Probate.

Piscataquis. Opinion October 15, 1918.

Probate appeal. Reason for appeal. Rule as to findings of fact by sitting Justice being final and conclusive. Exceptions.

This was an appeal by Patrick B. Pembroke, husband of Mary Pembroke, deceased, from a Decree of the Judge of Probate for the County of Piscataquis, granting administration of the estate of said Mary Pembroke, to Charles W. Hayes, on the petition of Hughes & Son Piano Manufacturing Company, claiming to be a creditor of said estate.

Held:

1. The testimony authorizes the finding of the sitting Justice. There is nothing before us to justify varying the rule that exceptions do not lie to the findings of fact by the presiding Justice, and such findings are final, binding and conclusive if there is any evidence to sustain such findings.
2. It clearly appears that Mary Pembroke owned the piano for which payment is claimed, that she was indebted to Hughes & Son Company for the balance due it thereon, and that she promised to pay it that amount. The obligation was her own and not within the Statute of Frauds.

Appeal from decree of Judge of Probate in the matter of the appointment of an Administrator. Appeal was duly entered at Supreme Court of Probate and from the rulings of the Justice presiding certain exceptions were filed. Judgment in accordance with opinion.

Case stated in opinion.

Harry L. Smith, and John S. Williams, for plaintiff.

Charles W. Hayes, for defendant.

SITTING: BIRD, HANSON, PHILBROOK, DUNN, MORRILL, JJ.

HANSON, J. This was an appeal by Patrick B. Pembroke, husband of Mary Pembroke, deceased, from a decree of the Judge of Probate for the County of Piscataquis, granting administration of the

estate of said Mary Pembroke, to Charles W. Hayes, on the petition of Hughes & Son Piano Manufacturing Company, claiming to be a creditor of said estate. The following reasons of appeal were alleged:

First: That said Charles W. Hayes is not an heir at law, or next of kin of said Mary Pembroke.

Second: That your appellant, Patrick B. Pembroke, is the widower of the said Mary Pembroke, and is a suitable person for Administrator of her estate.

Third: That Hughes & Son Mfg. Co. was not a creditor of the said Mary Pembroke during her lifetime, and is not a creditor of her said estate.

Fourth: That said Charles W. Hayes is not a creditor of the estate of said Mary Pembroke.

At the hearing the first, second and fourth reasons of appeal were admitted; the issue was upon the third reason, and involved the ownership of a piano.

A statement of the case, so far as material here, may be taken from the exceptions, which were to the admission of certain testimony filed by the appellant. "John Pembroke, son of the late Mary Pembroke, hired and received of the petitioning corporation a certain piano, known as Hughes & Son Mfg. Co. Style Hook, No. 22308, agreeing to pay certain instalments until the full sum of three hundred dollars had been paid. John Pembroke signed a certain writing or contract, commonly called a lease, November 29, 1913, and on the same day delivered to said corporation an organ for which he was allowed Thirty-Five Dollars by said corporation which was applied to the purchase price of said piano, and in said lease agreed to pay Seven Dollars per month thereafter until the full sum of Three Hundred Dollars had been paid. John Pembroke, with the knowledge of Hughes & Son Co. assigned all his right and title in said lease to his mother Mary Pembroke in February, 1916. Mary Pembroke died in June following, and her husband failing to seek administration of her estate, the petition herein was filed and allowed. The appellant claimed "that the assignment of said lease from John Pembroke to his mother was a conditional assignment; that it was made in anticipation of his going to the Mexican Border, that any interest he might have in said lease should go to his said mother in case he should not return home; but to be null and void should be return alive. And appellant further claims that said assignment was, in its nature,

asking said Mary Pembroke to assume the obligation of another, clearly within the statute of frauds; that Mary Pembroke was not indebted to said Hughes & Son Mfg. Co. during her life time, consequently her estate is not indebted to said Company."

Appellant excepted to the admission of testimony which tended to show that Mary Pembroke, in her lifetime, acquired and exercised ownership over said piano, with the consent of Hughes & Son Co., and that certain payments were made on the amount due them, in her behalf and upon her account, that she acknowledged her liability and promised to pay the balance due. The testimony came from disinterested parties, having full knowledge, and in part relating to documents belonging to Mary Pembroke, and was clearly admissible. The exceptions presented these questions: Was the lease or contract between John and Mary Pembroke within the Statute of Frauds? Was the undertaking of Mary Pembroke simply to pay the debt of her son, and not her individual undertaking?

The presiding Justice upon hearing the evidence, found for the appellee, and entered his decree as follows: "This case was heard by me on the 17th day of October, 1917. After a careful consideration of the law and the evidence my conclusion is that the appeal should be dismissed and the decree of the Judge of Probate affirmed. I therefore direct the Clerk of Court to make the entry 'Appeal dismissed with costs. Decree of Judge of Probate affirmed.'

"As a part of my finding I also file the evidence with decree."

The testimony authorizes the finding of the sitting Justice. There is nothing before us to justify varying the rule that exceptions do not lie to the findings of fact by the presiding Justice, and such findings are final, binding and conclusive if there is any evidence to sustain such finding. *Palmer's Appeal*, 110 Maine, 441; *Gower, Appellant*, 113 Maine, 156. It clearly appears that Mary Pembroke owned the piano, that she was indebted to Hughes & Son Co. for the balance due them thereon, and that she promised to pay them that amount. The obligation was her own and not within the Statute of Frauds. *Colbath* v. *Seed Co.*, 112 Maine, 277.

The entry will be,

Exceptions overruled.
Appeal dismissed with costs.
Decree of Judge of Probate affirmed.

TERSELLA ZANONI *vs.* WILLIAM F. CYR and LEWIS E. SMALL.

Oxford. Opinion October 15, 1918.

Search and seizure warrants. Rule as to officers being compelled to return warrants when nothing has been found in the search.

This was an action of trespass heard by a referee. Suit was brought for the alleged making of an illegal search of the dwelling house of the plaintiff.

Held:

1. Sec. 8 of Chap. 134, R. S., provides that "warrants issued by trial justices shall be *made returnable* before any justice in the county, and such warrants may be returned before any municipal or police court in the same county and the same proceedings had thereon as if said warrants had originally issued from said municipal court or police court; and the justice, for issuing *one not so returnable shall be imprisoned for six months* and pay the costs of prosecution." These words plainly relate to the form of the warrant, and the duty of the Justice, and not to the duty or liability of the officer.
2. The common law presupposed that the warrant would be executed before it was returned, and does not in terms require an immediate return unless the officer has actually done some act or accomplished some substantial object to be reported back to a court as "his doing thereon." No other case has arisen; a fact which may or may not justify continuance of the present form of warrant, as the legislature may determine.

Action of trespass which was referred, and from the rulings and findings of the referee exceptions taken by the plaintiff. Judgment in accordance with opinion.

Case stated in opinion.

Bernard A. Bove, and Jacob H. Berman, for plaintiff.

George A. Hutchins, and Bisbee & Parker, for defendant.

SITTING: CORNISH, C. J., BIRD, HANSON, PHILBROOK, DUNN, MORRILL, JJ.

HANSON, J. This was an action of trespass heard by a referee, who made the following report: "Judgment for the defendants with

the right of exceptions to the plaintiff upon the grounds stated in the Rescript and hereto attached."

The rescript states the case fully, as follows: "This is an action of trespass against the defendants for the alleged making of an illegal search of the dwelling house of Zanoni, and while so doing insulting and exciting his wife so that she fell into a state of nervous prostration and suffered much pain and injury. The plaintiff claims first that the search was unreasonable. I find as a matter of fact that it was not. Nor do I find that there was any abuse of process. The plaintiffs further claim however as a matter of law, that the defendants are guilty as trespassers ab initio. This contention arises upon this state of facts. The warrant was issued and served on the 29th day of September, 1916. The warrant was fair on its face, authorized the defendants as duly qualified officers to make the search commanded, and was executed in a reasonable manner. A proper return was made upon the warrant of the date of September 29, 1916, signed by Lewis E. Small, deputy, naming William F. Cyr as aid. The return contains this statement: "nothing found," and a notation of the officer's fees and court fees. The warrant was never returned to the court that issued it, nor to the sheriff, but was retained in the possession of deputy Small, the defendant who procured and served it, from September 29, 1916, until October 6, 1917, when he produced it at the reference as a justification. Upon this state of facts I rule as a matter of law that the failure of the defendant, Small, to return the warrant to the court issuing it, having found nothing in his search, and having made no arrest, does not deprive him of the right of protection under the warrant, but affords him, and his aid, Cyr, the other defendant, full justification for making the search complained of. To this ruling I reserve the right of exceptions to the plaintiff."

But one question arises. Did the warrant require the defendants forthwith to make a return under the circumstances? We think not. The law authorizing search and seizure process provides that search warrants can be issued only according to the following provisions. R. S., Chap. 134, Sec. 14. The complaint for a warrant to search must be made in writing, sworn to and signed by the complainant, must specifically designate the place to be searched, the owner or occupant thereof, and the person or thing to be searched for, and allege substantially the offense in relation thereto; and that the complain-

ant has probable cause to suspect, and does suspect, that the same is there concealed. Sec. 15. Search warrants shall recite, by reference to the complaint annexed or otherwise, all the essential facts alleged in the complaint, be directed to a proper officer or to a person therein named, and be made returnable like other warrants; and the person or thing searched for, if found, and the person in whose possession or custody the same was found, shall be returned with the warrant before a proper magistrate.

The plaintiff contends that the words "and be made returnable like other warrants," have peculiar significance, and apply to this case supporting his contention, and asks in his brief, "What does the legislature mean by the words 'like other warrants?'" Counsel concludes that recourse to the common law is the only avenue open, and quotes CUTTING, J., in *Patterson* v. *Creighton*, 42 Maine, 378: "At common law all warrants issuing from proper authorities are to be executed and returned by the officer to whom they are directed and received, with his doings thereon, and his return as to other parties is conclusive." As to the first contention, we think the words "and be made returnable like other warrants" are fully explained, and their purpose indicated, by a reference to the statute authorizing "other warrants." Sec. 8 of Chap. 134, R. S., provides that "warrants issued by trial justices shall be *made returnable* before any justice in the county, and such warrants may be returned before any municipal or police court in the same county and the same proceedings had thereon as if said warrants had originally issued from said municipal court or police court; and the justice, for issuing *one not so returnable shall be imprisoned for six months* and pay the costs of prosecution. These words plainly relate to the form of the warrant, and the duty of the Justice, and not to the duty or liability of the officer. Again, section 15 does not require a return to be made to the Justice issuing the warrant in any event; but only in case the person or thing searched for "is found." The return shows that nothing was found, and such return now used in this case as a justification, must be held to have been properly used, and the warrant may be returned to the proper magistrate within a reasonable time after final disposition of this case. The warrant did not in terms require the officer to make a return, and it seems that it has not been the custom in this State to have in such warrant a command to make return if there was "nothing

found." No other case has arisen; a fact which may or may not justify continuance of the present form of warrant, as the legislature may determine.

Exceptions overruled.
Judgment for defendants in accordance with the report of referee.

LILLIAN MCELWEE *vs.* MARIETTA MAHLMAN.

Washington. Opinion October 16, 1918.

Deeds. Plans. Rule where lots are deeded according to certain plan. Rule where the distances are given in a deed and the intention clearly gathered from the deed itself but some reference is made to a plan. General rule to be adopted in the construction of deeds.

This is a real action and is before the court on report.

The question at issue involves the location of the line dividing lots owned by the contending parties,—the plaintiff's south line and defendant's north line.

Held:

1. The wording of the description in defendant's deed clearly shows the intention of the parties to be that the grantors were selling what they knew to be a parcel of land from lot No. 1, and not lot No. 1 as originally laid out.
2. The use of the plan in the case, as in all cases, is limited to the one purpose as an aid to ascertain the intentions of the parties.
3. Here the reference to the plan was solely for the purpose of locating a lot, out of which the land was deeded, and was not a part of the description of the land conveyed. Applying the rule by which our court has been guided since its formation, that the expressed intention of the parties gathered from all parts of the instrument, giving each word its due force, and read in the light of existing conditions, must govern our action, we find for the plaintiff.

Real action to recover certain lands in the town of Lubec, Washington County. Defendant filed plea of general issue. At close of testimony, by agreement of parties case was reported to Law Court. Judgment for paintiff.

Case stated in opinion.

L. H. Newcomb, and J. H. Gray, for plaintiff.

H. E. Saunders, and H. H. Gray, for defendant.

SITTING: CORNISH, C. J., SPEAR, HANSON, PHILBROOK, JJ.

HANSON, J. This is a real action, and is before the court on report.

The question at issue involves the location of the line dividing lots owned by the contending parties,—the plaintiff's south line and defendant's north line.

All the land in question was originally owned by the heirs of Patrick Gillise, late of Lubec. Under their direction the large field comprising the estate was surveyed and divided into lots by George W. Ross, a civil engineer, whose plan of the lots in question was introduced in evidence. The survey was made in 1902. According to Mr. Ross' survey, Lot No. 1 was 70 feet wide on Gillise Street; lots No. 2 and No. 3 were each 50 feet wide on said street. The lines remained as originally located until April 20th, 1904, when H. P. Gillise and Annie T. Hicks conveyed their two-thirds interest in lot No. 2 to F. N. Gillise, and in addition thereto five feet from the northerly side of lot No. 1, and at the same time changed the Ross plan by drawing a new line upon the plan representing the north line of No. 1 and south line of No. 2. Up to this time no other conveyances had been made by the heirs. On May 5, 1904, Frank N. Gillise purchased from Archibald J. Black a small lot 12 feet, 6 inches wide and 13 feet long, in the southeast corner of lot No. 2, to square the same. On the same day F. N. Gillise deeded a triangular strip of land from the north side of lot No. 2, two feet wide on Gillise Street and running to a point fifty feet southeast on said north line, to Stephen Somers, the owner of lot No. 3.

The foregoing statement of title and history of the locus is presented for a better understanding of the real question involved. It will be noted that on May 5, 1904, the rights of parties other than the heirs of P. Gillise were not brought in question. The survey and plan had been made and used by the parties in interest; one deed between the heirs made, which involved a change in the plan. The change in the plan was made, and on July 1st, 1904, Frank N. Gillise deeded the land thus acquired, which for the purposes of this case comprised all of the original lot numbered two, and five feet from the northerly

side of lot No. 1, to Linda M. Ingalls, who occupied the land until May 24, 1914, when she conveyed the same to the plaintiff. That deed has the following description:—"Commencing at the southeast corner of Stephen Somers' homestead lot, (Lot No. 3) thence in a course nearly south forty-seven feet and six inches to the north line of lot No. 1, as per plat of the Gillise field, so called, by Geo. W. Ross, thence westerly on said north line of lot No. 1, sixty-six feet and eight inches to Gillis Street, so called, thence northerly along said Gillise Street fifty-three feet to the homestead lot of the said Stephen Somers, thence easterly along said Somers south line sixty-eight feet to the place of beginning."

It will be noted that while the description refers to the plan made by George W. Ross, the distances given are specific, exact and deliberate, and extend the width of lot No. 2, over the Ross line and into lot No. 1, where it had been relocated by all the parties in interest after Mr. Ross had finished his survey. This we think the owners had a right to do, especially as other interests had not intervened, and assuredly so as to the defendant whose title comes from the same source, and after the new line had been established for twelve years, and had been recognized by all concerned.

The defendant acquired title through a deed from Lelia E. Gillise and Mary T. Gillise, by deed dated July 17, 1916, the description in which deed is identical with that in a deed from F. N. Gillise to them, and reads:—"A certain lot or parcel of land situated in said Lubec and more particularly bounded and described as follows, to wit, beginning at the southeasterly corner of said lot, where the westerly line, at the southwesterly corner of land owned by Charles or Mary Mulholland, of said Lubec, intersects with Main Street, so called; thence running westerly fifty-five feet, more or less, to a new street, Gillis Street, so called; thence northerly, sixty feet, more or less, to property formerly owned by F. N. Gillise, now owned by McElwee, thence easterly fifty-four feet, more or less, to said Mulholland's line; thence southerly sixty feet, more or less, to the place of beginning. Meaning and intending to convey all of my said interest in and to said parcel of land, known on a plan of the Gillise estate as lot No. 1, said plan having been drawn by George W. Ross, Civil Engineer, in 1902."

Counsel have asserted that there is ambiguity in the description, but none is perceived. On the contrary, this, the latest deed, con-

tains in the description evidence of full knowledge of the parties as to the changes made in the original plan, and the widening of lot No. 2, and consequent decrease in lot No. 1. The grantors were not deeding lot No. 1. The description clearly states that they were conveying their interest in lot No. 1, and the Ross plan was not made a part of the deed, or referred to any further than to locate a certain lot No. 1, in which they were selling all their interest. That interest was an interest in lot No. 1 on the Ross plan, as changed by the parties, before any right had been acquired by the defendant. The wording of the description clearly shows the intention of the parties to be, that the grantors were selling what they knew to be a parcel of land from lot No. 1, and not lot No. 1 as originally laid out. The description was indefinite, every mention of distance was qualified by the use of the words "more or less," and the northerly bound was "property now owned by McElwee." The language used is not ambiguous, and the defendant must be charged with knowledge of the change in the plan, and the new line by which the property "now owned by McElwee" was limited. The plan was made for the Gillise heirs. They had the right to change a line, or make smaller lots of larger ones, if they saw fit; and the rights of others were not interfered with by the change. Our duty under the report is to ascertain the intention of the parties, and so find that such intention shall be carried out. In reaching our conclusion the oral testimony has thrown some light, but the deeds introduced, especially the deed to the defendant, considered in connection with the plan, clearly establish what the oral testimony tends to show, that the defendant is limited on the north by the new line fixed by the Gillise heirs, and not by a line fixed by Mr. Ross. The use of the plan in the case, as in all cases, is limited to the one purpose, as an aid to ascertain the intention of the parties. In considering the same subject, the text of Vol. 8, R. C. L., page 1078, Sec. 134, states the law in these words: "The words of reference usually serve merely to connect the deed with the plat, so that by applying the one to the other, the former may be rendered intelligible. They give effect to the expressions of the deed, but they do not limit them. If there is that upon the face of the plat to which the expressions of the deed can apply, then the court will make the application, rather than reject the words of the deed as not expressing the intentions of the parties."

If it was the intention to convey the original lot, then it could have been done by deeding lot No. 1 as per plan, etc., or by giving the exact boundaries. This course was not taken. On the contrary the opposite course, and one which most decidedly sustains the plaintiff's contention, was taken, and was adopted by the defendant, when every line and distance was qualified by the use of the words "more or less." These words used in connection with the words "now the property of McElwee," can only imply that the defendant's north line must be the south line of the plaintiff's land, according to the deed under which she and her grantor had occupied the land many years, the bounds of which were definite and unqualified.

This is not a case where a plan is referred to as a part of a description of a lot of land. *Danforth* v. *Bangor*, 85 Maine, 423, or where a grant of land is made with reference to a plan. *Heaton* v. *Hodges*, 14 Maine, 66, and cases cited. If so referred to in a proper case the map or plan designated would become a material and essential part of the conveyance with the same force and effect as if copied into the deed. 8 R. C. L., page 1079, Sec. 135, and cases cited, including *Kennebec Purchase* v. *Tiffany*, 1 Greenleaf, 219; *Ripley* v. *Berry*, 5 Greenleaf, 24.

Here the reference to the plan was solely for the purpose of locating a lot, out of which the land was deeded, and was not a part of the description of the land conveyed. Applying the rule by which our court has been guided since its formation, that the expressed intention of the parties gathered from all parts of the instrument, giving each word its due force, and read in the light of existing conditions, must govern our action, we find for the plaintiff. *Perry* v. *Buswell*, 113 Maine, 399.

Judgment for the plaintiff.
Parties to be heard in damages by the Clerk.

HAROLD E. SMITH *vs.* SOMERSET TRACTION COMPANY.

Somerset. Opinion October 31, 1918.

Negligence. Last Clear Chance Doctrine. Contributory negligence.

In an action to recover damages caused to the plaintiff's motor sprinkling truck, driven by his servant, by collision with a car of the defendant, the jury having returned a verdict for the plaintiff, it is

Held:

1. That the driver's own negligence in turning directly on to the track of the defendant without using reasonable efforts to discover whether a car was approaching precludes recovery. His conduct was not that of a reasonably prudent man concerned for his own safety.
2. The last clear chance doctrine does not apply. The driver's negligence actively continued from its commencement up to the moment of collision.
3. The verdict is so manifestly contrary to the law and the evidence that it should not stand.

Action on the case to recover damages on account of alleged negligence on part of defendant. Defendant filed plea of general issue. Verdict for plaintiff in sum of $418.75. Defendant filed motion for new trial. Motion sustained.

Case stated in opinion.

Fred F. Lawrence, for plaintiff.

Butler & Butler, for defendant.

SITTING: CORNISH, C. J., SPEAR, HANSON, PHILBROOK, DUNN, MORRILL, JJ.

CORNISH, C. J. The plaintiff seeks to recover for damages caused to his motor sprinkling truck, driven by one Boothby, in collision with a car of the defendant. The accident occurred on August 19, 1917, on Madison Avenue in the town of Skowhegan. The driver of the truck entered Madison Avenue from Pleasant Street on the west, crossed the track of the defendant and proceeded in a northerly direction on the easterly side of the track and three or four feet there-

from until he was opposite the stand-pipe from which he was to refill the sprinkler. He then swung the front end of the truck on to the track, put on his brakes and stopped, preparatory to reversing his gears and backing up to the stand-pipe. Before he was off the track the sprinkler was struck by the electric car which had come up Madison Avenue in the same direction as the truck.

The driver's own story of the accident proves such negligence on his part as precludes recovery. As he was proceeding up Madison Avenue he was free and clear of any car that might overtake him. The moment he turned toward the track he was approaching possible peril. It then became his duty to use reasonable efforts to ascertain whether a car was coming from behind. When he left Pleasant Street he glanced down Madison Avenue the short distance of two lots, and says he saw no car. He did not look again until just before he turned on to the track, when he looked over his shoulder, but the body of the sprinkler obstructed his view, so that he could see a distance of only fifteen or twenty feet along the track, which was about the length of the truck itself. With that restricted view he admits that he turned directly onto the track, and the collision followed. This certainly was not the conduct of a reasonably prudent man concerned for his personal safety. It was a clear case of contributory negligence. Perhaps the presence of a companion riding with him simply for pleasure may throw some light upon the degree of watchfulness he was exercising.

To relieve himself from this predicament the plaintiff invokes the last clear chance doctrine, and argues a subsequent and independent negligence on the part of the motorman of the electric car, after the truck had reached its perilous position. The evidence wholly fails to warrant the application of that doctrine. The collision followed close on the turning of the truck and the motorman of the electric car then used every reasonable effort to avoid the accident. The driver's negligence actively continued from its commencement up to the moment of collision, and this case is governed by *Butler* v. *Railway*, 99 Maine, 160; *Philbrick* v. *Railway*, 107 Maine, 429, and *McKinnon* v. *Railway*, 116 Maine, 289.

The verdict is so manifestly contrary to the law and the evidence that it should not stand.

Motion sustained.

HERBERT D. KNOX, Petitioner for Mandamus, *vs.* JAMES E. COBURN.

Androscoggin. Opinion October 31, 1918.

Mandamus. R. S., Chap. 51, Sec. 22 interpreted. General rule covering the rights of stockholders in relation to inspection of the books of a corporation of which he is a stockholder. Rule as to discretionary right of court to grant inspection.

This is a petition for writ of mandamas brought by the holder of one share of stock of the Androscoggin Mills against the Clerk of the corporation, to compel him to allow the petitioner to inspect the stock book, to take copies and minutes therefrom of such parts as concern his interests, and to make a list of stockholders, their residence and the amount of stock held by each. The petitioner is connected with a Boston firm that makes a specialty of dealing with unlisted and inactive stocks and bonds, and it is admitted that the share of stock standing in his name was purchased by this firm in order that the petitioner might have the status of a stockholder, and thereby obtain a list of the stockholders for their exclusive use; that such lists are neither sold nor loaned to brokers nor other dealers but are used as mailing lists in sending out circulars offering to buy or to sell stock in various corporations. The sitting Justice granted the petition and ordered the peremptory writ of mandamus to issue.

Upon defendant's exceptions it is

Held:

1. Under R. S., Chap. 51, Sec. 22, a stockholder has an absolute and unlimited right to inspect the corporate records and the list of stockholders at all reasonable times, whatever may be his motive in seeking to exercise it.
2. The stockholders right to take copies and minutes therefrom is limited to such parts as concern his interests and a list of stockholders does concern his interests.
3. It will not be presumed that the motive of a stockholder is an improper one, and if the motive or purpose is charged to be otherwise the burden is upon the officer refusing the request, or the corporation, to establish it.
4. The character of the remedy sought by application for a writ of mandamus and the discretion to be exercised by the court in issuing it seems not to have been abridged by the statute and a state of facts might be presented where the purpose of the petitioner was so obviously vexatious, improper or unlawful that the court might feel compelled to exercise its discretion and decline to issue the writ.
5. The use under the facts in this case is neither improper, vexatious nor unlawful.

Petition for mandamus brought under R. S., Chap. 51, Sec. 22, seeking to permit the plaintiff to inspect the books of the corporation and make copies of the names of stockholders of the Androscoggin Mills, of Lewiston, Maine. After hearing, the presiding Justice ruled in favor of plaintiff; to which ruling defendant filed exceptions. Judgment in accordance with opinion.

Case stated in opinion.

Ralph W. Crockett, for petitioner.

McGillicuddy & Morey, for defendant.

SITTING: CORNISH, C. J., SPEAR, HANSON, PHILBROOK, DUNN, WILSON, JJ.

CORNISH, C. J. This is a petition brought by a stockholder of the Androscoggin Mills, of Lewiston, Maine, for a writ of mandamus commanding the respondent, the clerk of the corporation, to allow him to inspect the stock book, to take copies and minutes therefrom of such parts as concern his interests, and to make a list of the stockholders, their residences and the amount of stock held by each.

The respondent admits the right of the petitioner to inspect the books, but denies him the right to make copies of the books and of the list of stockholders.

R. S., Chap. 51, Sec. 22, provides that the corporate records and stock book "shall be open at all reasonable hours to the inspection of persons interested, who may take copies and minutes therefrom of such parts as concern their interests," etc.

The sitting Justice after full hearing granted the petition and ordered the peremptory writ of mandamus to issue. The case is before the Law Court on defendant's exceptions to this ruling.

The opinion filed by the sitting Justice covers so fully and so discriminatingly the facts and the law involved in this matter that we adopt it as the opinion of the court. That opinion is as follows:

"The petitioner bases his application upon section 22 of chapter 51 of the Revised Statutes, and asks that a peremptory writ issue to the respondent, commanding him to allow the petitioner to inspect the stock book of the Androscoggin Mills and to take copies and minutes therefrom of such parts as concern the petitioner's interests and to make a list of the stockholders of said corporation, their residences and the amount of stock held by each.

In previous decisions of this court (*White* v. *Manter*, 109 Maine, 409; *Withington* v. *Bradley*, 111 Maine, 386; *Eaton* v. *Manter*, 114 Maine, 260), it has been held that this statute, so far as the right of inspection is concerned, adds to the common law rights of a stockholder and removes some of the common law limitations, and that it gives the stockholder an absolute and unlimited right to inspect the corporate records and the list of stockholders whatever may be his motive or purpose in seeking to exercise it, and that it is not necessary to state in his application or prove the reasons for his application to inspect such records. The right to take copies and minutes therefrom, is, however, limited to such parts as concern the interest of the stockholder making the application, and that limitation is recognized by the prayer of the petition in this case. It has further been held that a list of stockholders concerns a stockholder's interest, and that he has a right to take a copy of the list irrespective of his motive or purpose.

The court, however, has been careful to say that the character of the remedy sought by application for a writ of mandamus, and the discretion to be exercised by the court in issuing it, seems not to have been taken away or abridged by the statute, and that a state of facts might be presented where the purpose of the petitioner was so obviously vexatious, improper or unlawful that the court might feel compelled to exercise its discretion and decline to issue the writ.

It will not be presumed that the motive of the stockholder is an improper one, and if the motive or purpose is charged to be otherwise, the burden is upon the officer refusing the request or on the corporation to establish it. *Stone* v. *Kellogg*, 165 Ill. 192, 56 Am. St. Rep., 240; *State* v. *Pacific Brewing Co.* 58 Pacific, 584, 47 L. R. A., 208; *Foster* v. *White*, 86 Ala., 467, 6 So. 88.

The respondent has filed a return to the alternative writ, stating his reasons for not complying with the request of the petitioner. Treating the allegations of this return as statements of fact and not of opinion or belief, the allegations of paragraphs five and seven so far as they relate to the purposes of the petitioner, are not sustained by the evidence. In paragraph six of the return the respondent states his belief "that it is the intention of said Herbert D. Knox to endeavor to use the information for his sole benefit in the buying and selling of the stock of the Androscoggin Mills, and that such act would be detrimental to the best interests of the corporation and its stockholders."

It appears by the evidence before me that the petitioner first made application to the treasurer of the Androscoggin Mills for a list of the stockholders to which Mr. DeNormandie replied, under date of June 22, 1918: "If you will let me know by return mail any specific reason that you may have for desiring this list, I shall be glad to take the matter under consideration." In reply Mr. Knox states: "I beg to advise you that I desire this list for the use only by myself in connection with the firm of Charles A. Day & Company for the purpose of facilitating the purchase or sale of this stock, as by having a list of stockholders when occasion arises can communicate with them direct either as to purchase or sale should I so wish." To this letter Mr. DeNormandie replied: "I have given your letter careful consideration and have been advised that I should not disclose the stockholders' names under the circumstances to which your letter refers. We have always refused such requests and think that we ought not to change our custom."

In his testimony upon examination Mr. Knox testified as follows:

Q. Your purpose in buying a share of stock, as I said before, was for your own private business, to buy and sell to stockholders or anybody else you could get to buy?

A. In connection with the firm of Charles A. Day & Co.

Q. And in selling that stock of course you sell to people other than stockholders, or try to sell it, don't you?

A. Not at all times, no.

Q. You do sometimes?

A. Once in a while. For instance, we may in the Androscoggin, if there should happen to be two or three hundred shares offered for sale, we might circularize it."

It appears from the evidence before me that the petitioner is connected with the firm of Charles A. Day & Co. of Boston, and that that firm makes a specialty of dealing in unlisted and inactive stocks and bonds, and that the share of stock standing in the name of the petitioner was purchased by that firm that Mr. Knox might have the status of a stockholder in the Androscoggin Mills and such rights as attach thereto. It further appears that this firm makes it a practice to obtain lists of stockholders of corporations in the stock of which it deals; that these lists are for its own exclusive use; that they are not sold or even loaned to brokers or other dealers; that they are used as mailing lists in sending out circulars offering to buy or to sell stock in

various corporations. Copies of the circulars issued by this firm were put in evidence, without objection, and seem to be unobjectionable in form. I fail to see wherein the purpose which Mr. Knox intends to make of the lists of stockholders is in any way improper, vexatious or unlawful. In *Withington* v. *Bradley*, supra, the court found that the evidence failed to disclose any unlawful purpose, and that the power of the court to issue the peremptory writ was properly exercised. The report of that case does not show the evidence upon which this finding was based, but as supporting that view the court cited the case of *State* v. *Middlesex Banking Co.*, 87 Conn., 483, a case which is so parallel in its facts with the present case that I quote from the opinion of the court, on page 489:

"The primary charge brought against the relator in the return centers about his business as a stockbroker. It is asserted that he ought not to be admitted to an examination of the stock books because he became a stockholder for the purpose of trading in its shares, and that his controlling purpose in seeking access to the stock books is that he, by means of the information obtained, may more effectually carry on that business and more extensively and successfully buy and sell the company's shares for profit to himself. We fail to discover what harm or loss can threaten either the company or its stockholders from the relator's operations as a buyer and seller of its stock, however active or general they might become, of so gross a character as to call for judicial protection from the exercise of the statutory right. Such operations are not hostile to the corporation, have nothing wrong, unjust, illegitimate or unlawful about them, and the desire to advance them in honorable ways, although ulterior to the interests of the corporation and stock ownership, has no taint of impropriety about it."

In his testimony Mr. Coburn expresses concern that if the writ were granted annoyance to the stockholders might result. It is difficult to see how such a result would follow. The creation of a wider market for the stock cannot certainly be detrimental to the stockholders' interest, and any information as to stock being offered for sale, or of opportunity to sell stock to persons desiring to purchase, would naturally be to the stockholder's interest. The corporation has within its power to very effectually guard the stockholders against any deception, if such should be attempted, by distributing to its stockholders printed statements of its financial condition in such

form as to afford full information. It seems that in the case of this particular corporation it has not been the practice so to do. Referring to a similar claim the court in *State* v. *Middlesex Banking Company,* says:

"But whatever evil incidents might be expected to attend the policy of limited publicity enacted into the law, assuming that the allegations conform to the fact, we must presume that the General Assembly took that into account and weighed that against the anticipated benefits in determining upon it. Whatever possibilities of evil may lie in the policy adopted, they are inherent in the system, and do not arise from exceptional cases of misuse or abuse. If we were to say that the right given by statute should not be enforced for the reason that harmful results might follow, we should be usurping the functions of the legislative department in making practical repeal of the statute and transgressing the comparatively narrow limits of proper judicial action already indicated."

I have carefully examined the cases cited by respondent's counsel in his brief. They do not seem to controvert the positions taken in this opinion, but it may be said of them that such cases arose in states where a more limited policy seems to prevail than prevails in states having statutory provisions similar to those found here.

Peremptory writ of mandamus may issue, commanding the said James E. Coburn to allow the said Herbert D. Knox to inspect the stock book of the Androscoggin Mills and take copies and minutes therefrom of such parts as concern his interests, and to make a list of the stockholders of said corporation, their residences and the amount of stock held by each."

The entry must therefore be,

Exceptions overruled.

CHARLES E. SWEENEY *vs.* FRED W. HIGGINS.

Cumberland. Opinion November 4, 1918.

Actions for libel. When the same may be privileged. General rule covering the question of privileged communications. Necessity of proving malice. Burden of proof.

Action on the case for libel, brought by a police officer of South Portland against an alderman of the same city, and based on a communication to the Mayor and City Government signed by the defendant, preferring charges against the plaintiff, and asking for a hearing thereon.

Held:

1. This was a conditionally privileged communication which is not actionable unless proved to be malicious, and the burden of proving malice by affirmative evidence rested upon the plaintiff.
2. No action lies for a communication imputing want of integrity or other ground of unfitness to a public official or employee, who is subject to removal by the board or officer to whom the communication is addressed, provided such communication is made in good faith and without malice.
3. There was no evidence of malice on the part of the defendant in this case. The plaintiff was exonerated by the board after hearing, but actual malice is not to be inferred from falsity alone.

Action on the case for libel. Defendant filed plea of general issue and also brief statement setting forth, in substance, that the communication was a privileged one. By agreement of parties, case was reported to Law Court upon certain agreed statements and stipulations. Judgment in accordance with opinion.

Case stated in opinion.

William A. Connellan, for plaintiff.

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

SITTING: CORNISH, C. J., SPEAR, HANSON, PHILBROOK, DUNN, MORRILL, JJ.

CORNISH, C. J. This is an action on the case for libel brought by a police officer of South Portland against an alderman of the same city, and is submitted to the Law Court upon an agreed statement of facts.

The alleged libel is based upon the following written charges which were presented by the defendant against the plaintiff:

"To the Honorable Mayor and City Government of South Portland:

Respectfully represents Fred W. Higgins of South Portland, who gives this body to understand that Charles E. Sweeney of said South Portland has been acting as an officer of said South Portland; that he has been unmindful of his duty; that he has attempted to extort money from the city of South Portland by attempting to collect for services after having been paid by the Cumberland County Power and Light Company; wherefore your petitioner prays that the said Sweeney may be ordered to appear and show cause why he should not be discharged from the force.

Dated at South Portland this eighth day of August, A. D. 1916.

(Signed) FRED W. HIGGINS."

It is admitted that the defendant while an alderman and at a meeting of that Board, presided over by the Mayor, presented the foregoing charges, that at the time in question police officers of that city were appointed by the Mayor and his appointments were confirmed by the Board of Aldermen, and that after these charges were preferred an investigation was had and the plaintiff was exonerated. It does not affirmatively appear that these officers were subject to removal by the Mayor and Aldermen, but such is the fair inference, from the fact that the appointment was made by the Mayor subject to confirmation by the Aldermen, *Andrews* v. *King*, 77 Maine, 224, and from the further fact that this communication was addressed to them and cognizance thereof was taken as an investigation leading to exoneration was subsequently made.

These admitted facts bring the written charges within the class of what is known as conditionally privileged communications, which are not actionable unless proved to be malicious and the burden of proving malice by affirmative evidence rests upon the plaintiff. No evidence of malice is submitted by the plaintiff in this case. The burden is not met. The condition is not removed.

It is a settled principle of the law of libel that no action lies for a petition or communication imputing want of integrity or other ground

of unfitness, to a public official or employee, who is subject to removal by the board or officer to whom the petition or communication is addressed, provided such communication is made in good faith, and without malice. 17 R. C. L., Sec. 110; *Jczsa* v. *Moroney*, 125 La. 813, 19 Ann. Cas., 1193 and note; *Farr* v. *Valentine*, 38 App. Cas., (D. C.) 413, Ann. Cas., 1913, Chap. 821, and note; *Tyree* v. *Harrison*, 100 Va., 540; *Blakeslee* v. *Carroll*, 64 Conn., 223; *Kent* v. *Bougartz*, 15 R. I., 72; and see *Bradford* v. *Clark*, 90 Maine, 298.

This rule rests upon sound public policy. It tends to honesty and fidelity in the conduct of public affairs. It renders subordinates more amenable for their derelictions to the superior power which is responsible for their acts. It carefully guards against charges made in bad faith and from malicious motives on the one hand, while shielding the writer from charges made honestly and from a sense of public duty on the other. The case at bar comes within this rule. Not only were the charges made to a body having the power of investigation and removal, but they were put forth by one who was himself a member of that body at the time, upon whom rested in part the responsibility for the acts of the subordinate. The presumption is that the charges were preferred without malice and from a sense of official responsibility, and there is no evidence to rebut this presumption.

It appears that upon investigation the plaintiff was exonerated, from which fact, perhaps, it might be reasonably inferred that the charges were not proven to be true. But actual malice cannot be inferred simply because of the falsity of the charges. "It is well settled that falsity is not enough. The author or authors of the communication may make it and press it upon the attention of others, honestly believing it to be true and acting from the purest and highest of motives, when in fact it is false, and therefore actual malice is not to be inferred from falsity." *Kent* v. *Bougartz*, 15 R. I., 72, and cases cited.

The application of these familiar principles to the admitted facts in this case requires that the mandate be,

Judgment for defendant.

LUCETTA ARCHIBALD

vs.

THE ORDER OF UNITED COMMERCIAL TRAVELERS.

Androscoggin. Opinion November 4, 1918.

Contracts of insurance. Accident policy. Meaning of words "voluntary exposure to danger." Burden of proving that assured comes within an excepted clause.

The plaintiff is beneficiary under an accident policy issued by the defendant, and recovered a verdict of $6300. The constitution of the order, among other exemptions, provided that the benefits under the policy should not cover any death, disability or loss resulting from "voluntary exposure to danger."

The insured, who was the husband of the plaintiff, was killed while walking on the tracks of the Maine Central Railroad Company in Lewiston, at a point several hundred feet from the Lower Station, by being struck by a locomotive.

Upon defendant's motion and exceptions it is

Held:

1. To render one guilty of voluntary exposure to danger within the meaning of this policy he must have intentionally done some act which reasonable and ordinary prudence would pronounce dangerous, one which an ordinarily prudent man of common intelligence would know to be dangerous.
2. The term is not synonymous with lack of due care or contributory negligence. A mere passive negligence is not sufficient. It must ordinarily be active in its nature and implies both an intention to perform the act and a conscious willingness to assume the risk which is obviously connected with it.
3. The application of this definition to the facts in the case at bar brings it clearly within this exemption.
4. The defendant's request for an ordered verdict in his favor should have been given.

Action to recover the sum due under a policy of insurance issued by defendant. Defendant filed plea of general issue and also brief statement. Verdict for plaintiff in the sum of $6300. At close of evidence, defendant filed motion asking that the court direct a verdict in favor of defendant. Motion was overruled by presiding Justice; to which ruling, and other rulings of court, defendant filed exceptions. Exceptions sustained.

Case stated in opinion.

McGillicuddy & Morey, for plaintiff.

George C. Wing, George C. Wing, Jr., and John A. Millener, of the Columbus, Ohio Bar, for defendant.

SITTING: CORNISH, C. J., SPEAR, HANSON, PHILBROOK, DUNN, MORRILL, JJ.

CORNISH, C. J. On January 2, 1914, the defendant issued to the plaintiff's husband, Ernest U. Archibald, a certificate of insurance, in the sum of $6300. payable to the plaintiff as beneficiary in case of death occasioned by bodily injury effected through external, violent and accidental means, subject however to certain provisions, conditions and requirements contained in the constitution of the order. On January 31, 1914, Mr. Archibald was struck and killed by a locomotive while walking on the tracks of the Maine Central Railroad Company in the city of Lewiston. This suit was brought to recover the amount due under the certificate, and after a verdict for the plaintiff is now before this court on defendant's exceptions. A large number of exceptions was reserved, but it is necessary to consider only one, the refusal of the presiding Justice to direct a verdict for the defendant. We think this direction should have been given.

The constitution of the defendant order contains many exemptions. Among others it is provided that the benefits under the certificate shall not cover any death, disability or loss resulting from "self destruction (while sane or insane)," "the violation of any law," "or from voluntary exposure to danger." Each of these defenses is set up by the defendant, and in this class of cases the burden is on the defendant to prove the existence of facts which create the exemption.

In ordinary actions for personal injuries the burden is upon the plaintiff to prove his due care, but in an action upon the contract of insurance it devolves upon the defendant to prove the exemption which it sets up in defense. *Keene* v. *New Eng. Acc. Association,* 161 Mass., 149; *Garcelon* v. *Commercial Travelers Association,* 195 Mass., 531.

The defense of suicide was not made out. No such inference could reasonably be drawn from the facts and circumstances as disclosed by the evidence.

The defense of violation of law is based upon R. S., Chap. 57, Sec. 67, which provides as follows: "Whoever, without right, stands or walks on a railroad track or bridge, or passes over such bridge except by railroad conveyance, forfeits not less than five, nor more than twenty dollars, to be recovered by complaint." We will not discuss the application of this statute to the claimed exemption further than we may do so incidentally in connection with the next ground.

The third defense, based on "voluntary exposure to danger" is abundantly proved, and is a full and complete bar to the maintenance of this action.

The material facts are not in controversy. Mr. Archibald and his wife were residents of Poland. On the day of the accident they had come to Lewiston from Portland, arriving in Lewiston shortly before noon. They transacted some business at the Lewiston Trust Company, dined together at a restaurant, and then separated, Archibald going to an employment agency for the purpose of securing men for his lumbering operations. These were obtained and according to the testimony of the agent, Archibald left the agency stating that he had a little business down street and would return about quarter past one, in season to take the men up to the 1.45 P. M. train for Rumford. He was next seen by the gate tender at the Chestnut Street crossing as he was passing that crossing on the tracks, shortly before the accident, and then by the engineer and fireman of the regular 12.40 train out of the Lewiston Lower Station on its way to Brunswick. The train had reached a point several hundred feet from the station and between the Avon and Androscoggin Mills, when the engineer and fireman saw Archibald walking in the same direction in which the train was moving and beside the track. When the engine was within about thirty-five feet from him Archibald, without looking back, started to run across the track, took two or three steps between the rails, threw up his hands, fell and was caught by the pilot. Evidently he was not aware of the approaching train until that moment and then in his confusion, or perhaps with the thought of crossing to a safer position, he was struck and killed. Such in brief are the circumstances attending the accident.

This brings us to the interpretation of the clause, "Voluntary exposure to danger." What is its meaning as used in this contract of indemnity? A definition so accurate in detail and yet so compre-

hensive in scope as to meet all cases is difficult, if not impossible, to formulate, and yet the essential elements can be stated.

The term is not synonymous with lack of due care or contributory negligence. To give it that broad construction would make of an accident policy a delusive snare. Many of the accidents of life are attributable to the want of due care on the part of the injured person. They may result from inadvertence, from "thoughtless inattention," and yet they are within the contemplation of the contract. A mere passive negligence is not sufficient to constitute voluntary exposure to danger. It must ordinarily be active in its nature. The word voluntary implies an act of the will.

It may therefore be said, speaking generally, that to render one guilty of voluntary exposure to danger he must have intentionally done some act which reasonable and ordinary prudence would pronounce dangerous, one which an ordinarily prudent man of common intelligence would know to be dangerous. The term implies both an intention to perform the act and a conscious willingness to take the risk which is obviously connected with it. The application of this definition to the case at bar brings it clearly within the inhibition.

Mr. Archibald, in walking along the railroad tracks in the city of Lewiston, was voluntarily and unnecessarily walking in an admittedly dangerous place. The peril was open and plain, his exposure to it was voluntary, and he was injured by the very risk which he had chosen to take. The precise injury happened which there was reason to fear. The liability of passing trains was no hidden danger, but an apparent one. He was in fact a trespasser. *Copp* v. *Maine Central R. R. Co.*, 100 Maine, 568. The company itself had posted a sign in that vicinity calling attention to the penalty under R. S., Chap. 57, Sec. 67, for walking, without right, on the track or bridge. The fact that others were accustomed to take the same course is immaterial in this action against the Insurance Company. *Piper* v. *Mercantile Mut. Acc. Ass'n*, 161 Mass., 589; *Osgood* v. *U. S. Acc. Co.*, 76 N. H., 475.

In reaching the conclusion that the facts bring this case at bar within the exemption, we are in accord with the authorities which are numerous, and a few of which we cite. These of course differ in their facts, but they are analogous in principle, and in some of them the clause in the policy would require even stronger evidence against the plaintiff than that under consideration here. *Cornish* v. *Acc. Ins.*

Co., L. R., 23, Q. B. Div. 453; *Glass* v. *Fraternal Acc. Ass'n*, 112 Fed., 495; *Travellers Ins. Co.* v. *Jones*, 80 Ga., 541; *Small* v. *Travellers Prctec. Ass'n*, 118 Ga., 900; *Follis* v. *U. S. Mut. Acc. Ass'n*, 94 Iowa, 435; *Smith* v. *Pref. Mut. Acc. Ass'n.* 104 Mich., 684; *Alter* v. *Union Casualty & Surety Co.*, 108 Mo. App., 169; note to *Hunt* v. *U. S. Acc. Ass'n*, 146 Mich., 521, 10 Ann. Cases, 451; note to *Bakalars* v. *Continental Casualty Co.* 141 Wis., 43, 18 Ann. Cas., 1125; *Tuttle* v. *Travellers Ins. Co.*, 134 Mass., 175; *Willard* v. *Masonic Acc. Ass'n*, 169 Mass., 288; *Garcelon* v. *Commerical Trav. Ass'n*, 195 Mass., 531.

This case is distinguishable from *Keene* v. *N. E. Mutual Acc. Assoc'n*, 161 Mass., 149, confidently relied upon by the plaintiff, as in that case, to quote the opinion, "the deceased was not attempting to walk upon the track or to remain upon it, but he was simply crossing at a quick pace. He was hit, not by an engine with its noise, but by a detached car, which had been kicked along there, the sight of which was cut off by his umbrella." The other Massachusetts cases above cited are more closely in point.

Our conclusion therefore is that the plaintiff cannot recover, and that the request for an ordered verdict for the defendant should have been given.

Exceptions sustained.

RAYMOND TIBBETTS *vs.* DR. D. P. ORDWAY PLASTER COMPANY.

Knox. Opinion November 9, 1918.

Rule of practice where demurrer is filed. Right of court to allow plaintiff to amend after filing of demurrer. When an amendment must be filed. Rule of court. Failure to file amendment according to rule of court.

Writ entered at September term, 1917, and general demurrer to the declaration filed at that term. At the next or January term, 1918, hearing was had on the demurrer, the demurrer was sustained and the plaintiff was given leave to amend. At the next or April term, 1918, the plaintiff filed an amendment which was allowed.

On exceptions to this ruling it is

Held:

1. That as no exceptions were taken at the January term to the decision of the presiding Justice sustaining the demurrer and granting the plaintiff leave to amend, his ruling was final.
2. When the decision is made by the presiding Justice and no exceptions are taken the statute is silent as to the time when the amendment shall be filed, the language being: "If the declaration is adjudged defective and is amendable, the plaintiff may amend upon payment of costs from the time when the demurrer is filed." R. S., Chap. 87, Sec. 36.
3. This omission however is supplied by Rule of Court No. VIII, which has the force of a statute, and requires the amendment to be filed by the middle of vacation after the term when the order is made, and if the plaintiff neglects to do this judgment of nonsuit shall be entered unless the court for good cause shown shall allow further time.
4. The amendment in this case should have been filed by the middle of vacation after the January term and being filed at the April term came too late. As no further time was asked for or allowed by the court, the entry of nonsuit should have been made.

Exceptions to ruling of court allowing amendment to plaintiff's writ. Exceptions sustained.

Case stated in opinion.

O. H. Emery, for plaintiff.

J. H. Montgomery, for defendant.

SITTING: CORNISH, C. J., SPEAR, HANSON, DUNN, MORRILL, JJ.

CORNISH, C. J. On exceptions by defendant to the allowance of an amendment to the plaintiff's declaration. The writ in question was entered at the September term, 1917, of the Supreme Judicial Court for Knox County. At that term the defendant filed a general demurrer to the declaration. Hearing was had on this demurrer at the next or January term, 1918, the demurrer was sustained and the plaintiff was given leave to amend, the docket entry being, "Demurrer sustained, plaintiff allowed to amend." No exceptions were taken by the plaintiff to this ruling. At the April term following, the plaintiff filed an amendment which was allowed by the presiding Justice. To this ruling the defendant excepts on two grounds: First, because no exceptions were taken to the ruling of the Justice sustaining the demurrer at the January term and no amendment was then offered and filed; and second, because the amendment allowed at the April term was wholly new and inconsistent with the declaration, introducing not an amendment but a new cause of action.

It is necessary to consider only the first ground. This involves the construction of R. S., Chap. 87, Sec. 36. So much of that section as pertains to the point under consideration reads as follows:

"A general demurrer to the declaration may be filed, . . . but the Justice shall rule on it and his ruling shall be final unless the party aggrieved excepts; and before exceptions are filed and allowed he has the same power as the full Court to allow the plaintiff to amend or the defendant to plea anew. . . . If the declaration is adjudged defective and is amendable the plaintiff may amend upon payment of costs from the time when the demurrer was filed."

The defendant's contention is that under this statute only the Justice who hears and determines the demurrer can allow an amendment and it is not within the power of a Justice at a subsequent term so to do; that the amendment must be filed and allowed at the same term as the decision on the demurrer is rendered or not at all.

We do not think this is the true interpretation of the language of the statute, and the history of the legislation on this point is both interesting and illuminating.

The original act regulating proceedings on demurrer and permitting amendments in order to mitigate the severity of common law pleading was Chap. 211 of Public Laws of 1856. This act contemplated that

the decision on both points should be made by the Law Court and if the leave to amend was granted it should be only upon the payment of the defendant's costs from the time of filing the demurrer until the decision of the Law Court thereon, the action in the meantime being continued on the nisi prius docket to await the determination of the higher court.

This was enlarged the next year by conferring upon the presiding Justice the power to pass upon the demurrer, viz: "Whenever a demurrer shall be filed and joined the presiding Justice shall rule thereon and the ruling shall be final, unless the party aggrieved shall except to such ruling." Public Laws 1857, Chap. 55, Sec. 3. The provisions of these two statutes were incorporated in the revision of 1857 as Chap. 82, Sec. 19. But the power of granting leave to amend was still reserved to the Law Court. In 1859 however, this power was also conferred upon the presiding Justice before exceptions were filed and allowed, viz: "In all cases of general demurrer to the declaration after the presiding Judge shall rule on the demurrer and before exception filed and allowed, he shall have the same power to allow the plaintiff to amend or the defendant to plead anew that the full Court has by section nineteen of the chapter to which this is additional." Public Laws 1859, Chap. 73. This act was additional to Sec. 19 of Chap. 82 of the R. S. of 1857, before noted.

Since this enactment the presiding Justice, when no exceptions are taken, has the same power as formerly the Law Court alone had, both to pass on the demurrer and on the question whether the plaintiff should be permitted to amend. Subsequent revisions retain this power. R. S., 1871, Chap. 82, Sec. 19, R. S., 1883, Chap. 82, Sec. 23; R. S., 1903, Chap. 82, Sec. 35; R. S., 1916, Chap. 87, Sec. 36.

In the case at bar the presiding Justice at the January term, 1918, sustained the demurrer and gave the plaintiff leave to amend. No exceptions to these rulings were taken. Therefore under the statute his ruling was final.

The next question that arises is when the amendment itself should be filed, because there is a distinction between granting leave to amend and the allowing of the amendment itself. The former is an order permitting an act to be done, the latter is the doing of the act itself. The defendant claims it should have been filed at the January term; the plaintiff that it could be filed at any subsequent term upon payment of costs subsequent to the filing of the demurrer. Neither contention is strictly accurate.

The time for filing the amendment when the matter is decided by the Law Court is regulated by statute. Prior to the passage of Chap. 118 of Public Laws 1915, it was required to be on the second day of the next term after the certificate of decision from the Law Court. *Rollins* v. *Cen. Me. Power Co.*, 112 Maine, 175. Since the passage of that act the time for filing the same or for payment of costs may be enlarged by leave of court. If this statute is not complied with, judgment must be entered on the demurrer.

When the decision is made by the presiding Justice and no exceptions are taken, the statute is silent as to the time of filing the amendment, the language of section 36 being: "If the declaration is adjudged defective and is amendable, the plaintiff may amend upon payment of costs from the time when the demurrer is filed." But this omission is supplied by Rule of Court No. VIII, which has the force of statute and is as follows: "When an action shall be continued with leave to amend the declaration or pleadings, or for the purpose of making a special plea, replication, etc., if no time is expressly assigned for filing such amendment or pleadings, the same shall be filed in the Clerk's office by the middle of the vacation after the term when the order is made; and in such case, the adverse party shall file his plea to the amended declaration . . . by the first day of the term to which the action is continued. If either party neglect to comply with this rule, all his prior pleadings shall be struck out and judgment entered of nonsuit or default, as the case may require, unless the Court for good cause shown shall allow further time for filing such amendment or other pleadings." This fixes the time of filing and the rights of the parties, and renders the procedure in case of a decision by the Law Court or by a single Justice harmonious.

In the case at bar the amendment was not filed by the middle of vacation, after the January term. The plaintiff neglected to comply with the rule and by its terms judgment of nonsuit should have been entered after the expiration of the first day of the April term. No further time for filing was asked of the court. The mere filing of the amendment itself, after the prescribed time therefor had elapsed, cannot be regarded as a motion for extension of time, nor can the allowance of the amendment by the court be regarded as the granting of such a motion. These acts were without force. The rights of the parties had become fixed at the end of the first day of the April term,

Rollins v. *Cen. Maine Power Co.*, 112 Maine, 175, and the defendant has waived none of the advantage which he thereby gained. He protested against the allowance of the amendment and followed his protest with exceptions. The ground of his exception may not be the strictly legal one, but his acquired rights have been neither surrendered nor forfeited. He was entitled under the statute and the rule of court to a judgment of nonsuit, and the allowance of the amendment at the April term under the facts of this case was reversible error.

Exceptions sustained.

RHODNAH L. HASWELL

vs.

CHARLES L. WALKER,
Administrator of the Estate of Ernest N. Evans.

Waldo. Opinion November 9, 1918.

R. S., Chap. 87, Sec. 127 interpreted. Actions against executors and administrators.

The affidavit provided for in R. S., Chap. 87, Sec. 127, is not admissible in evidence in a case where the defendant is administrator or executor.

Nonsuit is properly ordered when on unquestioned facts the action cannot be sustained.

Action of assumpsit to recover on an account annexed certain sums of money claimed as due from defendant's decedent. Defendant filed plea of general issue. At close of the evidence a nonsuit was granted; to which ruling plaintiff filed exceptions and also filed exceptions to certain other rulings of presiding Justice. Exceptions overruled.

Case stated in opinion.

H. C. Buzzell, for plaintiff.

Arthur Ritchie, and Robert F. Dunton, for defendant.

SITTING: SPEAR, PHILBROOK, DUNN, MORRILL, JJ.

PHILBROOK, J. Two exceptions are presented for examination; first, the exclusion of an affidavit, made and offered by the plaintiff under the provisions of R. S., Chap. 87, Sec. 127; second, an order of nonsuit at the close of plaintiff's evidence.

The section of the Statute just referred to provides in part that "In all actions brought on an itemized account annexed to the writ, the affidavit of the plaintiff, made before a notary public using a seal, that the account on which the action is brought is a true statement of the indebtedness existing between the parties to the suit, with all proper credits given, and the prices or items charged therein are just and reasonable, shall be prima facie evidence of the truth of the statement made in such affidavit; and shall entitle the plaintiff to the judgment, unless rebutted by competent and sufficient evidence." The remaining words of the statute relate to the method of executing the affidavit in cases where the plaintiff is a corporation and are not involved in this case.

The defendant urges several reasons why this affidavit was properly excluded, but it will be necessary to consider only one of those reasons. It is familiar law, too well established to need the citation of authorities, that at common law a party to an action was not a competent witness at the trial thereof. But this common law rule of incompetency, arising from interest, has been abrogated by statute in England, Canada, and in every one of the United States. This abrogation was adopted in Maine more than three score years ago by Chap. 266, Public Laws 1856. But the statutory rule that parties are competent witnesses is subject to an exception which is almost as general as the rule itself, namely, that the common law rule of incompetency of parties appearing as witnesses still obtains in actions by or against executors and administrators. The abrogatory rule in our State, in the terms of its primal enactment, declared that the provisions of the act should not be applied to any case where, at the time of taking testimony, or the time of trial, the party prosecuting or the party defending, or any of them, shall be an executor or an administrator, or made a party as an heir of a deceased party. This rule, through all the intervening years, has retained its original language excepting in certain instances which do not affect the case at bar. Since the affidavit in question was made by the plaintiff, it is claimed

by the defendant that it should be excluded because the plaintiff is not a competent witness, the action being one in which the party defending is an administrator. On the other hand the plaintiff points out what he regards as most general language, in R. S., Chap. 87, Sec. 127, which declares that "In all actions brought on an itemized account annexed to a writ" the affidavit of the plaintiff may be used. In effect the plaintiff claims that R. S., Chap. 87, Sec. 127, enacted by the legislature as Chap. 137, Pulbic Laws, 1913, repealed a most wholesome, salutary statute, which has repeatedly proved its beneficence during more than half a century, without the scant courtesy of specifically referring to the statute thus repealed. We cannot adopt this view. In the interpretation of statutes the whole body of previous and contemporaneous legislation should be considered, for the legislative department is supposed to have a consistent design and policy, and to intend nothing inconsistent or incongruous. *Cummings* v. *Everett*, 82 Maine, 260. We do not hesitate, therefore, in declaring that when the legislature enacted the provisions for plaintiff's affidavit, in 1913, the plain intention of the law making body was to limit the use of such affidavit to cases in which the plaintiff would be a competent witness under statutory provisions so long existing. There was no error in excluding the affidavit in this case.

The order of nonsuit requires our examination of the record. The account annexed contains five items. The first charges for money paid Charlotte Stevens for and at the request of defendant's decedent, but does not disclose what the money was paid for. The other four charge for money paid the Lowell Fertilizer Company for fertilizer, in behalf of and at the request of the defendant's decedent. The only evidence offered by the plaintiff, except the excluded affidavit, is the testimony of an agent of the fertilizer company who took written orders for the fertilizer signed by the plaintiff, not by the defendant's decedent. That witness gave no evidence regarding the first item in the account but testified that he approached the plaintiff with a view of selling him some fertilizer. We quote practically his entire testimony.

"I asked Mr. Haswell if he wanted to buy some fertilizer.

Q. (MR. DUNTON). Was Mr. Evans there?

A. Mr. Evans was right there in the field; and he said, 'I haven't any use for any fertilizer; you will have to talk with'—I guess he called him Cap'en Flint—I don't remember the name—'about it,

because he is running things here.' So I went over and talked with the young man and he gave me an order for the fertilizer. I put it down on that original contract, taking a carbon copy and leaving it with him, and then went over, and knowing that the boy—or they told me in the conversation that the boy had no real estate, and our company will not take an account unless there is some backing. I asked Mr. Haswell about it and he said he would sign the contract for the boy and go good for the fertilizer. So we shipped the fertilizer to them, or they got it at Jackson & Hall's; I don't remember where they got it; I didn't deliver it myself, but he got the fertilizer and paid for it."

Giving this evidence its most liberal effect it falls short of proving that the defendant's decedent requested the plaintiff to pay the money, and that it was paid in accordance with such request. The nonsuit was properly ordered.

Exceptions overruled.

JAMES D. MAXWELL, Trustee in Bankruptcy,

vs.

DIRIGO MUTUAL FIRE INSURANCE COMPANY.

Penobscot. Opinion November 9, 1918.

Contract of insurance. Waiver of breach of conditions in policy. General rule as to what will constitute an equitable estoppel.

A three year policy of fire insurance was issued to G. on July 6, 1912. On April 5, 1915, G. filed his voluntary petition in bankruptcy and was adjudicated a bankrupt. On May 25, 1915, the plaintiff was duly appointed trustee of the bankrupt estate. On July 3, 1915, the insured property was destroyed by fire. The policy was not assigned to the plaintiff.

After a verdict for plaintiff, upon defendant's motion and exceptions,

Held:—

1. It is unnecessary to consider whether the transfer of property to a trustee by an adjudication in bankruptcy constitutes a "sale" within the purview of the policy, or whether a trustee in bankruptcy comes within the scope of the phrase "legal representatives" who together with G. were the parties insured.
2. The conduct of the defendant through its secretary during a period of six months after the fire occurred and close up to the time of bringing this suit in his dealings, interviews and correspondence with the plaintiff was such as to preclude the defendant from setting up the breach of conditions in defense even if the facts constituted such a breach.
3. When the conduct and declarations of the insurer are of such a character as to justify a belief that a waiver was intended, and acting upon this belief the insured is induced to incur trouble and expense and is subjected to delay, to his injury and prejudice, the insurer may be prohibited from claiming a forfeiture for such a breach upon the principles of equitable estoppel.
4. The required elements, trouble, expense and prejudicial delay are all present here.

Action by plaintiff as trustee in bankruptcy of Martin S. Guppy to recover the amount of a certain policy of fire insurance issued to said Guppy. Defendant filed plea of general issue and also brief statement. Verdict for plaintiff in the sum of $587.37. Defendant filed motion for new trial, also exceptions to rulings of presiding Justice. Judgment in accordance with opinion.

Case stated in opinion.
Ryder & Simpson, for plaintiff.
Newell & Woodside, for defendant.

SITTING: CORNISH, C. J., SPEAR, PHILBROOK, DUNN, MORRILL, JJ.

CORNISH, C. J. The defendant company on July 6, 1912, issued its three-year policy of insurance in the sum of $1150 to one Martin S. Guppy upon certain buildings and personal property owned by him in the town of Garland. On April 5, 1915, upon his voluntary petition, Guppy was adjudicated a bankrupt in the United States District Court. On May 25, 1915, the plaintiff was duly appointed trustee of the bankrupt estate and qualified as such. On July 3, 1915, the insured property was destroyed by fire.

The writ contains two counts, the first for the total amount of loss, with interest, aggregating $937.12, and the second for the amount alleged to have been agreed upon in compromise settlement, $527.50.

The defendant set up a breach of the conditions of the policy in that without the company's assent the property had been sold, the contention being that the voluntary proceedings in bankruptcy, followed by the adjudication and the appointment of the trustee, constituted a sale of the property, within the meaning of the condition which rendered the policy void if without the written or printed assent of the company "the said property shall be sold."

The policy in terms insured "Martin S. Guppy and his legal representatives," and the presiding Justice instructed the jury that without any assignment made by Mr. Guppy and duly assented to by the company, the trustee was the legal representative of the bankrupt, stood in his place and was entitled to bring and maintain this action under the terms of the policy. This instruction forms the basis of the defendant's exceptions. The jury returned a verdict for the plaintiff in the sum of $587.37, evidently the amount of the alleged compromise settlement plus interest.

In deciding this case it is unnecessary to determine whether the transfer of property to a trustee by an adjudication in bankruptcy proceedings constitutes a "sale" within the purview of the policy so as to render the policy void, nor whether a trustee in bankruptcy comes within the scope of the phrase "legal representatives," who together with Martin S. Guppy in this case, were the parties insured.

We rest our decision upon another principle of firmly established law enunciated in *Hanscom* v. *No. British, etc., Ins. Co.*, 90 Maine, 333, and kindred cases, and hold that the conduct of this company through its secretary, Mr. Millett, during a period of six months after the fire and close up to the time of bringing this suit, was such as to preclude the defendant from setting up the breach of conditions in defense, even if the facts here constitute such a breach, a point that we do not decide.

It cannot be doubted that it was within the power of the secretary who was acting in behalf of and as agent of the company in investigating and adjusting the loss, to waive the breach of condition as to sale if he desired so to do. A waiver implies knowledge of the material facts and of one's rights, and a willingness to refrain from enforcing those rights. "It is a voluntary surrender of known rights." Further than that, however, "it may happen that a waiver of a breach of condition in the policy was not actually intended; but if the conduct and declarations of the insurer are of such a character as to justify a belief that a waiver was intended, and acting upon this belief the insured is induced to incur trouble and expense and is subjected to delay to his injury and prejudice, the insurer may be prohibited from claiming a forfeiture for such a breach, upon the principles of equitable estoppel." *Hanscom* v. *Ins. Co.*, 90 Maine, 333-9. The elements mentioned, trouble, expense, prejudicial delay, and recognition of the continued existence of the policy, are all present here.

The fire occurred on July 3, 1915. Mr. Dearth, the mortgagee of the property, filed a proof of loss directly after the fire, and in that proof the fact that the plaintiff was trustee in bankruptcy was stated, and several letters passed between the mortgagee and the secretary. No objection was made by the company to the proof, although it then knew from its own records and files that the policy still stood in the name of Martin S. Guppy without assignment. A little later, the secretary with one of the directors investigated the fire. Then the secretary met the trustee on the street in Bangor and told him that he had been out in Garland to investigate the fire, and that he desired a conference at some time in order to adjust the loss. The latter part of September or the first of October a conference was held. The agent went to the office of the Referee in bankruptcy in Bangor, where the bankruptcy proceedings were pending, and the trustee was sum-

moned to meet him. At that conference the agent made an offer of settlement which, after some discussion and also after consultation with the mortgagee, was rejected as being too low. The agent then told the trustee he should require a proof of loss from him and promised to send the trustee a blank.

Under date of October 4, 1915, the agent wrote the trustee that on arriving home he found he had on hand no blank proofs but would secure some as soon as possible and send him one, adding that he expected to be in Bangor during the week and would call "hoping we can agree on loss." On October 11, 1915, one week later, the agent wrote the trustee, enclosing a blank proof, stating that he was just starting for Alberta to be gone the rest of the month, and adding "we will adjust this matter on my return." On October 13, 1915, the proof of loss was prepared by the plaintiff, setting forth the facts relating to the bankruptcy proceedings in detail, and was signed "James D. Maxwell, trustee in bankruptcy of the estate of Martin S. Guppy, bankrupt, the assured." This was sent to the secretary on the same day, with a letter in which the trustee said "I trust that we shall be able to adjust this matter as soon as possible, as the estate is held up by reason of the insurance not being adjusted." On October 14, the receipt of the proof of loss was acknowledged by the assistant secretary of the company in the absence of the secretary. On November 9, Mr. Millett wrote to the trustee stating that the proof had not been acted upon by the company and he wished to see the trustee before presenting it to the company. On November 15, Mr. Millett went to Bangor and held another conference with the trustee in regard to a settlement. The plaintiff claims that after considerable discussion and calculation Mr. Millett made an offer of $527.50 in full settlement and adjustment of the loss on both buildings and personal property, but he was unwilling to accept that amount without the sanction of the mortgagee. They could not reach the mortgagee by telephone and the trustee suggested writing him. Finally the secretary said, "Well, we ought to close this thing up, its a small matter; so I guess perhaps you do that. You write to him and find out what he will do, if he is satisfied with it, and then you let me know right off, and if it is satisfactory, I will send you a check," and the trustee replied, "That is all right, that is fair enough." We are convinced of the truth of the trustee's statement. He wrote Mr. Dearth

under date of November 19th, obtained his acquiescence to the proposed adjustment and on November 22, wrote to Mr. Millett accepting his offer.

On November 26, Mr. Millett replied, saying, "The law requires us to wait forty-five days from the time proofs are filed with the company. We will submit your letter to the Committee on losses and let you know in a few days." But the promised advices did not follow and after waiting until January 3, 1916, the trustee wrote again, saying "Will you kindly send me check for the amount of this claim as per my letter of November 22 last. This matter is holding up the estate, and I should appreciate an early settlement." On January 5, the secretary replied, regretting the delay which he termed unavoidable, and for the first time raised any question as to the legality of the plaintiff's claim: "We have been told that the policy should have been transferred to the trustee in order to make it legal and I have asked our lawyers to look this matter up carefully. I expect to be in Bangor Monday night and will give you our decision at that time. . . . . Will you kindly look this matter up relative to the assignment of the policy and see what you find."

On January 7, the plaintiff wrote the secretary a rather sharp letter demanding check and protesting against the conduct of the secretary and the unnecessary and prejudicial delay. This was answered by the attorney of the company denying for the first time liability on the part of the company.

If this course of dealing on the part of the company, carried on over a period of six months, involving many interviews, much correspondence, the preparation of proof of loss, the adjusting of the amount, and the delay both in bringing suit and in settling the bankrupt estate, does not constitute a waiver or an equitable estoppel, we can conceive of no state of facts which could be so considered. Their mere rehearsal without comment brings them within the legal rule. This doctrine which is universally accepted is a healthy one. It rests upon sound public policy and the ethics of fair dealing between man and man as well as upon firmly fixed principles of equity. *Peabody* v. *Acc. Ass'n*, 89 Maine, 96; *Hanscom* v. *Ins. Co.*, 90 Maine, 333, supra, and cases cited, 14 R. C. L., 1197, and cases cited.

In this view of the case it is immaterial whether as an abstract proposition of law the instruction excepted to should or should not have been given. Under all the evidence in the case the plaintiff's

right of action is unquestionably established, and the verdict rendered was fully warranted. The plaintiff was legally entitled to what he has won. That is the main object of legal inquiry, before which mere academic technicalities fade away.

Motion and exceptions overruled.

HARRY SCOTT'S CASE.

Penobscot. Opinion November 12, 1918.

General rule of construction to be applied to interpretation of Acts relating to Industrial Accident Commision. Meaning of word "family." Rights of wife, even if living apart from husband. Rule where there are illegitimate children. General meaning of word "dependents."

(1) That two persons or groups of persons under a strict application of the language of Sec. VIII, Chap. 50, R. S., must each be conclusively presumed to be wholly dependent upon a deceased employee will not defeat the plain purpose of the Act, known as the Workmen's Compensation Act, which must receive a liberal construction with a view to carrying out its general purpose.

(2) Under Sec. 8 (a) of Chap. 50, R. S., evidence of whether a wife was being supported by her deceased husband, from whom at the time of his injury she was living apart by reason of his continued desertion without her fault, is immaterial. In such case the presumption that she is wholly dependent upon him is conclusive and cannot be controverted by evidence; but if after his desertion, she has furnished just cause for his refusing to return, she can no longer be conclusively presumed to be wholly dependent upon him in case of his death. In such case her dependency must be proven.

(3) A woman with whom a deceased employee is living in unlawful union is not a dependent within the meaning of this Act.

(4) Illegitimate children of a deceased employee with whom they were living and by whom they were being supported at the time of his death are not included among those conclusively presumed to be wholly dependent under Sec. VIII (c) of this Act.

(5) A collective body of persons who live in one household under a head or manager who has a legal or moral duty to support them constitutes a family within the meaning of the Act, but they must be violating no law in thus living together.

6) A father is violating no law in caring for and supporting his illegitimate children, and when he recognizes them as his and supports them in a household of which he is the head, they are members of his family within the meaning of this Act, even though his lawful wife is living apart from him and the mother of such illegitimate children is a member of the same household and living with him in unlawful union. His unlawful union with the mother does not affect his obligations towards the children of such union, nor their rights under this Act.

Appeal from decree of single Justice affirming the findings of the Chairman of the Maine Industrial Accident Commission. Judgment in accordance with opinion.

Case stated in opinion.

Harold H. Murchie, and Burleigh Martin, for Mabel Scott.

Emery & Waterhouse, for Eastern Manufacturing Company and American Mutual Liability Company.

Frederick B. Dodd, and Lawrence V. Jones, for defendants.

SITTING: CORNISH, C. J., SPEAR, HANSON, PHILBROOK, DUNN, MORRILL, WILSON, DEASY, JJ.

WILSON, J. This is an appeal from the decree of a single Justice in accordance with the findings of the Chairman of the Industrial Accident Commission under Sec. 34 of Chap. 50, R. S., known as the Workmen's Compensation Act.

On the twenty-fourth day of September, 1917, one Harry Scott received an injury while in the employ of the Eastern Manufacturing Company from which death resulted on the following day. Following his death two claimants filed petitions with the Industrial Accident Commission claiming to be dependents under the Act, viz: Mabel St. Clair Scott, claiming to be the lawful wife of the deceased whom he had deserted, and one by Rachel S. Scott also claiming to be the wife of the deceased and dependent upon him for her support, but whose claim has been abandoned by counsel. The petition of Rachel S. Scott, however, was later amended to include the minor children of said Rachel S. Scott, viz: Irene F., Stanley W., Harry J., and Donald F., aged ten, seven and four years and one year and nine months respectively.

After a hearing the Chairman of the Industrial Commission found from the evidence submitted that Harry Scott received the injury which caused his death in the course of his employment and that at

the time of his injury his "average weekly wage" computed according to subdivision IX of Sec. 1 of the Act was fifteen dollars a week, and that his dependents were therefore entitled to seven dollars and fifty cents per week for a period of three hundred weeks. So far there seems to be no dispute between the several parties to these proceedings.

The questions raised under this appeal are upon the Chairman's rulings as to who the dependents of Harry Scott were at the time of the injury and so entitled to the benefits. Subdivision VIII of section 1 of the Workmen's Compensation Act, Chap. 50, R. S., defines dependents as follows: "Dependents shall mean members of the employee's family or next of kin who are wholly or partly dependent upon the earnings of the employee for support at the time of the injury." It then provides that "the following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employee:

(a) A wife upon a husband with whom she lives, or from whom she was living apart for a justifiable cause or because he had deserted her, or upon whom she is dependent at the time of the accident.

(c) A child or children, including adopted and step-children under the age of eighteen years (or over said age but physically or mentally incapacitated from earning) upon the parent with whom he is or they are living, or upon whom he is or they are dependent at the time of the death of the parent, there being no surviving parent."

Bearing upon the question of dependency the Chairman of the Commission from an agreed statement signed by counsel for all claimants found the following facts which appear to be undisputed by either the employer or the insurer: Henry Scott was lawfully married to the claimant Mary St. Clair Scott February 17, 1901, but deserted her after three years of married life. Since the desertion he has never contributed anything toward her support. One child, Herbert Scott, aged sixteen years, was born of this lawful union Five years after the desertion there was born to Mabel St. C. Scott an illegitimate child, Ruth, aged nine years at the time of the hearing.

After the desertion of his wife, Mabel St. C. Scott, Harry Scott, at least ten years before his death, formed an illicit union with one Rachel Somers, who is named in the petition as Rachel S. Scott. The four children named in the petition of Rachel S. Scott the Chairman finds from the agreed statement of counsel to be the illegitimate

children of Harry Scott and Rachel Somers, and were members of his family, and it appears to be assumed in the agreed statement of counsel and in all the discussion and findings of the Chairman that they were all known under the family name of Scott.

Upon these admitted facts the Chairman of the Commission ruled that the four children of Harry Scott and Rachel Somers Scott were members of his family and his next of kin and were wholly dependent upon him for their support at the time of the injury; that Mabel St. C. Scott was not a member of his family, nor dependent upon him for support; that Rachel S. Scott by reason of the illicit union could not be a dependent under the Act; and therefore the four minor illegitimate children of Henry Scott and Rachel S. Scott being the only dependents, were entitled to all the benefits under the Act. From the decree of the Justice rendered in accordance with this decision as required under Sec. 34 of Chap. 50, R. S., the claimant Mabel St. C. Scott, the employer and the insurer all appeal. The contentions of the several parties, and we state the facts and contentions of parties at length owing to the questions of first impression raised by this case under the Act, are as follows:

1. Mabel St. C. Scott claims that the Chairman of the Commission erred in ruling that she was not a dependent of Harry Scott at the time of the injury inasmuch as she was his lawful wife and had been deserted by him, and by the express terms of the statute is conclusivly presumed to be wholly dependent upon the deceased husband for her support; that the illegitimate children of Harry Scott were not members of his family or his next of kin, because their father and mother were living together contrary to law, and are not within the purview of subdivision VIII (c) of Sec. 1, Chap. 50, R. S., which she contends refers only to legitimate, adopted and step-children.

2. Counsel for the illegitimate minor children of Harry Scott and Rachel S. Scott contend that while they may not be conclusively presumed to be dependent under paragraph (c) of subdivision VIII of Sec. 1 of the Act yet they were members of the family of Harry Scott within the meaning of the Act, and were as a matter of fact wholly dependent upon him at the time of his death; and that the wife by her act of adultery had terminated the running of her husband's desertion and had thereby taken herself out of the class conclusively presumed to be dependent and was not at the time of his death a member of his family or, at least, was not dependent upon him in fact.

3. Counsel for the employer and insurer join with counsel for each claimant and agree each is correct in his contention, viz: that Mabel St. C. Scott as the lawful deserted wife was wholly dependent upon the deceased and that the four children of Harry Scott and Rachel S. Scott were also wholly dependent upon him; but that such a condition was not contemplated by the statute and therefore the case must be disposed of under section 13 of the Act as though there were no dependents.

We must reject the contention of counsel for the employer and insurer as wholly contrary to the spirit and "general purpose" of the law, *Coakley's Case*, 216 Mass., 71.

We sustain the ruling of the Chairman of the Commission that Mabel St. C. Scott was not a dependent of Harry Scott at the time of the injury, though not for the reasons assigned by the Chairman in his decree. The Chairman appears to find that inasmuch as Mabel St. C. Scott was no longer living with the deceased and was not in fact dependent upon him for support, the conclusive presumption of the statute arising from her marriage to the deceased and his desertion of her is overcome. If there were no other facts in the case than her marriage and his desertion, we think the presumption of her dependency could not be overcome by evidence, but is conclusive. Greenleaf Ev., 16 ed., Vol. 1, Sec. 15; *Nelson's Case*, 217 Mass., 467, 470. The fact of whether she was or not actually a member of his family or dependent upon him for support would then be immaterial.

Another fact, however, appears in this case, which we think takes Mabel St. C. Scott out of the class conclusively presumed to be dependent and places her in the class that requires proof, and that is her act of adultery after being deserted by her husband. Her counsel do not deny that by that act she would be precluded from obtaining a divorce on the ground of desertion. We think the word desertion as used in this connection has its usual meaning when used in connection with marital relations. Desertion as a ground for divorce must continue up to the time of filing the libel, and involves not only the wilful abandonment without just cause, or the consent of the other party, but also the continued refusal to return without justification. If the deserted party at any time furnishes just cause for the one deserting refusing to return, or by his or her acts consents to the separation, desertion as a wilful and unjustifiable abandonment of one party by the other and as a ground of divorce ceases. *Ford* v.

Ford, 143 Mass., 577; *Whippen* v. *Whippen,* 147 Mass., 294. Without a conclusive presumption in her favor Mabel St. C. Scott, though she was one of the deceased's next of kin, or even if within the meaning of the Act was still a member of his family, has no standing in this case, as it is admitted that she was not dependent upon him in fact. *Nelson's Case,* 217 Mass., 467; *Newman's Case,* 222 Mass., 563; *Fierro's Case,* 223 Mass., 378; *Veber's Case,* 224 Mass., 86.

It is not necessary to decide whether the illegitimate children of Harry Scott were his next of kin since, in this case, the only ground upon which it could be claimed that they were his next of kin would be because they had become his heirs under Sec. 3, Chap. 80, R. S., by being adopted into his family. *Morton* v. *Morton,* 62 Neb., 420. If they were members of his family at the time of his death, for that reason alone, being wholly dependent upon him in fact, they would be entitled to the benefits of the Act.

We do not think that illegitimate children come within the class defined in paragraph (c) of subdivision VIII of Sec. 1 of Chap. 50, R. S., and so are conclusively presumed to be dependents of a deceased parent. Notwithstanding the rule of liberal construction expressly enjoined upon those interpreting the Act, the application of the familiar rule of construction, "*Expressio unius est exclusio alterius,*" seems to us upon reason and authority to be proper in this instance. *Lyon* v. *Lyon,* 88 Maine, 395; *Hall* v. *Cressey,* 92 Maine, 514, 516; *Bell* v. *Terry & Tench Co.,* 163 N. Y. S., 733.

The determining factor in this case is were these illegitimate children members of the family of Harry Scott at the time of his death. We must accept the finding of the Chairman of the Commission upon this question as to the fact of their living in that relationship, the only question open for this court is whether they may lawfully be considered members of his family within the meaning of the statute. The word family is one of elastic and somewhat varied meaning. Its meaning in any particular statute is a question of intent and must be determined largely by the purpose of the act and the connection in which it is used. While as used in wills and expressing relationship it has a broader meaning, *Jacobs* v. *Prescott,* 102 Maine, 63, a common definition of the word in acts granting benefits to members of a "family" is "a collective body of persons who live in one house under a head or manager who has a legal or moral duty to support the members thereof." *Fox* v. *Waterloo Nat. Bank,* 126 Iowa, 481;

Sheeby v. *Scott*, 128 Iowa, 551, 553; *Holnback* v. *Wilson*, 159 Ill., 148; *Wike Bros.* v. *Garner*, 179 Ill., 257, 259; *Cowden's Case*, 225 Mass., 66, 67; *Robbins* v. *Railway Co.*, 100 Maine, 496, 506. There appears to be no question from the statement of facts but that Harry Scott, Rachel S. Scott and their children were living together in one household of which Harry Scott was the head and manager supporting them. But it is urged, and we think the point is well taken, that they must not be violating any law by so doing. *Gordon* v. *Stewart*, 96 N. W., 624. The violation of law in this case, however, only applies to Harry Scott and Rachel S. Scott as was recognized in the case last cited; and it was held in *Bell* v. *Keach*, 80 Ky., 42, 45; *Rutherford* v. *Mothershed*, 42 Tex., Civ. Appls., 360; *Lane* v. *Phillips*, 69 Tex., 240; *Roberts* v. *Whaley*, 192 Mich., 133, that there being a natural and moral duty on the part of the father to support his illegitimate children, even though at the time he was living in adultery with the mother, and had a wife living apart, the father and the illegitimate children constitute a household or family entitled to receive the benefits of a Homestead Act, and the illegitimate children were held to be dependents in case of the father's death under the Workmen's Compensation Act of Michigan in the cases above cited.

The common law was very harsh in its attitude toward the offspring of unlawful unions. Nearly, if not all, the states, however, have relaxed the rigor of the common law rule, especially with reference to the rights of the illegitimate child in the property of his or her parents at their death, and following the more liberal spirit of the civil and canon law have enacted statutes permitting illegitimate children when the parents inter-marry, or when they are publicly acknowledged by the father, to inherit equally from the father and mother and their collateral kindred. Sec. 3, Chap. 80, R. S. The natural and moral duty of the father to support and maintain them is generally recognized, Kent Com., Vol. II, pages 212-214; Schouler's Dom. Rel., Sec. 279; Chap. 102, R. S. Harry Scott was violating no law in fulfilling these natural and moral obligations of caring for and supporting his illegitimate children. The law condemns his acts so far as his relations with Rachel Somers were concerned, but having brought these children into the world, it was his duty to care for them. They are not to blame for their conditions nor their manner of coming into existence, and having been recognized by him as his children, the law regards it as his duty to support

them, and having assumed that obligation and maintained them in his household, we think they became members of his family and dependents within the meaning of the Workmen's Compensation Act of this State.

The Michigan case above cited was decided upon this ground. The father in that case had a wife in an asylum for the insane, by whom he had one daughter who was living apart from him, and to whom he contributed nothing toward her support. He formed an illicit union with his housekeeper, by whom he had two children. The court held, there being no provision in the Michigan statute of conclusive dependency on the part of the wife as in the Maine statute, that the wife was not a dependent, she being supported by the State; that the daughter of the lawful wedlock was not a dependent, inasmuch as he was contributing nothing toward her support. The mistress had, of course, no standing in law and apparently made no claim, but it was held that inasmuch as he had cared for and supported the illegitimate children in his household, and it was his legal and moral duty to support them, that they had a right to expect a continuance of that support had he lived, and that they were therefore members of his family and dependents within the meaning of the Michigan statute.

The case of *Bell* v. *Terry & Tench Co.*, 163 N. Y. S., 733, cited by counsel for Mabel St. C. Scott is not in point contra. The New York statute does not provide for the payment of the death benefits to the dependents and then define dependents as many statutes of this nature do, but stipulates that it shall be paid to the wife with additional compensation to children, if any, under eighteen years of age. The court there held that the word children, which the statute expressly provided included posthumous children and children legally adopted, by the familiar rule of construction above referred to, excluded all illegitimate children. We have already applied the same doctrine to the Maine statute, so far as it is applicable to this case.

It is true that the rights of these children of Harry Scott and Rachel S. Scott are purely statutory and unless they can be fairly said to come under its provisions, they cannot take. It is a well recognized rule of construction of Acts of this kind, however, and expressly enjoined upon those whose duty it is to administer this statute, that it shall be construed liberally with a view to carrying out its general purpose, and not strictly as other statutes in derogation of common

law rights usually are. Sec. 37, Chap. 50, R. S.; *Simonds Case*, 117 Maine, 175, 177. We so construe it. The general purpose of this Act undoubtedly is to transfer the burdens resulting from industrial accidents, regardless of who may be at fault, from the individual to the industry and finally distribute it upon society as a whole, by compelling the industry, in which the accident occurs, through the employer, to contribute to the support of those who were actually and lawfully dependent upon the deceased for their sustenance during his lifetime. To transfer it in this case from the deceased upon whom these children were actually dependent in his lifetime and who had lawfully assumed the burden, to this mother, even though she had violated the social canons and the law of the land in producing these offspring, or upon the town in which they may have a pauper residence, is not in accord with the general purpose of this Act.

Appeals dismissed with one bill of costs to appellee.
Decree of sitting Justice affirmed.

WALTER S. LADD

vs.

EVA E. BEAN, Exec. of Will of Martha J. Merrill.

York. Opinion November 12, 1918.

Witnesses. Verdict. Burden of proof. General rule where one renders beneficial services to another and the same are accepted and availed of by the person so receiving them.

The plaintiff relying upon an implied contract, brought a civil suit against Martha J. Merrill, who died before the case came on for trial, and whose executrix defended it, to recover a balance claimed to be due as wages for labor performed by him from an indefinite time in the year of 1911 to December, 1915, on a farm in Saco. He recovered a verdict for $582.42, a less amount than he sued for.

It is elementary to say, that where one renders beneficial services to another, and the latter knowingly and with approbation accepts and avails himself of these services, the law ordinarily supposes a request and a promise to pay what they are reasonably worth, but the hypothesis is by no means conclusive. If a plaintiff produce evidence ample to prove a case unless answered, and the defendant replies, it then remains to be seen, following the ebb and flow of the testimony, whether that response be sufficient.

For the reason that his suit was tried against the legal representative of a deceased person, the plaintiff himself was precluded to testify. He called several witnesses who testified that, during the years he claimed to recover for services, he lived on the farm, and as they passed by or went directly to it, they saw him working there. A witness called by the defendant declared that he was present when the plaintiff and Mrs. Merrill entered into a contract by the terms of which the former was to go to live on the farm, and keep it in order, for what it would yield; excepting that, as was otherwise shown, of the hay crop he should have only sufficient for fodder for his horse.

Witnesses are to be judged not so much by numbers as by the weight of the evidence given by them. And the weight of the evidence depends upon its effect in inducing belief. Simple, natural and reasonable narration by a single witness from personal knowledge, of the essentially complete details of a transaction should, and does, stamp conviction on an impartial mind conscientiously seeking truth, to a greater degree than the aggregate testimony of several witnesses, each apparently as reliable and as honest as the single one, but aware only partially of the facts of the case, and whose attestations are equally consistent with the contention of either of the opposite litigants.

In this case it appears that the verdict was not founded on a careful scrutiny and examination of the evidence. It is so palpably wrong as to necessitate the court to set it aside and grant a new trial.

Action of assumpsit upon account annexed. Defendant filed plea of general issue. Verdict for plaintiff. Defendant filed motion for new trial. Motion sustained. New trial granted.

Case stated in opinion.

John P. Deering, for plaintiff.

Eva E. Bean, and Clarence Webber, for defendant.

SITTING: CORNISH, C. J., SPEAR, HANSON, PHILBROOK, DUNN, MORRILL, JJ.

DUNN, J. While she was yet living, Walter S. Ladd brought a civil suit against Martha J. Merrill, relying upon an implied or quasi contract, to recover a balance claimed to be due as wages for labor performed by him, from an indefinite time in the year of 1911 to December, 1915, on a farm in Saco; the title to which Mrs. Merrill then recently had acquired by inheritance from her father, but which she did not personally occupy. The case came on for trial, at a York term, in January 1918, after Mrs. Merrill's death, and was defended, under a general denial of liability, by the executrix of her will.

In his writ the plaintiff says, that from 1911 to 1912 he worked for the decedent 120 days; from 1912 to 1915, 450 days; and in the year last mentioned 70 days, at $1.75 a day in each instance. Without being more specific he extends debits which foot up to $1220.00. He credits, house rent 43 months at $5.00 a month $215.00, and hay for his horse 3 years $219.00. the sum total of the two being $434.00; leaving a balance of $786.00. But there is error in his computation of the amount of the second debit item. It should be $100.00 less than as stated. Correction of this, and amendment likewise through the bill, would leave the balance $686.00. Verdict was for $582.42, equivalent to an allowance of approximately $1.59 a day.

For the establishment of his case, the plaintiff, himself precluded to testify (R. S., Chap. 87, Sec. 117), called four witnesses, from a reading of the transcript of the testimony of whom it appears, that the Merrill farm consisted of 25 to 30 acres of sterile land, with a one and one-half story house and a barn, where Mr. Ladd came to live in 1911 and thence continued to dwell to and including all or a portion

of 1915. During his occupancy, as these witnesses either traveled by the place or went there to traffic or for neighborly converse, they saw him at work on or about it. The farm was mainly set apart to the growing of grass for hay, but the annual yield was meagre, not far from one-half ton to the acre,—ten to twelve tons in all. The plaintiff helped to make the hay, and of it had fodder sufficient for his horse. One year he raised, and the fair inference of the case is that he fed out, 12 to 15 bushels of oats. His tillage comprised an acre, possibly an acre and one-half. On this he every year raised for his own use, and therefrom may have sold too, potatoes, turnips, beans, corn, squash, cabbage, and other plants and vegetables. At odd times he cut down bushes growing along the wall by the roadside; he made slight repairs to the buildings, namely, by causing a plank to be put in the barn door that it might open and shut the better, and by renewing an outside door for the cellar. Not infrequently he worked away from home. The extent of his labor at the farm is variously estimated from one-third to one-half of the time in each year, and the usual daily wage of man in like employment stated to have been $1.50 to $1.75, with increase to $2.25 through the haying season.

It is elementary to say, that where one renders beneficial services to another, and the latter knowingly and with approbation accepts and avails himself of these services, the law ordinarily supposes a request and a promise to pay what they are reasonably worth, but the hypothesis is by no means conclusive. If a plaintiff produce evidence ample to prove a case unless answered, and the defendant replies, it then remains to be seen, following the ebb and flow of the testimony, whether that response be sufficient.

In this case a witness testified, that, in his presence and hearing, Mrs. Merrill and Mr. Ladd, at the home of the former, entered into an agreement by the terms of which, for the consideration of its use and its revenue, exclusive the hay crop, (and of that enough, as is otherwise shown, for the feed of his horse), Ladd was to live on and take care of her farm, during the term, as the court concludes, of their mutual pleasure from year to year. Said the witness: "They (Mrs. Merrill and Mr. Ladd) were talking about going on the farm." "He was to raise whatever he could there, and he was to have it, and he was to help Mr. Merrill to gather the hay, keep the bushes cut down, and look after things up there for the rent, as they wanted somebody there to cover the insurance."

Witnesses are to be judged not so much by numbers as by the weight of the evidence given by them. And the weight of the evidence depends upon its effect in inducing belief. Simple, natural, and reasonable narration by a single witness, from his personal knowledge, of the essentially complete details of a transaction should, and does, stamp conviction on an impartial mind conscientiously seeking truth, to a greater degree than the aggregate testimony of several witnesses, each apparently as reliable and as honest as the single one, but aware only partially of the facts of the case, and whose attestations are equally consistent with the contention of either of the opposite litigants.

The defendant's witness is disinterested, uncontradicted, and of credibility unchallenged. The tale that he told is likely. There is evidence that the plaintiff vacated the farm and buildings in dilatory compliance with Mrs. Merrill's request that he remove. That asking may have caused him to be displeased with a compact fairly made. But to rue his contract so created, whatever the reason, would not justify its renouncement and the recovery of damages regardless thereof, for the law will not esteem as of proper advantage to man the undue breaking of the word that he plighted in accordance with her terms. In fine, with performance of the agreement which he and the defendant's testate made, the plaintiff ought to be content and satisfied. At all events he should cease to complain.

The verdict was not founded on a careful scrutiny and examination of the evidence. It is so palpably wrong as to necessitate the court to set it aside and grant a new trial.

Motion sustained.
New trial granted.

JOSIAH H. HOBBS *vs.* WILLIAM P. HURLEY.

Knox. Opinion, November 15, 1918.

General rule as to contribution between joint tort-feasors. Rule where the parties are not intentional or wilful wrongdoers. Rule as to right of recovery against master and servant in actions for negligence. Right of master to recover of servant for damages paid by master on account of servant's negligence. Rule as to judgment of court being open to collateral attack.

In an action on the case to recover the sum of $274.05 as contribution toward the payment of a joint judgment in an action of tort rendered against both the plaintiff and defendant, the entire sum having been paid by the plaintiff,

Held:

1. It is undoubtedly a general rule of law that as between joint tort-feasors in pari delicto, there is no right of contribution, because the law will not lend its aid to one who founds his cause of action upon an immoral or illegal act. It leaves him where it finds him.
2. It is equally well established that when the parties are not intentional and wilful wrongdoers but are made wrongdoers by legal intendment then contribution may be enforced. It is only when a person knows or must be presumed to know that his act was unlawful that the law will refuse to aid him in seeking contribution.
3. The rule denying contribution to joint tort-feasors has no application to torts which are the result of mere negligence in carrying on some lawful transaction.
4. The joint judgment in this case was based upon the negligence of a servant of both the plaintiff and defendant in colliding with a team while engaged in transporting certain parties by automobile from one point to another in Knox County, a lawful enterprise.
5. The rights of the parties as to the amount of contribution were fixed by the judgment in the former suit which stands unreversed. One-half of the amount is due from the defendant.

Action to recover certain sum of money as contribution on account of a judgment rendered against plaintiff and defendant, which judgment was paid by plaintiff. Cause was reported to Law Court upon certain agreed statements and stipulations. Judgment in accordance with opinion.

Case stated in opinion.

Charles T. Smalley, for plaintiff.

A. S. Littlefield, for defendant.

SITTING: CORNISH, C. J., SPEAR, HANSON, PHILBROOK, DUNN, MORRILL, JJ.

CORNISH, C. J. This is an action on the case to recover from the defendant the sum of $274.05 as contribution towards the payment of a joint judgment rendered against both the plaintiff and defendant, the entire sum having been paid by the plaintiff.

The material facts leading up to this action are briefly as follows. On September 7, 1912, one Jethro D. Pease was thrown from his wagon and injured by reason of an automobile, driven by one Herrick as chauffeur, suddenly backing against and frightening the horse of Pease and causing him to cramp the wheels. The automobile was owned by Mr. Montgomery and an action of negligence was first brought against him by Pease, but it was held that the suit could not be maintained because, while Mr. Montgomery was the owner of the machine, he was not in the possession, control and management of it, nor was the chauffeur acting as his servant at the time of the injury. *Pease* v. *Montgomery,* 111 Maine, 582.

Then suit was brought by Pease against Messrs. Gardner, Hobbs, Hurley and Herrick, and judgment was rendered in favor of the then plaintiff against Messrs. Hobbs and Hurley, the parties in the case at bar in the sum of $500, and judgment in favor of Gardner and Herrick. *Pease* v. *Gardner,* 113 Maine, 264. The liability of Messrs. Hobbs and Hurley was placed upon the ground that they had secured this automobile from its owner, Mr. Montgomery, to take Mr. Gardner and perhaps others who were on a political speaking campaign, from Rockland to other towns in Knox County, that for that trip they had the legal possession, control and management of the car and were responsible therefor, that the engagement and operation of the car was a joint enterprise on their part as chairmen of certain political committees, and Herrick the chauffeur was for the time being their servant.

The defendant raises two contentions; first, that the parties to this action against whom the judgment was rendered were joint tort-feasors, and that one joint tort-feasor cannot enforce contribution

from another; second, if the plaintiff is legally entitled to recover, it is only for one-fourth of the amount of the joint judgment, as four persons were involved in the original transaction which was the basis of the judgment.

1. RIGHT OF CONTRIBUTION.

It is undoubtedly a general rule of law that as between joint tort-feasors, in pari delicto, there is no right of contribution.

The reason of the rule is that the law will not lend its aid to him who founds his cause of action upon an immoral or illegal act. It leaves him where it finds him. The leading case is *Merryweather* v. *Nixan*, 8 T. R., 186, and this has been uniformly and consistently followed. The term tort-feasor, as used here, applies to persons who by concert of action intentionally commit the wrong complained of.

But an exception to this rule is equally well settled, and that is that when the parties are not intentional and wilful wrongdoers, but are made wrongdoers by legal inference or intendment, are involuntary and unintentional tort-feasors, so to speak, then the preceding rule does not apply and contribution may be enforced. The rule ceases because the reason for it has ceased. Contribution is not contractual It is an equitable right founded on acknowledged principles of natural justice and enforceable in a court of law.

The exception was suggested by Lord Kenyon in *Merryweather* v. *Nixan*, supra, which announced the rule, and has been fully developed and recognized by later decisions, both in England and this country. *Betts* v. *Gibbons*, 2 Ad. and Ell., 57; *Pearson* v. *Skelton*, 1 Mees. and Wels., 504; *Wooley* v. *Batte*, 2 Car. & P., 417; *Bailey* v. *Bussey*, 28 Conn., 453; *Same* v. *Same*, 37 Conn., 349; *Acheson* v. *Miller*, 2 Ohio St., 203; *Jacobs* v. *Pollard*, 10 Cush., 287; *Nickerson* v. *Wheeler*, 118 Mass., 295, 6 R. C. L., 1055, and cases cited.

The distinction between the two classes of cases and therefore between the rule and the exception was clearly set forth by the Massachusetts Court in these words:

"It is undoubtedly the policy of the law to discountenance all actions in which a party seeks to enforce a demand originating in a wilful breach or violation, on his part, of the legal rights of others. Courts of law will not lend their aid to those who found their claims upon an illegal transaction. No one can be permitted to relieve himself from the consequences of having intentionally committed an unlawful act, by seeking an indemnity or contribution from those

with whom or by whose authority such unlawful act was committed. But justice and sound policy, upon which this salutary rule is founded, alike require that it should not be extended to cases where parties have acted in good faith, without any unlawful design, or for the purpose of asserting a right in themselves, or others, although they have thereby infringed upon the legal rights of third persons. It is only when a person knows, or must be presumed to know that his act was unlawful, that the law will refuse to aid him in seeking an indemnity or contribution. It is the unlawful intention to violate another's rights or a wilful ignorance and disregard of those rights, which deprives a party of his legal remedy in such cases. It has therefore been held that the rule of law, that wrongdoers cannot have redress or contribution against each other, is confined to those cases where the person claiming redress or contribution, knew or must be presumed to have known, that the act, for which he has been mulcted in damages, was unlawful." *Jacobs* v. *Pollard*, 10 Cush., 287, supra.

It may be safely asserted that the rule denying the right of contribution as between joint tort-feasors has no application to torts which are the result of mere negligence in carrying on some lawful transaction. In such cases the parties are tort-feasors, not wilfully, but by inference of law, and the term itself seems disproportionately harsh under such circumstances.

The application of this exception to the facts in the case at bar is obvious. As was said in the former case, "the engagement and operation of the car on this special trip seem to have been a joint enterprise on the part of Captain Hurley and Mr. Hobbs who were interested in a common undertaking." *Pease* v. *Gardner*, 113 Maine at 267. That undertaking was entirely lawful, the transportation of certain parties from one place to another. No element of wrong doing attached to it. In fact, so far as the evidence discloses, neither the plaintiff nor the defendant was present at the time of the accident. But as the car was legally under their possession and control, as they were the owners pro hac vice, as Herrick the chauffeur was their agent, his want of care toward third persons in the eye of the law was imputable to them under the doctrine of respondeat ouster. However there was no voluntary, wilful and intentional wrong doing on their part. There was no community of wrong and there could have been none. Therefore the plaintiff having paid the entire sum for which

he and his quondam partner were jointly liable, he can recover of the defendant his proportional part or one-half thereof. Any other result would be illogical and unjust.

2. AMOUNT OF CONTRIBUTION.

As four persons seem to have been concerned with the transaction, Messrs. Gardner, Hobbs, Hurley and Herrick, the defendant claims that if forced to contribute at all contribution on his part should be limited to one-fourth of the amount of the judgment.

The answer to this contention is two-fold:

In the first place, all four of these persons were joined as defendants in the former suit, and their liability or non-liability was there determined. Judgment was rendered against Hobbs and Hurley while it was held that the action should not be maintained against Gardner and Herrick. That judgment still stands unreversed and is not open to collateral attack unless it was obtained by fraud or unless want of jurisdiction appears on the face of the record. *Toothaker* v. *Greer*, 92 Maine, 546; *Winslow* v. *Troy*, 97 Maine, 130. The rights of the parties were fixed by that judgment and it constitutes the impregnable basis of this suit. Contribution must be of one-half the amount.

In the second place, the result is as it should be under the law. Mr. Gardner was merely a passenger and no liability attached to him.

The chauffeur Herrick was the active party in the negligent act creating the liability, but as he was at the time the servant of Hobbs and Hurley, judgment could not be rendered against him and also against Hobbs and Hurley in a joint suit, as both master and servant cannot be held jointly liable for a negligent act. The reason is that joint tort-feasorship in cases of negligence necessarily implies a community of interest in the object and purposes of the undertaking and an equal right to govern and direct the conduct of each other in respect thereto, and master and servant cannot be said to engage in a common enterprise because that relation is inconsistent with the relation of master and servant. Hence the rule. *Parsons* v. *Winchell*, 5 Cush., 592; *Melchey* v. *Meth. Relig. Soc.*, 125 Mass., 487; *Hill* v. *Murphy*, 212 Mass., 1-4; *Bailey* v. *Bussing*, 37 Conn., 349; *Betcher* v. *McChesney*, 255 Pa., 394. In this we are not speaking of actions of trespass where the wrong is inflicted at the command of the superior, but of ordinary actions of negligence.

We are aware that in some jurisdictions joint actions against master and servant have been allowed even in cases of negligence, *Maybury* v.

No. Pac. Ry. Co., 100 Minn., 79, 10 A. C., 754 and note, but our court has adopted with approval the doctrine and reasoning of the Massachusetts Court. *Campbell* v. *Portland Sugar Co.*, 62 Maine, 552, 566.

The injured party, Pease, had the right to bring suit against either the servant or the masters, but could not recover a joint judgment against all. *Duryee* v. *Hale*, 31 Conn., 217; *Bailey* v. *Bussing*, 37 Conn., at 352.

The judgment was obtained against the masters alone and the servant was properly omitted.

Our conclusion therefore is that this action for contribution is maintainable and the entry should be,

Judgment for plaintiff for $274.05 with interest from date of the writ.

FLORENCE W. COBB

vs.

CUMBERLAND COUNTY POWER AND LIGHT COMPANY.

Cumberland. Opinion November 15, 1918.

General rule as to degree of care required when vehicles are approaching street junctions. Rule as to negligence of the driver of an automobile being imputed to a passenger riding with him. Rights and liabilities of automobiles not properly registered. Rule where the liability sought to be imposed is a statutory one. Rule where recovery is sought because of common law liability. Rule as to violation of a Statute or Ordinance constituting negligence per se. General right of recovery by person while violating an Ordinance or Statute, providing that the violation does not contribute to the injury.

In an action brought to recover damages for personal injuries received by the plaintiff, a passenger in an automobile operated by her husband and struck by an electric car, after a verdict in favor of the plaintiff and upon defendants motion and exceptions it is

Held:

1. Upon the evidence, while the case is somewhat close, the verdict is not regarded so palpably wrong as to warrant the intervention of this court.
2. A certificate of registration issued to dealers under R. S., Chap. 26, Sec. 24, in force when this accident happened, "to purchase, demonstrate, sell and exchange automobiles" does not confer a general and unlimited license, but only for the restricted uses named.
3. As the automobile on this occasion was being used solely for pleasure it was, so far as this case is concerned, an unregistered car in violation of R. S., Chap. 26, Sec. 28.
4. It is a general rule that penal statutes are to be construed strictly and not to be extended beyond their obvious import.
5. The fact that a car is unregistered in violation of this statute, does not constitute negligence per se, and does not preclude a plaintiff from recovering in a common law action of negligence, unless such violation is the direct and proximate cause contributing to the act.

6. The non-registration of this car had no causal connection with the accident and therefore the violation of the statute did not bar the plaintiff's right of recovery.
7. This case is clearly distinguishable from the cases of *McCarthy* v. *Leeds*, 115 Maine, 134, and *McCarthy, Adm'r*, v. *Leeds*, 116 Maine, 275, because the right of action against a town for defect in the highway is purely a creature of statute. The duty imposed upon the town is only towards lawful travelers, and one traveling in violation of law is not deemed a lawful traveler within the purview of the statute so far as the town is concerned.

Action on the case to recover damages caused by the alleged negligence of defendant company. Verdict for plaintiff in the sum of $775. Motion for new trial filed by defendant, and also exceptions to certain rulings of presiding Justice. Motion and exceptions overruled.

Case stated in opinion.

Frank H. Haskell, for plaintiff.

Bradley & Linnell, and William Lyons, for defendant.

SITTING: CORNISH, C. J., SPEAR, HANSON, PHILBROOK, DUNN, MORRILL, JJ.

CORNISH, C. J. This is an action on the case brought to recover damages for personal injuries received by the plaintiff while a passenger in an automobile operated by her husband, and struck by an electric car operated by servants of the defendant. A verdict for $775 was rendered in favor of the plaintiff and the case is before the Law Court on defendant's motion and exceptions.

MOTION.

The accident occurred about eleven o'clock in the evening of April 17, 1917, in the city of Portland. Mr. and Mrs. Cobb with five other passengers entered Congress Street, which runs in a general easterly and westerly direction from Oak Street, which runs in a general northerly and southerly direction. The approach to Congress Street was from the southerly side. The purpose of Mr. Cobb was to cross the electric tracks on Congress Street, and then turning to the left to proceed westerly on the northerly side. At the same time a car was approaching and moving easterly on the southerly track of the electric railroad.

The plaintiff and her husband claim that as they emerged from Oak Street the electric car was quite a distance to the west on Congress

Street and seemed to be slowing down as if to stop, that they supposed they had ample time in which to cross without incurring any danger whatever, that the husband gave the hand signal and proceeded slowly on his way straight across the tracks, and when the rear wheels of the automobile had passed nearly over the southerly track it was violently struck by the car, thrown around upon the northerly track and headed toward the west.

The defendant's contention is that the electric car was coasting along Congress Street at a rate of four or five miles an hour, and was under complete and watchful control, that the automobile on emerging from Oak Street did not proceed straight on but turned easterly and proceeded along Congress Street in the same direction as the electric car for a distance of about twenty-five feet, and then darted suddenly toward the track and without warning went directly in the path of the car at a point so close to it that notwithstanding the immediate application of the brakes the collision could not be averted. These were the sharp contentions as to the manner in which the accident happened. The evidence was flatly contradictory, and the jury accepted the plaintiff's view.

So far as the negligence of the defendant is concerned it should be remembered that the collision took place at a street junction, a place where the electric car and the automobile are on an equality, and a close watch is required on the part of the motorman. *Marden* v. *Street Railway Co.*, 100 Maine, 41. This rule as to the duties of drivers of all vehicles at street junctions must be strictly observed. It tends to safety in travel.

When questioned in regard to his conduct the motorman testified: "If we follow an automobile and a hand signal is given, we understand he is going across in front of us either in one direction or the other; but an automobile coming out of a side street to cross directly in front of us, and give us a hand signal, they either wait or take their chances of going across." This answer may have given to the jury the impression that the motorman claimed a priority of passage or was regardless of or at least indifferent to the rights of travelers approaching from a side street.

So far as the plaintiff's want of due care is concerned it should be noted that she was merely a passenger sitting on the rear seat, that her husband, an experienced driver, was in full management and control of the machine, and even though he might be deemed guilty

of contributory negligence, his negligence was not imputable to her. *Denis* v. *Street Railway Co*,. 104 Maine, 39. It further appears that she did not blindly rely on him because she also looked, saw the car some distance up the street, and observed nothing to indicate peril in crossing the track.

Without further discussion we would say that while the case is somewhat close, we do not regard the verdict so palpably wrong as to warrant our intervention.

EXCEPTIONS.

The exceptions involve two questions: First, whether the automobile, considering the purpose for which it was being used at the time, was legally registered? Second, if not, whether non-registration is a bar to recovery?

As to the first point, it appears that this automobile was registered under the provisions of R. S., Chap. 26, Sec. 24, then in force. This section provided that instead of the separate and individual registration of each car by a manufacturer or dealer, such manufacturer or dealer could obtain a certificate of registration bearing a general distinguishing number or mark, together with five number plates, so that for the specified number of cars the same number and distinguishing mark might be used. This was called a certificate of registration "to purchase, demonstrate, sell and exchange automobiles." It was not a general and unlimited license for all purposes and uses, but for the restricted uses named. It did not include riding for pleasure nor for hire. On this occasion the auto was being used obviously for no one of the restricted uses, but for pleasure alone, and therefore so far as this particular trip was concerned, and as relating to this accident, it was the same as if the car had not been registered at all.

This brings us to the second and vital point, whether, considering this as an unregistered car, the plaintiff is thereby precluded from recovering in this common law action for negligence.

We are aware that the Massachusetts Court has so construed the registration statute of that State as to render an unregistered car a trespasser and an outlaw, having no rights which even a negligent party is bound to respect, and to whose occupants no duty is owed by the traveling public except to refrain from wilful and wanton injury.

The leading Massachusetts case is *Dudley* v. *Northampton Street Railway*, 202 Mass., 443, a decision rendered by a divided court, and the opinion likens such an unregistered car to a runaway horse, citing *Richards* v. *Enfield*, 13 Gray, 344, and *Higgins* v. *Boston*, 148 Mass., 484. Those citations are not precedents for *Dudley* v. *Northampton St. Ry.* because they are not actions at common law, but statutory actions against municipalities arising from defects in the highway, a distinction which will be noted later in discussing *McCarthy* v. *Leeds*, 115 Maine, 134, and *McCarthy, Adm'r*, v. *Same*, 116 Maine, 275. To the same class belongs *Feeley* v. *Melrose*, 205 Mass., 329.

But the decision in *Dudley* v. *Street Railway* has been followed by the Massachusetts Court in subsequent cases, and is unquestionably the law of that Commonwealth today. *Chase* v. *N. Y. Cen. R. R.*, 208 Mass., 137, 158; *Love* v. *Street Railway*, 213 Mass., 137; *Holden* v. *McGillicuddy*, 215 Mass., 563; *Deane* v. *Boston Elevated Ry.*, 217 Mass., 495; *Gould* v. *Elder*, 219 Mass., 396; *Kovnosky* v. *Quillette*, 226 Mass., 474; *Rolli* v. *Converse*, 227 Mass., 162.

It would seem however that this reaffirmation has been at times somewhat reluctant because in *Bourne* v. *Whitman*, 209 Mass., 155, 172, the court in commenting upon the *Dudley Case* said: "Some of us were disinclined to lay down the law so broadly and the opinion of the Court was not unanimous, but the doctrine has been repeatedly reaffirmed and is now the established law of the Commonwealth."

The Massachusetts cases rest wholly upon the interpretation of the words of the statute. They recognize and concede the common law doctrine that the violation of a statute or ordinance does not constitute negligence per se and does not prohibit a plaintiff from recovering in an action of negligence unless such violation is the direct and proximate cause contributing to the act, but they hold that it does not apply. The most striking illustration perhaps is *Bourne* v. *Whitman*, 209 Mass., 169, cited supra, where it was held that an operator who has violated the statute which provides that "no person shall operate an automobile. . . . unless specially licensed" etc., may recover in an action of tort, his unlawful act being regarded as punishable under another section of the statute, but not as rendering him a trespasser on the highway.

It is only in the case of non-registration that the Massachusetts Court has construed the statute so broadly, and we think they have read into the statute more than its language will permit and have

attached to the consequences of non-registration more than the legislative enactment will warrant. The statutory provisions are almost identically the same in the two States, so that it is impossible to distinguish the Massachusetts cases by reason of a difference in the statutes.

We therefore take up our own statute with a view to determining whether the Legislature in the case of non-registration has created a duty to other travelers on the highway or only a public duty to be enforced in the ordinary administration of the criminal law, in other words whether the offender is in effect penalized beyond the express provisions of the statute.

The general rule, which needs no citation of authorities, is that penal statutes are to be construed strictly and not to be extended beyond their obvious import. The penalties to be imposed are those expressed in clear and explicit terms. Inferential penalties are not to be discovered and enforced.

Sec. 28 of R. S., Chap. 26, reads as follows: "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, and no person, a resident of the State, shall operate a motor vehicle upon any highway . . . unless licensed to do so under the provisions of section thirty-one." Other minor requirements as to sale and exchange are added, and in section thirty-three it is provided that whoever violates any of the provisions of the nine preceding sections shall be punished by a fine not exceeding fifty dollars or by imprisonment not exceeding ten days.

No distinction is made between any of the offenses. The same penalty within fixed limits is meted out to all. Non-registration of the machine is made no greater crime than non-licensing of the driver. It was within the power of the Legislature to impose such penalties, within constitutional limitations, as it saw fit. It imposed a small fine or a short imprisonment. It might have added the forfeiture of the car, as in the case of the illegal transportation of intoxicating liquors, Public Laws, 1917, Chap. 294, or it might have subjected the owner of the unregistered car and the occupants to civil liabilities, but it did neither. The difference between wrongs to the public and to the individual is well marked and the Legislature in other acts recognizes both. Thus in R. S., Chap. 26, Secs. 2-6,—the law of the road, so-called,—there are certain provisions as to travelers turning to the

right, not obstructing passage, using bells, etc., and section 6 reads: "Any person injured by violation of either of the previous sections may recover damages in an action on the case commenced within one year. Such violator forfeits not less than one nor more than twenty dollars, to be recovered on complaint made within sixty days." Here both a penalty and the liability to civil action are expressly stated.

An apt and striking illustration may be found in the legislation and decisions of Connecticut on the precise point under consideration. Under the Public Acts of Connecticut, 1907, Chap. 22, automobiles were required to be registered and a penalty was provided for violation of the law. Under that act it was held that a party could recover against a municipality for injuries sustained from a defect in the highway although his car was unregistered. *Hemming* v. *New Haven*, 82 Conn., 661. It should be observed that the contrary rule prevails in this State, *McCarthy* v. *Leeds*, 115 Maine, 134; *McCarthy, Adm'r,* v. *Leeds*, 116 Maine, 275, but that does not affect the force of the illustration. Subsequently the statute of Connecticut was amended and an additional liability was placed upon the violator, Public Laws Conn, 1911, Chap. 85. This expressly provided in addition to the penalty previously imposed, that no recovery should be had by the owner, operator or passenger of an unregistered motor vehicle "for any injury to person or property received by reason of the operation of said motor while in or upon the public highways in this State." Under this act the owner of an unregistered car has been held to be absolutely precluded from maintaining an action for negligence. *Stroud* v. *Water Commissioners*, 90 Conn., 412. No other conclusion could well have been reached because the taking away of the violators civil rights was distinctly specified. Nothing was left to implication.

The Legislature of Maine has not seen fit to impose this liability upon the violator of the registration section, and the court does not feel justified in reading such a drastic clause into the section, and in effect multiplying many times the fine imposed by statute.

We see nothing in the language of the registration clause which differentiates it from the license clause. They follow each other and together constitute one sentence. They are expressed in substantially the same language: "No motor vehicle shall be operated . . . unless registered." "No person shall operate a motor vehicle unless

licensed." Their breach is followed by the same penalty. We can discover no legislative intent of civil disabilities lurking in one clause which does not pertain to the other. The license clause is held by the Massachusetts Court to be non-preclusive. Why should not the registration clause be the same? If in practice either should be held prohibitive of the right to maintain a civil suit, there are more practical reasons for attaching the prohibition to the animate non-licensed driver than to the inanimate unregistered car. An inert automobile of itself is harmless, whether registered or not. It is only when in motion that danger attaches. But an unlicensed driver operating a machine may be the cause of much injury. "What is gained by the display of a license number is not the avoidance of collisions but the more ready identification of the machine and its responsible owner" says the New Jersey Court in *Shaw* v. *Thielbar*, 82 N. J., Law 23. The act providing for registration has no tendency to prevent collisions, while that requiring the licensing of operators does have that tendency, in so far as it may prevent incompetent persons from managing an engine fraught with such capacity for injury. The Legislature however has made no distinction between the two and has provided merely a penalty in either case, and the same penalty.

This construction brings us back to the familiar principle that the right of a person to maintain an action for a wrong committed upon him is not taken away because at the time of the injury he was disobeying a statute, provided this disobeyance in no way contributed to the injury. He is not placed outside the pale of the law merely because he was committing a misdemeanor. That would be a wrong to the public, but not to the other party in the civil action. Such violation may in certain cases be evidence of negligence but it is not conclusive. *Ross* v. *Gilmore*, 72 Maine, 194; *Burbank* v. *Bethel Steam Mill Co.*, 75 Maine, 373; *Neal* v. *Randall*, 98 Maine, 69; *Wood* v. *Me. Cen. R. R. Co.*, 101 Maine, 469; *Moore* v. *Same*, 106 Maine, 297; *Kimball* v. *Davis*, 117 Maine, 187, 103 At., 154; *Kidder* v. *Dunstable*, 11 Gray, 342; *Spofford* v. *Harlow*, 3 Allen, 176; *Counter* v. *Couch*, 8 Allen, 436; *Hall* v. *Ripley*, 119 Mass., 135; *O'Brien* v. *Hudner*, 182 Mass., 381; *Slattery* v. *Lawrence Ice Co.*, 190 Mass., 79; *Jashnig* v. *Ferguson Co.*, 197 Mass., 364; *Bourne* v. *Whitman*, 209 Mass., 169; *Holland* v. *Boston*, 213 Mass., 560; *Holden* v. *McGillicuddy*, 215 Mass., 563; *Conroy* v. *Mathes*, 217 Mass., 91; *Carrington* v. *Worcester St. Ry.*, 222 Mass., 119.

The application of this governing rule to the case at bar is obvious. The non-registration had no causal connection with the accident whatever. It no more contributed to the collision in this case than did the color of the car. The one was as immaterial as the other. Therefore the violation of the statute did not bar the plaintiff's right of recovery.

This view of the effect of the registration section is uniformly held, outside of Massachusetts, so far as we have been able to ascertain. *Birmingham Ry. & L. Co.* v. *Aetna Acc. & Liab. Co.*, 184 Ala., 604; *Stovall* v. *Corey Highlands Land Co.*, 189 Ala., 516; *Shimoda* v. *Bundy*, 24 Calif. App., 677; *Atlantic Coast Line R. R. Co.* v. *Weir*, 63 Fla., 69, A. C. 1914, A. 126 and note; *Moore* v. *Hart*, 171 Ky., 725; *Lockridge* v. *Minneapolis R. R.*, 161 Iowa, 74; *Armstead* v. *Lounsberry*, 129 Minn., 34, 56 L. R. A., N. S. 628 and note; *Shaw* v. *Thielbar*, 82 N. J. Law, 23; *Hyde* v. *McCreery*, 130 N. Y. Supp., 269; *Black* v. *Moree*, 139 Tenn., 73; *So. Ry. Co.* v. *Vaughan*, 118 Va., 692, L. R. A., N. S., 1916, E. 1222 and note; *Derr* v. *R. R. Co.* 163 Wis., 234; 2 R. C. L., 1208; 2 Elliott, Roads and Streets, 3rd ed., sec. 1115.

The defendant however contends that the recent decisions of this court have virtually adopted the Massachusetts rule. *McCarthy* v. *Leeds*, 115 Maine, 134; *McCarthy, Adm'r*, v. *Leeds*, 116 Maine, 275. Not so. The first case was brought by the owner of an unregistered automobile against the inhabitants of a town to recover for injuries sustained by reason of a defective bridge. The second was brought by the administrator of the estate of two of the passengers to recover on the same ground. Judgment was rendered in favor of the defendants in both actions, and the decisions were based squarely and solely upon the proposition that the liability of a town for defects in its ways and bridges is purely statutory and the duty owed by the town is only to lawful travelers; that the occupants of an unregistered automobile are not lawful travelers so far as the town is concerned, and therefore no duty is owed to them by the town except to refrain from wilful injury. This doctrine is well established in this State by a long line of analogous decisions; thus one using the street as a playground is not a lawful traveler, within the purview of the statutory liability of a town, *Stinson* v. *Gardiner*, 42 Maine, 248; nor for horse racing, *McCarthy* v. *Portland*, 67 Maine, 167; nor a traveler on the Lord's Day, under the old statute, *Bryant* v. *Biddeford*, 39 Maine, 193; *Hinckley* v. *Penobscot*, 42 Maine, 89; *Cratty* v. *Bangor*, 57 Maine, 423.

The cases of *McCarthy* v. *Leeds*, supra, simply enforce the same rule, and the court drew the distinction between that class of actions and a common law action for negligence in these words: "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. . . . 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." *McCarthy, Adm'r,* v. *Leeds*, 116 Maine, 275. Evidently the court anticipated the probable necessity of determining at some future time the precise question which has arisen in this common law action now under consideration, and left itself free to decide that question upon common law principles when it should arise. The decisions in these two distinct classes of cases are entirely consistent.

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

Motion and exceptions overruled.

CARROLL W. MORRILL, Executor and Trustee,

vs.

ALFRED ROBERTS, Jr., et als.

Cumberland. Opinion November 16, 1918.

Bill in equity. Construction of wills.

Where under a will the final distribution of balance of trust fund is postponed until death of Sarah M. Roberts, *Held:*

Until such time, it is not necessary to determine or advise as to whom such distribution shall be made, since future conditions, and future existence of the persons to whom distribution may be made, can only be determined hypothetically.

Bill in equity to determine the construction of certain provisions of the will of Alfred Roberts of Portland, Maine. Cause was heard upon bill, answer and replication. From the findings of the single Justice, an appeal was entered to the Law Court. Judgment in accordance with opinion.

Case stated in opinion.

Woodman & Whitehouse, for plaintiff.

W. K. & A. E. Neal, Linwood F. Crockett, Samuel L. Bates, John J. Devine, William H. Murray, Collins, Collins & Burke, Sydney B. Larrabee, and John Mitchell Jones, for defendants.

SITTING: CORNISH, C. J., HANSON, PHILBROOK, DUNN, MORRILL, JJ.

PHILBROOK, J. This is a bill in equity brought under R. S., Chap. 82, Sec. 6, sub-div. X, to determine the construction of certain provisions of the will in which the plaintiff is named as executor and trustee. He declares that "he is in doubt as to the true and proper construction of said will, to wit, as to whether he may lawfully dis-

tribute the remainder of said trust estate at the present time, prior to the death of said Sarah M. Roberts, and before the happening of all the three events which were expressly made, by the terms of said will, a condition precedent to the final distribution of said estate, and as to whether or not the estate of said Amie B. Roberts is entitled to any part of the balance of the estate of said testator under said will, and, if so, what part, when a final distribution may lawfully be made; also as to what is the proper time for the final distribution of the balance of said estate, and as to who are the legatees, or class of legatees, among whom it is to be distributed when the proper time for distribution arrives, and also at what time the balance of said estate is to vest in such legatees."

In the court below the bill was sustained. The decree of the learned Justice, with some minuteness of detail, also answered the many other questions raised by the plaintiff. From this decree the case comes to this court by appeal.

Time of final distribution. The testator provided for final distribution after the occurrence of three events, viz., the death of his sister, Sarah E. Roberts, the death of his brother's widow, Sarah M. Roberts, and the maturity of a certain endowment bond in which Alfred Roberts, Jr., was the original beneficiary, either by the lapse of the time mentioned in the bond or by the death of Alfred Roberts, Jr. It is conceded that the sister, Sarah E. Roberts is dead, that the bond has matured by lapse of time, but that Sarah M. Roberts is still living. On February 16th 1917, one John Mitchell Jones, who now claims to be attorney in fact and of record for Alfred Roberts, Jr., filed in the Probate Court a petition for the distribution of the balance of the estate, alleging that said Sarah M. Roberts was ready and willing to waive, and had waived any and all right, title or interest, present or prospective, accruing or accrued to her under any of the terms of said will. In her answer to this bill, Sarah M. Roberts declared that such waiver, release or assignment was obtained by fraud, false representations and duress, that there was no consideration for the same, and that it was and always had been null, void and of no effect. The decree of the learned Justice, upon this contention of fact, upheld the claim of Sarah M. Roberts and we unhesitatingly approve this finding. The final distribution of the balance in the hands of the plaintiff is therefore postponed until the death of Sarah M. Roberts, and the plaintiff is ordered to pay her all annuities over-

due and unpaid, with interest from the dates when each annuity became due, and to pay her such annuities in the future as may be demanded by the terms of the will.

Until such time as final distribution is to be made, it is not necessary to determine or advise as to whom such distribution shall be made, since future conditions, and future existence of the persons to whom distribution may be made, can only be determined hypothetically.

The decree of the sitting Justice provided for payment of counsel fees, costs and expenses, out of the estate, but it is the opinion and order of this court that, exclusive of cash disbursements, the total amount to be allowed for attorney's fees shall be five hundred dollars, the sitting Justice by whom decree below will be signed, to determine the distribution of such sum among counsel, providing they cannot agree thereto.

Appeal sustained.
Bill sustained.
Temporary injunction made permanent.
Decree in accordance with opinion.

MATILDA H. FERGUSON BATCHELDER *vs.* EDWIN F. BICKFORD.

Penobscot. Opinion November 19, 1918.

Foreclosure of mortgages. Right of redemption where mortgagee has entered upon the premises and held them adversely for twenty years. Rights of parties to redeem from mortgage. When redemption must be sought.

If the plaintiff in a bill in equity files a replication and afterwards consents that the cause may be reported to the Law Court for decision upon the bill and answer, the replication is waived and the facts stated in the answer are to be taken as true.

It is well settled that if a mortgagee enters into possession of the mortgaged premises after condition broken without taking the steps provided by statute to foreclose the mortgage, it is open to redemption for twenty years. But if the mortgagor and those claiming under him permit the mortgagee to hold possession for twenty years without accounting and without admitting that he holds only as mortgagee, his title becomes absolute and the right of redemption is lost.

It is the adverse character of the possession, and not the mere fact of possession by the mortgagee for twenty years that will operate to convert the mortgage title into an absolute one.

A mortgage was dated and delivered March 16, 1878; the mortgagor and the plaintiff were married in the year 1886; mortgagor died May 3, 1901, leaving the plaintiff as his widow.

Held: That under R. S., Chap. 80, Sec. 17, the plaintiff was entitled to her right and interest by descent in the mortgaged premises, as against every person except the mortgagee and those claiming under him; and that she had such an interest in the mortgaged premises as would permit her to redeem from the mortgage in the lifetime of her husband.

Bill in equity asking for an accounting and right to redeem from mortgage. Cause was heard upon bill, answer and replication, and by agreement of counsel case was reported to Law Court. Judgment in accordance with opinion.

Case stated in opinion.

U. G. Mudgett, for plaintiff.

Morse & Cook, for defendant.

SITTING: SPEAR, HANSON, PHILBROOK, DUNN, MORRILL, JJ.

MORRILL, J. This is a bill in equity to redeem from a mortgage. The plaintiff filed a general replication, but by agreement of parties the case is reported to the Law Court for decision upon the bill and answer. The plaintiff thereby waived her replication and the facts stated in the answer are to be taken as true. *Dascomb* v. *Marston*, 80 Maine, 223, 230.

The mortgage was dated and delivered March 16, 1878; the mortgagor, Isaiah Ferguson, and the plaintiff were married in the year 1886; he died May 3, 1901, leaving the plaintiff as his widow. The answer contains the following material statement of facts:

"The Defendant admits that on the twenty-second day of July 1895, he entered upon and took possession of the premises described in said mortgage and has ever since continued in possession and received the rents and profits of said real estate; and the defendant alleges that he entered peaceably and openly, no one opposing, in the presence of two witnesses, and took possession of the premises in the character of mortgagee, and by virtue of his mortgage only, and that since the twenty-second day of July, A. D. 1896, he has held possession of the premises without acknowledging a subsisting mortgage, and without accounting, and without admitting that he held only as mortgagee, during which period last named he has treated said real estate as his own and as if said mortgage never existed."

The mortgage contains an agreement "that the right of redeeming the above mortgaged premises shall be forever foreclosed in one year next after the commencement of foreclosure by any of the methods now provided by law."

The sole question for decision upon these undisputed facts is whether on the day of demand, July 21, 1917, the plaintiff had a right to redeem from the mortgage. The question must be answered in the negative.

It is well settled, as claimed by the defendant, that if a mortgagee enters into possession of the mortgaged premises after condition broken without taking the steps provided by statute to foreclose the mortgage, it is open to redemption for twenty years. But if the mortgagor and those claiming under him permit the mortgagee to hold possession for twenty years without accounting and without admitting that he holds only as mortgagee, his title becomes absolute

and the right of redemption is lost. *Roberts* v. *Littlefield*, 48 Maine, 61; *Frisbee* v. *Frisbee*, 86 Maine, 444; *Hughes* v. *Edwards*, 9 Wheat., 489, and cases cited in 2 Rose's Notes, page 66; *Munro* v. *Barton*, 98 Maine, 250.

"It is obviously the adverse character of the possession, however, and not the mere fact of possession by the mortgagee for twenty years that will operate to convert the mortgage title into an absolute one. . . . . To constitute a bar to such right (of redemption) it must appear that the mortgagee's possession is unequivocally adverse to the mortgagor, or to those claiming under him." *Munro* v. *Barton*, supra.

It is the opinion of the court that the admitted facts stated in the answer clearly show that defendant's possession was "unequivocally adverse" to the mortgagor and those claiming under him.

Plaintiff's counsel earnestly contends that the defendant's possession did not begin to operate against his client's right to redeem until her husband's death. Her husband having died seized of premises mortgaged before their marriage, the plaintiff was entitled to her right and interest by descent in the mortgaged premises, as against every person except the mortgagee and those claiming under him. R. S., Chap. 80, Sec. 17. It is plain that she had such an interest in the mortgaged premises as would permit her to redeem from the mortgage in the lifetime of her husband. *Tuttle* v. *Davis et al.*, 114 Maine, 109. "It may be stated in general terms, that any one who has an interest in the premises and who would be a loser by foreclosure, is entitled to redeem." *Frisbee* v. *Frisbee*, 86 Maine, 444. Therefore the plaintiff had the full period of twenty years in which to redeem, and her right must now be considered barred.

Bill dismissed with costs.

MERTIE A. LAMBERT *vs.* JAMES M. LAMBERT.

JAMES M. LAMBERT,
Appellant from Decree of Judge of Probate.

Franklin. Opinion November 19, 1918.

Husband and wife. Rights of husband and wife under R. S., Chap. 80, Sec. 14. General rule as to gifts "causa mortis." When the same may be set aside. Essentials of gifts "causa mortis." Distinction between testaments and gifts causa mortis.

Suit on a note given by defendant to his wife Augusta E. Lambert and by her indorsed and delivered to plaintiff as a gift causa mortis. The probate appeal for purposes of this rescript may be disregarded as it presents the same question involved in the suit.

Defendant contends that the gift causa mortis is void as against the surviving husband (himself) and that the note is therefore owned not by the plaintiff but by the estate of the deceased wife Augusta.

Defendant bases his contention upon R. S., Chap. 80, Sec. 14.

Held: That the statute relied upon applies only to property left by a husband or wife at death and not to personal property which the decedent has parted with during life either by sale or gift.

The distinction between testaments and gifts causa mortis is clear. The former require no delivery and take effect at death. The latter require delivery and (subject to revocation) take effect upon delivery.

Action of assumpsit to recover on a promissory note given by the defendant to his wife and by her delivered to the plaintiff, her daughter, as a gift causa mortis. The defendant contended that the gift was invalid as against himself as surviving husband. The same question was raised on the probate appeal. In both cases the Court ruled that the gifts were valid. To this ruling the defendant excepted. Exceptions overruled.

Case stated in opinion.

McGillicuddy & Morey, for Mertie A. Lambert.

C. N. Blanchard, and J. B. Morrison, for James M. Lambert.

SITTING: CORNISH, C. J., HANSON, PHILBROOK, DUNN, MORRILL, WILSON, DEASY, JJ.

DEASY, J. One point only is presented by the exceptions in these cases, to wit: That under existing statutes, gifts causa mortis are in this state invalid.

James M. Lambert is defendant in one case and appellant in the other. For convenience we shall refer to him as the defendant.

Augusta E. Lambert, owning a promissory note of the defendant, endorsed and delivered it to Mertie A. Lambert as a gift causa mortis. Augusta E. Lambert afterward died testate and Mertie A. Lambert was made executrix of her will. The executrix did not include the note in the inventory of the estate. Individually she brought suit upon it. Hence the two proceedings. In both the presiding Justice ruled that "a gift causa mortis of personal property, as in this case, is a valid gift." To these rulings the defendant excepted.

The printed case does not show the relationship between the defendant and Augusta E. Lambert. Counsel for both parties, however, in their briefs assume that he is her surviving husband. If the defendant's contention is that gifts causa mortis are under all circumstances invalid we perceive no reason and find no authority to sustain such proposition. There are, however, respectable authorities holding that gifts causa mortis, being in the nature of testaments, are invalid as to surviving husbands or wives. For the purpose of reaching and passing upon what we understand to be the real merits of the case we shall assume that the defendant is the surviving husband of Augusta E. Lambert and that the exceptions raise the question of the validity of such a gift as against him.

The defendant bases his claim upon Chap. 160 of the Public Laws of 1903, as amended by Chap. 260 of the Public Laws of 1909, and incorporated in the R. S., of 1916, as Sec. 14 of Chap. 80.

One contention is that under the statute above cited a husband has an interest in the nature of a vested right in his wife's personal property, which he cannot be deprived of without his consent. Were this contention well founded it would, of course, follow that a wife has a similar interest in her husband's personal property. This doctrine, if admitted, would invalidate not only gifts causa mortis, but also gifts inter vivos and sales by husbands or wives without consent of the other. But the statute neither creates nor recognizes such rights.

It applies only to property left by a husband or wife at death. The statute refers only to "estate of such testator, or testatrix." It does not relate to personal property which the decedent has parted with during life, either by gift or sale.

The defendant contends that a gift causa mortis is tantamount to a testamentary disposition without the safeguards and formalities required in the case of a testament. To so hold we would have to go contrary to the multitude of cases wherein courts and jurists have uniformly sustained and sanctioned such gifts. The distinction between testaments and gifts causa mortis is clear. The former require no delivery and take effect at death. The latter require delivery and (subject to revocation) take effect upon delivery.

The defendant cites and relies upon *Nichols* v. *Nichols et al.*, 61 Vermont, 430. This case is not quite in point. It does not involve the validity of gifts causa mortis, nor does it mention or refer to such gifts. The case of *Thayer* v. *Thayer*, 14 Vermont, 107, also cited by the defendant, holds an alleged gift causa mortis ineffective for want of delivery.

The defendant also relies upon the New Hampshire cases of *Baker* v. *Smith*, 66 N. H., 422, and *Jones* v. *Brown*, 34 N. H., 439. These cases arose under a statute substantially similar to ours. They hold that gifts causa mortis are valid, but being "a form of testamentary disposition," are inoperative as to surviving husbands.

The great weight of authority, however, is to the effect that gifts causa mortis clearly proved, or, as in the cases at bar, admitted, are valid and operative against all but creditors. We might cite numerous authorities, but think it necessary to refer only to *Wright* v. *Holmes*, 100 Maine, 508, and *Marshall* v. *Berry*, 13 Allen, 43, and cases cited therein.

Whether or not conditions may exist invalidating an attempted gift causa mortis by reason of fraud, we are not called upon to decide. Nothing in these cases shows fraud, unless such a gift is necessarily and inevitably fraudulent as against a surviving spouse. The law does not justify this court in so holding.

The entry in both cases must be,

Exceptions overruled.

STATE OF MAINE

vs.

DUNCAN MCDONALD and ANNETTE MCDONALD.

Penobscot. Opinion November 25, 1918.

Contract of insurance. Vacancy clauses. Effect upon policy where vacancy is shown to exist longer than the time allowed under the terms of the policy. Rule as to such vacancy voiding a policy where the same is made payable to a mortgagee.

Prosecution under R. S., Chap. 128, Sec. 22, for wilfully burning an insured building. Reported to the Law Court for determination whether at the time of the fire there was as shown by evidence any valid existing insurance upon the burned building. One of the policies contained a clause making the loss payable to a mortgagee.

Held: That as contracts between the insured respondent and the insurance companies the policies had been and were void by reason of non-occupancy. But if the mortgage was at the date of the fire outstanding and unpaid and if the non-occupancy were not due to the act or default of the mortgagee there was valid existing insurance on the building at the time of the fire.

Indictment for burning buildings with intent to defraud insurance company. At close of evidence case was reported to Law Court upon certain agreed statements. Judgment in accordance with opinion.

Case stated in opinion.

Albert L. Blanchard, County Attorney, for State.

Benjamin W. Blanchard, for respondents.

SITTING: CORNISH, C. J., HANSON, PHILBROOK, DUNN, MORRILL, DEASY, JJ.

DEASY, J. Prosecution under R. S., Chap. 128, Sec. 22, for wilfully burning a building insured against loss or damage by fire, with intent to defraud the insurer. The case comes to the Law Court on report by order of the presiding Justice as follows:

"This case is reported to the Law Court to have determined the question whether, upon the evidence in the case, any valid, existing insurance was upon the bungalow which was burned on the twenty-eighth day of August, 1917. If the Law Court finds that no such insurance did so exist, then the case is to be dismissed or to be nol prossed at nisi prius; otherwise the case to be sent back for trial upon the merits."

At the time the fire occurred the owner, Annette McDonald, had two policies of fire insurance on the building in force unless avoided by breach of the conditions of the policies. Both policies were in standard form. Both had vacancy permits attached. It is clear that on August 25th when the building was damaged by fire and on August 28th when it was destroyed by another fire it was unoccupied and had been vacant so long and under such circumstances that the conditions of the policies and of the vacancy permits had been violated and that the policies were void as contracts between the companies and the insured respondent. This conclusion is obvious from a reading of the evidence and it would serve no useful purpose to state the reasons at length. *Dolliver* v. *Fire Insurance Company*, 111 Maine, 275.

But one of the policies contained a mortgagee clause as follows:

"Payable in case of loss to the Maine Real Estate Title Company as its interest may appear as mortgagee."

One of the provisions of the Maine Standard policy, which provision was contained in both of the policies involved in this case is as follows:

"If this policy shall be made payable to a mortgagee of the insured real estate no act or default of any person other than such mortgagee or his agents or those claiming under him shall affect such mortgagee's right to recover in case of loss on such real estate."

Notwithstanding the non-occupancy and the forfeiture by the respondents, the mortgagee's rights under the policy remain valid and enforcible provided that at the date named the mortgage on the building was outstanding and unpaid and provided that the breach of condition was not due to the act or default of the mortgagee. *Gilman* v. *Commonwealth Insurance Company*, 112 Maine, 528, and cases cited.

If on August 28, 1917, the mortgage referred to running to the Maine Real Estate Title Company was in force and if the non-

occupancy was not wholly or in part due to any act or default on the part of the mortgagee there apparently was at that date valid existing insurance upon the building in question; otherwise not.

Case remanded to nisi prius for further proceedings in accordance with this opinion.

JOHN H. LOOK *vs.* C. A. WATSON & SONS.

Franklin. Opinion November 25, 1918.

Principal and agent. Rule in regard to entering general appearance for defendants. Rule as to proving agency by the testimony of the agent. Rule as to liability of one who holds himself out as partner, even though such partnership does not exist. Pleading and practice. Pleading non-joinder when true relation does not appear upon inspection. Rule as to pleading of misjoinder, or how the same can be taken advantage of. Rule as to plaintiff failing in his action where too many defendants are joined. Procedure under Statute where too many defendants are made parties to action.

Action of assumpsit against three defendants as co-partners under the name of C. A. Watson & Sons. The defendants contended that there was no such partnership and that the plaintiffs dealings were with a corporation bearing that name.

The presiding Justice directed a verdict for the plaintiff. The defendants excepted.

The defendants did not file an affidavit under Supreme Judicial Court, Rule X, denying partnership and did not plead mis-joinder in abatement.

Held: That so far as C. A. Watson is concerned the ruling of the presiding Justice was justified. C. A. Watson held himself out as a member of a partnership bearing the name C. A. Watson & Sons and the plaintiff relied upon such partnership in extending credit. But the verdict was ordered not only against C. A. Watson but also against R. A. Watson and George Watson. The case shows that George Watson was not a partner and it does not appear that he ever held himself out as such.

A defendant who holds himself out as a partner is liable to a plaintiff who believing in and relying upon such partnership enters into a contract involving the

giving credit to it. This principle applies although the defendant is not a partner and notwithstanding that such supposed partnership is in fact but without the plaintiff's knowledge, a corporation.

A defendant sued as a partner who files no affidavit (under Rule X) but who challenges the existence of the alleged partnership is precluded from demanding affirmative proof on that issue but not from introducing negative proof. When not seasonably and on oath denied, the existence of an alleged partnership is prima facie but not conclusively presumed.

Mis-joinder was not pleaded in abatement. It was not necessary. In actions of contract when the situation does not appear upon inspection of the pleadings non-joinder must be pleaded in abatement but mis-joinder is available under the general issue.

Action of assumpsit upon account annexed. Defendant filed plea of general issue, also brief statement. At close of evidence presiding Justice directed verdict for plaintiff, to which ruling exceptions were filed. Judgment in accordance with opinion.

Case stated in opinion.

Frank W. Butler, for plaintiff.

Elmer E. Richards, and Sumner P. Mills, for defendant.

SITTING: CORNISH, C. J., HANSON, PHILBROOK, DUNN, MORRILL, DEASY, JJ.

DEASY, J. John H. Look brings this action of assumpsit on account annexed against C. A. Watson, R. A. Watson and George Watson, as co-partners under the name of C. A. Watson & Sons. A check is also declared upon but not printed. The case comes to the Law Court upon exceptions to the ruling of the presiding Justice directing a verdict for the plaintiff.

The defendants allege and prove that "C. A. Watson & Sons" is the name of a corporation. This fact is not decisive. It is not very material unless it also appears that the dealings involved in this action were between the plaintiff and that corporation. The plaintiff, on the other hand, contends that his dealings were with a partnership doing business under the same name. He claims further that if he has not proved the partnership he has at least proved facts and circumstances which estop the defendants from denying its existence and its liability.

The plaintiff urges that the defendant's appearance was general and not special. This point relates to jurisdiction but does not go to the merits of the controversy. A general appearance waives defects in service and want of jurisdiction over the defendant's person but does not relieve the plaintiff from the burden of proving the allegations of his writ.

Turning to the evidence in the case, it appears that the plaintiff's transactions were largely with Joel P. Barrett. The defendants say that Barrett was agent for the corporation and not for them, or any of them, individually. The plaintiff, on the other hand, says that Barrett was agent for the individual defendants. He seeks to prove this by showing that Barrett, in reply to the plaintiff's inquiry, gave him the names of the defendants as his principals. But while agency may be proved by the testimony of the alleged agent it cannot be proved by his admissions out of court.

"To permit the proving of the agency by proving the declarations of the agent would be assuming without proof that which is a prerequisite to the admissibility of the declaration." *Bennett* v *Talbot*, 90 Maine, 231; *Hazeltine* v. *Miller*, 44 Maine, 177; *Sleeper* v. *Ins. Co.*, 61 Maine, 272; *Eaton* v. *Provident Association*, 89 Maine, 58; *Hill* v. *Foss*, 108 Maine, 472.

The defendants cannot be held on the principle of liability of an agent for an undisclosed principal. Neither R. A. Watson nor George Watson were concerned in making the contract sued upon and there is no evidence that C. A. Watson was agent for the corporation for the purpose of buying apples.

The plaintiff testifies that C. A. Watson gave him express directions to pack and ship the apples in question. But the testimony of C. A. Watson, not categorically but in effect, contradicts this. It cannot be said that the evidence of the plaintiff so greatly and manifestly outweighs that of the defendant as to justify a directed verdict. If the directed verdict can be sustained it must be upon the well established principle of law which we state thus:—

A defendant who holds himself out as a partner is liable to a plaintiff who, believing in and relying upon such partnership, enters into a contract involving the giving of credit to it. This principle applies although the defendant is not a partner and notwithstanding that such supposed partnership is in fact, but without the plaintiff's knowledge, a corporation.

The bare statement of this principle defines the status of the defendant, C. A. Watson, as shown by undisputed evidence.

In the autumn of 1917 a large business in buying and shipping apples was conducted in Maine by C. A. Watson & Sons. This business was so carried on not only with the full knowledge of the defendant, C. A. Watson, but in some transactions with his active participation. The plaintiff received several checks signed "C. A. Watson & Sons, by J. P. Barrett, Agent." The name "C. A. Watson & Sons" signifies to the ordinary mind not a corporation but a partnership of which C. A. Watson is a member. The plaintiff was engaged by Joel P. Barrett to buy apples for this concern. Barrett did not inform the plaintiff that C. A. Watson & Sons was a corporation. He did not know it himself. At the Exchange Hotel, before the apples sued for were shipped, Barrett introduced the plaintiff to C. A. Watson as "the gentleman that was buying apples for him." The defendant, C. A. Watson, now says in substance: "My name as used in connection with C. A. Watson & Sons did not mean me. It was merely a part of the name of a corporation in which I was not interested, either as officer, director, or stockholder. But he said nothing tantamount to this, either to the plaintiff or Barrett and said nothing and did nothing to correct in the mind of the plaintiff the very natural inference that he was dealing with a partnership in which C. A. Watson was concerned.

No question can well be raised as to the plaintiff's belief in and reliance upon the liability of C. A. Watson. Upon the undisputed evidence above summarized C. A. Watson held himself out as a partner and is liable to the plaintiff as such.

This conclusion is abundantly supported by authorities.

Speer v. *Bishop*, 24 Ohio State, 598. This case arose under practice corresponding with a petition for review. The original action was against Henry Speer et als., as co-partners under the name of Henry Speer & Company. It appeared that Henry Speer was not a member of the firm at the time the goods sued for were sold and that there had been no previous dealings between the plaintiffs and the firm of Henry Speer & Company. The court in its opinion says: "His (Henry Speer's) consent to such use of his name was, in effect, a continuing representation to those ignorant of the facts, that he was one of the firm."

Hamilton v. *Davis et al.*, 90 N. Y. S., 370. The defendants were sued as partners under the name of Davis & Darcy, upon a contract signed "Davis & Darcy, per Chas. L. Young." Davis and Darcy was in fact (unknown to the plaintiff) a corporation and the defendants contended that the action should have been brought against the corporation. The court holds, "These circumstances justified the court below to hold that the defendant Davis was estopped from denying that the contract was made with a firm of which he and Darcy were the members. . . . . It was apparent that the plaintiff was induced by Davis & Darcy to believe that she was contracting upon the faith of their liability as individuals and members of a firm. . . . . The corporation bore a name, to their knowledge, and with their approval and consent, which would ordinarily indicate a co-partnership, rather than an incorporated body."

Bourgeois v. *Bustanoby*, 138 N. Y. S., 366. This was an action for goods sold upon an order signed "Bustanoby Bros., per Louis Bustanoby." The defendants proved in defense that Bustanoby Brothers was a corporation. In ordering judgment for the plaintiff the court says: "The mere fact that a corporation existed under the name of Bustanoby Bros. does not prevent stockholders from making contracts individually, and, if they do make such contracts, they are personally liable; nor does it preclude the stockholders from forming a firm, and doing business under a firm name, even though the corporation may have also adopted the same name. In this case the order was given under circumstances equivalent to a direct representation that the firm of Bustanoby Bros., composed of Louis, Andre, and Jacques Bustanoby, was giving the order, and the plaintiff had a right to make the contract with them and to hold them liable."

See also the following authorities: *Haug* v. *Haug*, (Ill) 61 N. E., 1053; *Kahn* v. *Bowden*, (Ark.), 96 S. W., 126; *Cirkel* v. *Ellis*, (Minn.) 31 N. W., 513; *Kritzer* v. *Sweet*, (Mich.), 24 N. W., 764; *Harris* v. *Sessler*, (Tex)., 3 S. W., 316; *Ellis* v. *Jameson*, 17 Maine, 235; *Rice* v. *Barrett*, 116 Mass., 312; *Smith* v. *Hill*, 45 Vt., 91.

We think that the liability of C. A. Watson is abundantly shown.

But the verdict is against C. A. Watson, R. A. Watson and George Watson.

Whatever may be true of R. A. Watson, the undisputed evidence shows that George Watson was not a partner of C. A. Watson. It is not proved that he held himself out as such.

The fact that no affidavit under Supreme Judicial Court Rule X, was filed is not decisive.

A defendant sued as a partner who files no affidavit but who challenges the existence of the alleged partnership is precluded from demanding affirmative proof on that issue, but not from introducing negative proof. When not seasonably and on oath denied the existence of an alleged partnership is prima facie but not conclusively presumed. *Hewins* v. *Cargill*, 67 Maine, 554.

Mis-joinder was not pleaded in abatement. It was not necessary.

In actions of contract when the situation does not appear upon inspection of the pleadings non-joinder must be pleaded in abatement but mis-joinder is available under the general issue.

"It is a well established principle in the English Law that in assumpsit where too many defendants are joined the plaintiff must fail in his action though he prove an express or implied promise against some of them." *Cutts* v. *Gordon*, 13 Maine, 478.

"If it (mis-joinder) appears on the pleadings it gives rise to a demurrer; if it appears at the trial, to an adverse verdict." *State* v. *Chandler*, 79 Maine, 174.

Under the authority of R. S., Chap. 87, Sec. 14, the plaintiff by amendment might have stricken out the name of any defendant not liable.

This not having been done and the verdict being general against all defendants the entry must be,

Exceptions sustained.

LEWIS POULTRY COMPANY

vs.

NEW YORK CENTRAL RAILROAD COMPANY

and

MAINE CENTRAL RAILROAD COMPANY, Trustee.

Androscoggin. Opinion December 12, 1914.

Common carriers. Carmack Amendment. Rule before enactment of Carmack Amendment permitting common carriers to limit liability over their own lines. Rights of shipper under Carmack Amendment to bring action against any of the carriers of an interstate shipment.

Plaintiff's employe forwarded to them at New York City from Batavia, Iowa, a car of bagged hickory nuts. Shipment was made by the Chicago, Burlington & Quincy Railroad as initial carrier. In due course, the shipment reached destination, the car intact as the first carrier had sealed it, over the line of the principal defendant, the New York Central Railroad Company, as terminal carrier. Claiming a loss of 142 bags of nuts, plaintiffs sued the latter, counting on default of its responsibility as a common carrier of goods.

Held: The accountableness created by the Congress of the United States, on the part of the initial carrier of goods in interstate commerce, does not preclude the right to enforce responsibility against the particular carrier on whose line loss, damage, or injury was occasioned. Indeed, the statute expressly preserves such right. To maintain the action, when the suit is against other than the initial carrier, the evidence must establish the fact not merely that there was loss, damage, or injury to the shipment in the course of its transportation in interstate commerce, but that such loss, damage, or injury was caused by the carrier named as defendant.

Action on the case to recover damages on account of alleged negligence of defendant company. Defendant filed plea of general issue. Verdict for plaintiff in the sum of $884.89. Defendant filed motion for new trial. Judgment in accordance with opinion.

Case stated in opinion.

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

H. P. Sweetser, and Dana S. Williams, for defendant.

SITTING: CORNISH, C. J., SPEAR, HANSON, PHILBROOK, DUNN, MORRILL, JJ.

DUNN, J. October 19th 1915, I. Rosenfield and Isaac Lewis were copartners, and doing business under the firm name and style of Lewis Poultry Company. On that day an employe of theirs shipped to them at New York City, from Batavia in the State of Iowa, a car of bagged hickory nuts. Shipment was made by the Chicago, Burlington & Quincy Railroad as initial carrier. It reached destination, in the original car, under unbroken seal protection, over the line of the defendant, the New York Central Railroad Company, as terminal carrier, at ten o'clock at night on the 31st day of the same month. The car was unloaded and delivery of the consignment made on the very next day.

The issue of this case as it was tried, may be compressed into the compass of the question: In the beginning, how many bags of nuts were intrusted to the railroad at Batavia for carriage? The plaintiffs say 468. The defendant replies 326. Plaintiffs' witness, one Abraham H. Rosenfield, testified that he, in their behalf, purchased the nuts of sundry dealers in and about the Iowa town, and that, from time to time, within a period of three days next preceding the day on which the shipment was made, he loaded 468 bags of nuts into the car. His count, he continued, was verified by an agent of the railroad company, when and as it was made. Immediately after it was loaded, the car was sealed. When this had been done, a straight bill of lading was prepared from a printed form, and issued. It was signed by the shipper and by the agent of the carrier. In the bill the shipment is described as 468 bags of hickory nuts, in apparent good order, contents and condition of contents of packages unknown, weighing, subject to correction, 15000 pounds. On the bill, following description of the goods, as part of its written portion, are the initials O. R. S. L. & C., which another witness, a general foreman for the defendant company, testified on cross examination, against objection, were by usage of particular significance, in the specific line of the business of freight transportation, and which he translated as abbreviations for the words, Owner's Risk, Shipper's Load & Count. If the initials were within the general information of the court as symbols of ideas adopted by the community generally and forming part of the

language, and they in themselves were plain enough to permit judicial construction, it would be unnecessary to prove their import. *State* v, *Intoxicating Liquors*, 73 Maine, 278. Otherwise it would be competent to do so. In either event the proof would do no harm.

When in the course of its appointed journey, the car had arrived at a place called Weehawken in the State of New Jersey, it was put on board a float and transferred to ultimate destination, the Franklin Street station of the defendant, a dock without trackage, at Pier 23, North River, New York. From the float, as it lay at the pier, the defendant unloaded the car into a shed on the dock. Notice of arrival of the freight was given the self-same agent of the consignees who dispatched the goods originally. He promptly repaired to the station, made payment of the carrying charges, received a bill specifying 468 bags H. Nuts, and sought the freight. Defendant made delivery to him of 326 bags of nuts, and no more. Plaintiffs sued the terminal carrier, declaring on default of its responsibility as a common carrier of goods for the loss of 142 bags of nuts, and adding count in trover. There is dearth of principles and facts on which to found trover. One may lose the goods which he confided to a carrier for transportation, but a loss so sustained has characteristics which differentiate it from all others, as the physical features of a man distinguish him from his neighbors. Cause of action, if there be such, flows from default of the obligation of a common carrier. *Georgia, Florida & Alabama Railway Company* v. *Blish Milling Company*, 241 U. S., 190.

In one way or another, freight shipments have provoked numerous intricate controversies, which the courts have met with decisions, certain of which we epitomize: At the common law, if a common carrier of goods were tendered property to be transported along and beyond his own route or line to a point on the route or line of a succeeding carrier, it would be elective on his part whether to contract to carry safely to destination, or so to carry only over his own route or line, and safely to deliver the property to the next carrier. In the first case, from the very nature of the undertaking, he would agree that from the end of his own line, he would perform the contract through the medium of agents, that is to say, the carriers from the end of his route or line to destination, succeeding and participating in the carriage. And, as the act of the agent, within the scope of his

employment, is that of his principal, the original carrier's responsibility would attend the shipment in undiminished degree from the place where it was made to that at which it was, or should have been, safely delivered to the consignee. In the other suppositive case, his responsibility as carrier would continue from the place and time that he received the goods to the end of his route or line, where would attach the liability of forwarding them over the connecting route. A special contract not shown, the law would presume that he bound himself only to carry safely over his own line, and likewise to deliver to the next carrier. However, being free to contract either way: which contract he made was not infrequently mooted. If the first, and it were with respect to goods to be carried in interstate commerce, not necessarily as comprehensively as that expression has been defined by the Congress of the United States, but for the purpose of this discussion from a point in one State to a point in another State, it might happen that responsibility for want of befitting discharge of the contract never would be fixed.

Concerning the regulation of interstate commerce, the power of Congress is paramount and plenary. U. S. Const., Art. 1, Sec. 8, Clause 3. Until Congress spoke, there was a wide field which it was competent for the several States to occupy with legislation governing commerce national in character, and regulating the subject of its transportation. Regardless of whether they carried in intrastate or interstate commerce, without agreement between them, and in the absence of legislative regulation, the mere fact that their coaches regularly were driven to the same place, or that their boats plied to the same dock, or that the tracks of their railroads connected, would not establish business or contractual relation between independent carriers. Legislation regarding the duty of connected railroads began early in the history of their construction, perhaps even earlier in the State of Maine than elsewhere in the Union. As long ago as 1842 our Legislature enacted a general statute dealing with connected roads (1842, Chap. 9), and in 1854, Chap. 93, a tribunal was established to determine "the terms of connection, and the rates at which passengers and merchandise coming from the one shall be transported over the other." In these and related respects laws were enacted by the legislatures in other States. So far as the legislation, passed by the several States in the exercise of the police power, concerned interstate

commerce, it was superseded eventually by acts of Congress, but until made void it controlled. A practical trouble with the legislation of the States was that it lacked uniformity of obligation and of liability. The rules were almost as numerous and as various as the jurisdictions. And judicial decisions were not always in complete accord. Facts on which a carrier might be held liable in one State would exempt him in another. A well-intentioned plaintiff with a good cause of action and in the right court might find himself in the wrong State. Indeed, he might go from commonwealth to commonwealth, and from court to court, to meet defendants each in his turn successfully contending on the ground that loss, injury, or damage, if it had occurred, was from act or neglect not shown to have been his.

In this situation, and as additional to earlier laws by it enacted, Congress legislated on the extent of the liability of an initial carrier of goods in interstate commerce. It importantly changed The Interstate Commerce Act of February 4, 1887 by adding thereto, under date of June 29, 1906, what, in historic and euphonious brevity, has come to be known as the Carmack Amendment. For failure of performance of a contract for the carriage of goods by a common carrier in interstate commerce, that amendment permits the enforcement of responsibility as against the initial carrier, without reference to where in the whole line of transportation the loss, damage, or injury occurred. It imposes on the initial carrier the responsibility of a carrier from the point of shipment to the point of destination, with right of recovery over against the carrier who actually caused the loss. It makes the initial carrier contract as though he owned and operated a continuous line from the point of shipment to that of destination. It creates the relation of principal and agent between the initial carrier and other carriers participating in the carriage; and makes the former contract safely to carry the goods with carrier's liability through to the end of the line, even into the warehouse at destination, and beyond that safely to deliver the goods to the consignee. *Atlantic Coast Line Railroad Company* v. *Riverside Mills*, 219 U. S., 186; *Northern Pacific Railway Company* v. *Wall*, 241 U. S., 97; *St. Louis, Iron Mountain & Southern Railway Company* v. *Starbird*, 243 U. S., 593; *Ross* v. *Maine Central Railroad Company*, 112 Maine, 63; *Southern Railroad Company* v. *Prescott*, 240 U. S., 632; *Briggs Hardware Company* v. *Aroostook Valley Railroad Company*, 117 Maine, 321.

The liability thus imposed is inclusive of that which is caused by neglect as well as of that caused by positive act. As Chief Justice Knowlton aptly wrote: "One obvious purpose of Congress was to extend the provisions of the common law so as to make a common carrier receiving property for transportation liable for loss, damage, or injury to it, not only while it is in transit over his own lines, but while it is in the hands of a connecting carrier. . . . Although the liability stated is made statutory by the enactment, the statement of it, in the words 'for any loss, damage, or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass,' includes nothing beyond the liability at common law, except that for the undertaking of other carriers into whose possession the property may come. . . . The liability stated is for every kind of positive misconduct of the carrier affecting the property, and for negligence from lack of care or effort." *Bernard* v. *American Express Company*, 205 Mass., 254.

But the accountableness created by Congress on the part of the initial carrier does not preclude the right to enforce responsibility against the particular carrier, whether initial, intermediate, or terminal, on whose line the loss, damage, or injury was occasioned. Such right of action the statute expressly preserves. *Kansas City Railway Company* v. *Carll*, 227 U. S., 369. See, too, *Hayden* v. *Maine Central Railroad Company*, 117 Maine, 560. And the bill of lading, symbolic representative of the goods it itself describes, which it is mandatory on the initial carrier to issue, in its valid, applicable terms governs the entire transportation. *Georgia, Florida & Alabama Railway Company* v. *Blish Milling Company*, 241 U. S., 190; *Missouri, Kansas & Texas Railway Company* v. *Ward*, 244 U. S., 383. In so far as the bill of lading admits the quantity, the quality, or the condition of the goods at the time that they were delivered to the initial carrier, certainly as between the parties, it is a mere receipt, constituting an admission, not necessarily conclusive, which may be explained or contradicted by parol; but respecting the transportation and delivery of the goods it is evidence of a contract of affreightment that must be construed according to its terms. *Pollard* v. *Vinton*, 105 U. S., 8; *O'Brien* v. *Gilchrist*, 34 Maine, 554; *Witzler* v. *Collins*, 70 Maine, 290. The receipt of the goods lies at the foundation of the

contract to carry safely and deliver. If no goods were received by the carrier, albeit a bill of lading outstand, there could be no valid contract to carry safely and deliver; and such bill would be void even in the hands of a transferee in good faith and for value. *Pollard* v. *Vinton*, supra. If, by mistake or otherwise, more goods were receipted for than received, it would be competent for appropriate explanation to be made. *Pollard* v. *Vinton*, supra; *O'Brien* v. *Gilchrist*, supra; *Witzler* v. *Collins*, supra; *Arthur et al.* v. *Texas & C. Ry. Co.*, 139 Fed., 127; *Cohen Bros.* v. *Missouri & C. Ry. Co.*, 98 S. W. 437; *St. Louis & C. Ry. Co.* v. *Citizens' Bank*, 112 S. W., 154.

The question about which all the facts of this case center and cluster, and the answer to which shall determine the legal rights of the parties, recurs: How many bags of hickory nuts did the plaintiffs commit to the initial carrier for transportation? No other inquiry, as the case shapes, is germane. The car in which the shipment was made came to destination, so far as outward appearance was concerned, precisely as it left the starting point. About that there is no question. There had been no opportunity for loss or abstraction of any part of the load while the car was on the way. Thieves had not broken in and stolen. It had not been entered by anybody. It was intact as the Chicago, Burlington & Quincy Railroad sealed it, in the presence of the plaintiffs' witness, within five minutes after it was loaded. If the loading count was verified, as the witness testified that it was, by the agent of the Chicago, Burlington & Quincy, that agent did not testify either personally or by deposition. The bill of lading which he as agent issued bears on its face, in characters written by a pen that his hand guided, the monitory, exoterical inscription S. L. & C., signifying that the shipper's representation in that behalf formed the basis of recitals with respect to load and count. True the bill is to be construed strictly as against the carrier. Carriers issue such largely as a matter of business routine. At times, in the rush of traffic or for other reason, adequate opportunity is not always afforded the shipper to define or impress his view. Courts hold that the shipper may insist upon verification of his count and load. The Willie D. Sandoval, 92 Fed., 286. Here the plaintiffs say that the carrier counted the load; that its count agreed with that of their own man; and yet defendant's agent, in the exercise of an excessively abundant caution, when he made out the bill of lading, restricted it

as to load and count to the shipper's representations. And he underestimated by 19500 pounds the weight of the load that it is insisted he had personally counted! Mr. Abraham H. Rosenfield's testimony that he had and made delivery to the carrier of 468 bags of nuts stands alone. There are no corroboratory facts, excepting the quantity restricted bill of lading and the freight bill. The latter bears inherent evidence that it was prepared from the bill of lading. That the charges for carrying were paid on arrival of the goods is not of potency greater than prepayment for the transportation of the freight would have been. The plaintiffs' case must stand or fall on the testimony of Mr. Rosenfield, the man who loaded the nuts, who as shipper signed the bill of lading with its material limitation, and did not protest; and who received delivery of the goods at destination.

For the defendant it appears: The car aboard, the float which was towed from the New Jersey shore was made fast to the New York pier; a shed covered the dock save that, on the river projecting end, there was a space about two feet in width, presumably about as long as the dock was wide, on which the floatmen walked when they fastened their boats to the wharf; from the shed this space was accessible only from the tug dispatcher's office; seal protection of the car on its arrival was complete. It was opened and unloaded into the shed, where watch and ward was kept, and men not there habitually employed had admittance only by pass. Employees of various grades had to do with the freight, each independently of the other. The freight was counted as it came from the car. Excepting as he found it, the man who counted out the load, was not advised as to the quantity of freight supposed to be in the car. He made written report of his count to a verifying clerk, to whom also came report from the man who made delivery of the goods to the consignees. When the reports were compared with a record already filed with the verifying clerk, a "shortage" was indicated; fewer bags of nuts were found in the car than the way-bill and bill of lading called for. But the record with which the reports were compared, in fairness it should be remembered, was based on the representation of the plaintiff's servant and witness, concerning the quantity of the load, to the agent in Batavia when the nuts were shipped.

Which count, all things considered, was the more accurate? That made by Mr. Rosenfield when he, at intervals of time, in the course of two or three days, loaded the nuts into the car at Batavia, as he purchased them in small lots from dealers there and thereabouts, or that of the defendant, under its system of checks and balances, as the freight was unloaded from the car into the shed a plank's length away, and again as delivery was thence made to the consignees. The quantity of nuts shipped, the quantity received, the quantity, if any, that was lost, and if lost, whether by the positive act or neglect, not of some carrier in the course of the transportation, but whether by the act or neglect of the defendant on its line, for this suit is not against the initial carrier, were questions of fact for the jury. The decision of the jury counts for much. It is not to be lightly annulled. But weighing the evidence in cold, calculating, unimpassioned manner, it is our conclusion that the jury misapprehended the evidence, and from it drew inferences so erroneous as to make it the clear duty of the court to set the verdict aside.

Motion sustained.
New trial granted.

JOSEPHINE T. NASH

vs.

BENNETT BENARI,

Administrator of the Estate of Sarah Wood Lemon.

Executors and Administrators. General rule as to authority of Administrator in one State extending to the assets of his Decedent in another State. Rule of law as to a judgment in one State against an Administrator being res adjudicata in a suit for the same account in another State. Rule as to such judgment being admissible in action between the same plaintiff and the defendant as Administrator in another and separate State.

Androscoggin. Opinion December 12, 1918.

At the time of her death, the domicile of the defendant's intestate, one Sarah Wood Lemon, was in Massachusetts. She left property for administration there, and also left property to be administered in the State of Maine. The same person was appointed as administrator in the different states, and accepted the distinct trusts. The present plaintiff previously sued defendant, in his representative capacity, in Massachusetts, and there recovered judgment against the estate of the decedent. That judgment remaining largely unsatisfied, she sued the administrator in Maine, on the very demand, less subsequent payments thereon, that had formed the basis of her case in Massachusetts. Defendant invoked the judgment recovered against him as domiciliary administrator as special matter of defense in bar of the suit in this jurisdiction, and took exception to the ruling of the trial court excluding the Massachusetts judgment.

Held:

1. The exclusion of the offered evidence was in accordance with the established doctrine of the courts of this country. Where administrations of the estates of the same intestate are granted to different persons in different states they are so far deemed independent of each other that a judgment obtained against one will furnish no right of action against the other, to effect assets received by the latter in virtue of his own administration, for in contemplation of law there is no privity between him and the other administrator. Each administration is sovereign with in its own limits.

2. That one and the same person is administrator in both states does not alter the doctrine. The judgment is against the defendant in his representative capacity, that he shall pay the debt of the intestate out of the funds committed to his care. Such representation does not extend beyond the assets of which the court that appointed him has jurisdiction. Another administrator in another state may be subject to a like judgment upon the same demand. The law and courts of a state can only affect persons and things within their jurisdiction. Consequently, both as to the administrator, and the property confided to him, a judgment in another state is a transaction between other parties.

Action of assumpsit to recover for services rendered by plaintiff to defendant's intestate. Defendant filed plea of general issue and, by way of brief statement, as a special matter of defense, pleaded a certain foreign judgment. Verdict for plaintiff in the sum of $1195.91. Defendant filed exceptions to the ruling of presiding Justice, excluding the foreign judgment which defendant had specially pleaded and offered in evidence in bar of plaintiff's suit. Judgment in accordance with opinion.

Case stated in opinion.

Payson & Virgin, for plaintiff.

Tascus Atwood, Robert J. Curran, and Dana S. Williams, for defendant.

SITTING: SPEAR, HANSON, PHILBROOK, DUNN, WILSON, DEASY, JJ.

DUNN, J. At the time of her death, intestate, the domicile of Sarah Wood Lemon was in Massachusetts, She there left property for administration, and she also left property to be administered in the State of Maine. Administrations were granted in the different States, first in Massachusetts and later in Maine, to one Bennett Benari. He accepted the distinct trusts. Alleging that she had rendered personal services for the intestate in her lifetime, for which payment was not made, the plaintiff in the present case previously sued Mr. Benari, in his representative capacity, in Massachusetts. In that suit, in the Superior Court in Suffolk County, she recovered judgment against the estate of the decedent. That judgment remaining largely unsatisfied, she brought this action against Benari as administrator in Maine, counting on a claim differing only from that which formed the basis of her case in Massachusetts, in that it gives credit for payments there made on account, since the commencement

of the original action. As special matter of defense in bar, supplemental to the general issue, and by way of brief statement under it, the State of Maine administrator invoked the judgment recovered against him as domiciliary administrator in Massachusetts. Plaintiff by counter brief statement replied that the suits were between different parties. Evidence of the Massachusetts judgment was excluded by the trial court, and an exception allowed.

The exclusion of the offered evidence was in accordance with the established doctrine of the courts of this country. Where administrations of the estates of the same intestate are granted to different persons in different states they are so far deemed independent of each other that a judgment obtained against one will furnish no right of action against the other, to affect assets received by the latter in virtue of his own administration; for in contemplation of law there is no privity between him and the other administrator. Story, Conflict of Laws, Sec. 522; *Aspden* v. *Nixon*, 4 How., 467; *Stacy* v. *Thrasher*, 6 How., 44; *Hill* v. *Tucker*, 13 How., 458; *McLean* v. *Meek*, 18 How., 16; *Noonan* v. *Bradley*, 9 Wall., 394; *Reynolds* v. *Stockton*, 140 U. S., 254; *Smith* v. *Madden*, 78 Fed., 833; *Low* v. *Bartlett*, 8 Allen, 259. As was said by Mr. Justice Virgin in *Fowle* v. *Coe*, 63 Maine, 245; "..... the answer is, that the administrations of the estates of the same decedents in different states where there are creditors and property belonging to the same estate, are regarded as wholly independent of each other; that there is no privity between the different administrations; but that each is sovereign within its own limits."

In the case at bar, the fact that one and the same person is administrator in both States does not alter the doctrine. The Massachusetts judgment is against the defendant in his representative capacity there. That representation does not extend beyond the assets of which the Massachusetts court that appointed him has jurisdiction. *Stacy* v. *Thrasher*, supra. Letters of administration are without extra-territorial force. Story, Confl. of Laws, Sec. 512; *Smith* v. *Guild*, 34 Maine, 443; *Saunders* v. *Weston*, 74 Maine, 85; *Smith* v. *Howard*, 86 Maine, 203; *Brown* v. *Smith*, 101 Maine, 545. The two administrations are entirely unrestricted by each other. *Low* v. *Bartlett*, supra; *Ela* v. *Edwards*, 13 Allen, 48. In *Johnson* v. *Powers*, 139 U. S., 156, at page 159, Mr. Justice Gray, in delivering the opinion of the court, says: "A judgment recovered against the administrator of a

deceased person in one state is no evidence of debt, in a subsequent suit by the same plaintiff in another state, either against an administrator, whether the same or a different person, appointed there, or against any other person having assets of the deceased.

In *Stacy* v. *Thrasher*, supra, a judgment recovered in one State, on an alleged debt of the intestate, was held to be incompetent evidence of the debt in a suit brought by the same plaintiff in the Circuit Court of the United States, held within another State, against an administrator there appointed of the same intestate. In that case it was urged, as here, that the principle indicated was not applicable because of the provision of the Constitution, that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. U. S. Con. Art. IV, Sec. 1. In speaking the speech of the court, Mr. Justice Grier said: "The judgment is against the person of the administrator, that he shall pay the debt of the intestate out of the funds committed to his care. If there be another administrator in another state liable to pay the same debt, he may be subject to a like judgment upon the same demand; but the assets in his hands cannot be affected by a judgment in which he is personally a stranger. The law and courts of a state can only affect persons and things within their jurisdiction. Consequently, both as to the administrator and the property confided to him, a judgment in another state is res inter alios acta."

The ruling of the trial court was right.

Exceptions overruled.

M. J. McIVER, et al. *vs.* NAPOLEON BELL, et al.

Aroostook. Opinion December 12, 1918.

Lease and agreement. Mortgage. Evidence. Exceptions. Waiver. Equitable defenses and pleading.

An Aroostook County farmer, of the name of Napoleon Bell, went from his home to the store of the plaintiffs, and negotiated with them for a supply of fertilizer. Their trading merged in a written agreement under seal, variously styled in the case a "contract" or "lease", which concerned the defendants' farm and its contemplated crop, and constituted a security for the payment of the purchase price of the fertilizer; a payment the one was obligated to make, and the others were bound to receive, in potatoes at an agreed price of one dollar a barrel.

About three months later, after Bell had received the commercial manure, he and his wife gave to the plaintiffs a mortgage of the aforesaid farm, the recited consideration corresponding in amount with that of the charge for the fertilizer, namely $234.00. The mortgage is defeasible, to quote its terms, if the mortgagor, "shall truly perform the conditions of the potato contract and lease . . . and in default thereof the sum of Two Hundred and Thirty-four Dollars shall immediately become due and payable. This mortgage is given as collateral security for the performance of said contract and does not deprive the grantees of any right of action for breach of its conditions. If the property herein described is sold before fall the mortgage will be discharged on payment of $234.00."

Well within the appointed time, Bell delivered to the plaintiffs one hundred and thirteen barrels of the specified kind of potatoes, actually worth somewhat more than $22.00 in excess of the amount of the charge for the fertilizer. He declined to deliver more to apply on the fertilizer account. Thereupon the plaintiffs brought this action of covenant broken, counting on breach of the original agreement.

Held:

1. That the two documents, although executed at different times, were parts of the same transaction and that in respect to damages they should be taken and construed together.

2. The rights and liabilities of the parties at first were fixed by the lease or contract. It was perfectly competent for them in succeeding time to waive or annul that contract, or to add to or to subtract from it, or to give and take security for its fulfillment or to vary and modify its terms. The two documents should be read together and each construed with reference to the other, to the end that the intent of the parties, what they particularly meant, as they defined and recorded that meaning, shall control.

Action for covenant broken. Defendant filed plea of general issue; also brief statement setting forth in substance an equitable plea of defense. Verdict for plaintiff in the sum of $443.47. Defendant filed motion for new trial; also exceptions to certain rulings of presiding Justice. Exceptions sustained.

Case stated in opinion.

George J. Keegan, and Powers & Guild, for plaintiff.

L. V. Thibodeau, and R. W. Shaw, for defendant.

SITTING: CORNISH, C. J., SPEAR, HANSON, DUNN, MORRILL, JJ.

DUNN, J. An Aroostook County farmer, of the name of Napoleon Bell, went from his home in Hamlin Plantation to the store of the plaintiffs in the town of Van Buren, and negotiated with them for a supply of fertilizer. Their trading merged in a written agreement under seal, dated February 10, 1916, variously styled a contract or lease. By the terms of that agreement, for a consideration recited as two hundred and thirty-four dollars and additionally good and sufficient, Bell and his wife purported to "lease and convey" to the plaintiffs, "my farm," for the term of ten months from the day of the date of the writing. They further agreed to carry on, plant, and sow the farm, at their own expense, to the approval of the plaintiffs; and, in a husbandlike manner, to cultivate, harvest, and store the crop under the supervision, control, and direction of the latter. Moreover the defendants covenanted to deliver to the plaintiffs, in Van Buren, between September 20th and October 30th 1916, from the contemplated crop if sufficient, but absolutely in any event, two hundred and thirty-four barrels of Aroostook Prize potatoes at one dollar a barrel, or to pay the current value thereof. The plaintiffs agreed to pay Bell the stipulated price for potatoes of that quantity and variety, and to "release and convey" to him and his wife, all the remainder of the crop. Soon following upon the execution and delivery of the contract, and as the only consideration therefor, Bell received fertilizer of the plaintiffs for which they charged him two hundred and thirty-four dollars. Stopping here, the "lease" constituted a security for the payment of the purchase price of the fertilizer, which payment the one was obligated to make, and the others were bound to receive, in potatoes at an agreed price.

But the negotiations did not stop there. Later on, to be precise as to time, on the fourth day of May in the same year, after Bell had received the commercial manure, he and his wife gave to the plaintiffs a mortgage of the aforesaid farm. The mortgage, in which the consideration is stated as two hundred and thirty-four dollars, is defeasible, to quote its terms, if the mortgagor,—

> "shall truly perform the conditions of the potato contract and lease signed by said Napoleon Bell and Evelyn Bell in favor of said M. J. McIver and W. E. Watson, doing business under the title and firm name of McIver & Watson at Van Buren, Maine, and in default thereof, the sum of Two Hundred and Thirty-four Dollars shall immediately become due and payable. This mortgage is given as collateral security for the performance of said contract and does not deprive the grantees of any right of action for breach of its conditions. If the property herein described is sold before fall the mortgage will be discharged on payment of $234.00."

From the time of making the lease, Bell continued in possession of the farm, and there raised a crop from which, well within the appointed time, he delivered to the plaintiffs, for credit on his indebtment to them, one hundred and thirteen barrels of the specified kind of potatoes, actually worth two hundred fifty-six dollars and eighty cents, or somewhat more than twenty-two dollars in excess of the amount of the charge for fertilizer. Afterward, through the autumn and winter, Mr. Bell himself, or his son for him, sold the plaintiffs, on the market, from his crop, about two hundred other barrels of potatoes, for which, when and as purchased, they paid him at prevailing prices. But he never delivered more than the one hundred and thirteen barrels to apply on the fertilizer account, and when, about the last of October, he was requested, as the plaintiffs say, to completely perform his contract, "he sent word by the boy that his contract was filled."

In April of the next year, plaintiffs brought covenant broken against Bell and his wife, counting on breach of the original agreement, for that the defendants neither delivered the potatoes nor paid the value thereof. The defendants, by brief statement under the general issue,

invoked as an equitable defense (R. S., Chap. 87, Sec. 18,) that plaintiffs declared on what, in effect, was a chattel mortgage given to secure payment of the price of the fertilizer, and that, when the suit was commenced, both the chattel and the later real estate mortgage were then already fully paid and satisfied. Verdict was for the plaintiffs in the sum of $443.47. The case is here on motion and exceptions by the defendants.

Among the questions that arose at the trial was whether the lease and the real estate mortgage, both of which were in evidence, should be considered in concert. The defendants requested an instruction, in substance, that the two documents, although executed at different times, were parts of the same transaction, and that, in respect to damages, they should be taken and construed together. We are of opinion that the instruction should have been given. The rights and liabilities of the parties at first were fixed by the lease or contract. It was perfectly competent for them in succeeding time to waive or annul that contract, or to add to or to subtract from it, or to give and take security for its performance, or to vary or modify its terms. In the terse expression of Judge PETERS, parties may contract about a contract as well as concerning anything else. *Storer* v. *Taber*, 83 Maine, 387. The lease and the mortgage relate to the same subject-matter. The one refers in terms to the other, and they together embody the transaction. The two should be read together, and each construed with reference to the other, to the end that the intent of the parties, what they particularly meant, as they defined and recorded that meaning, shall control.

The mortgage was in the usual form, reciting a consideration of $234.00, and no other. The defeasance clause provides that on default of payment "the sum of $234.00 shall immediately become due and payable." The word "immediately" is unusual and as here used becomes significant in its bearing upon the intent and purpose of this mortgage. An unusual word, like a technical word, sometimes furnishes a key for the solution of a matter under consideration. While the word "immediately" added nothing to the plaintiff's legal right of foreclosure it is yet suggestive of what he wished to accomplish by means of the mortgage. The direct force of this word was to liquidate the amount due and enable the plaintiff to bring an action at once on default and not await foreclosure.

It also will be seen that this mortgage presents two unusual features. It made the amount "immediately due and payable" and was not accompanied by any promissory note as evidence of the consideration named. But making the amount "immediately" due on default obviated the necessity of such evidence. The amount was agreed upon in definite, written terms. This was liquidation. Webster's New International Dictionary defines "to liquidate" as follows: "To determine by agreement the precise amount of indebtedness." Words and Phrases, Vol. 5, page 4173. "To reduce to precision in amount." Idem 5174, "A claim is liquidated when the amount due is fixed by law or has been ascertained and agreed upon by the parties." This is what the language of the mortgage shows was done in this case. The amount was made certain and payable at once upon the contingency named, as would a promissory note be definite in amount and payable at once upon the expiration of its due date.

But an agreement to liquidate is binding upon both parties. One party cannot claim liquidation if it is to his advantage and disclaim if to his disadvantage.

Following the defeasance clause of the mortgage, is found the proviso upon which the plaintiffs found this action, viz: "That the mortgage does not deprive the grantors of any right of action for breach of its condition," that is, the condition of the lease. The consideration of the lease is named as $234.00. The exact amount due the plaintiff for phosphate. This amount was, however, payable in potatoes at $1.00 per barrel. But the exact amount the plaintiffs would receive, or the exact amount the defendant would be required to pay in this way, was uncertain. If the potatoes were worth more than $1.00 per barrel the plaintiff would gain by holding to the terms of the lease; if less than $1.00 per barrel, they would lose and the defendant would gain. It, therefore, was not unreasonable that they should get together and agree upon the exact amount that should be due, and secure its payment by a mortgage of real estate, regardless of the lease or the price of potatoes named in it. The plaintiffs had to refer to the lease in the mortgage for the lease was the only consideration for the mortgage.

The mortgage itself is evidence that the parties did get together.

Accordingly, we think a reasonable construction of this clause is that the plaintiffs should not be confined to a foreclosure of the mort-

gage, but should still retain their right of action under the lease for the sum agreed upon, liquidated at $234.00. This construction does justice to each of the parties, carries into effect both the lease and the mortgage and meets the presumption of law that the mortgage was intended by the parties to have some effect and be something more than a mere nullity. For it would be unreasonable that the plaintiffs should have a right of action under the mortgage for one sum and under the lease for an entirely different sum at their election.

Hence the requested instruction: "That the contract between the parties at the time the suit was brought is shown by the original lease and the mortgage of May 4, and when considering the amount of damages both writings should be taken into consideration" should have been given, and the exceptions to a refusal to so instruct the jury is sustained.

It is unnecessary to consider the other exception or the motion, as this particular exception is vital to the determination of the case.

Exceptions sustained.

WILLIAM HANSCOM *vs.* ELLA J. BLANCHARD, et al.

Androscoggin. Opinion December 13, 1918.

Agreements for the sale of real estate. Giving of options. General rule in regard to rights of parties where options have been given. General rule covering the right of brokers to have commissions on sales of real estate. Rule where the broker may bring the parties together but the supposed purchaser fails to carry out his agreement in regard to transfer.

This is an action for the recovery of commissions for the alleged sale of real estate and comes up on report. Oramandel Blanchard makes no defense. But Ella J. Blanchard defends upon the ground that the plaintiff did not make a sale or procure a purchaser, in accordance with his contract of brokerage.

Held:

1. That the parties whom the plaintiff brought to the defendants as purchasers entered into a contract of purchase that bound them as optionees only.
2. That an option is neither a sale nor an agreement to sell; but only a right to buy.
3. To entitle a broker to his commissions the option must be exercised, unless prevented by the sellers.
4. That in this case the exercise of the option was not prevented by the sellers.
5. That the plaintiff by bringing these parties together did not earn his commissions.

Action on the case to recover commissions claimed as due plaintiff on account of sale of defendants' lands. The defendant, Oramandel Blanchard, entered no appearance, and in behalf of Ella J. Blanchard a plea of general issue was filed. At the close of testimony, by agreement of parties case was reported to Law Court. Judgment in accordance with opinion.

Case stated in opinion.

McGillicuddy & Morey, for plaintiff.

E. E. Richards, Frank W. Butler, and W. H. Judkins, for defendant.

SITTING: CORNISH, C. J., SPEAR, HANSON, PHILBROOK, DUNN, MORRILL, JJ.

SPEAR, J. This is an action for the recovery of commissions for the alleged sale of real estate and comes up on report. Oramandel Blanchard makes no defense. But Ella J. Blanchard defends upon the ground that the plaintiff did not make a sale or procure a purchaser in accordance with his contract of brokerage. The first contract between the plaintiff and defendants was of the following tenor: "Stratton, Me., March 28th 1916. In consideration of $10. Ten Dollars We Mrs. Blanchard and Mr. O. Blanchard Gives Wm. Hanscom An Option Until July 1st, 1916 on our land known as the Hedghog land and Bemis land at $10. ten Dollars per acre as the deeds calls for about 2270 acres with all buildings thereon. And agree to go show the Lines and Timber to any Customer he gets, we agree to pay Wm. Hanscom as a commission whatever he furnishes a customer for over the said ten dollars." She contends this was not a contract for commission, but an option to buy. Construing this instrument with reference to all its phraseology, although it is somewhat mixed and inconsistent in its language, we are of the opinion that it was intended by the parties to be regarded as a contract for a commission on a sale above ten dollars per acre. The language "to any customer he gets" and to pay "as a commission whatever he furnishes a customer for over the said ten dollars" seems to quite clearly indicate that the defendant understood that the plaintiff was to realize his commission from a sale to another, and not from a purchase by himself, under the word "option" as used in the first part of the instrument. The subsequent action of the parties also goes to show that this was their understanding, since the defendants, by virtue of parties being introduced under this agreement, did proceed to make an option to the parties thus produced.

Without question the plaintiff by virtue of the above instrument brought parties to the defendant, who were desirous of purchasing the tracts of land described therein and with these parties the defendants, themselves, made a contract for a disposal of the lands described. The interpretation of this new instrument determines the rights of the parties in this case. If it was a contract of sale, by which the parties were mutually bound, then the plaintiff would be

entitled to his commission. *Veazie* v. *Parker*, 72 Maine, 443. It was the duty, however, of the broker in the first instance to procure a purchaser who was ready and willing to meet the exact terms of his contract to make a sale. Even an offer of better terms will not suffice. 4 R. C. L., 313, 52. But if a broker introduces parties with whom the seller makes a different contract, resulting in a sale, he is entitled to his commission. *Veazie* v. *Parker*, supra; *Ward* v. *Cobb*, 148 Mass., 518; *Roche* v. *Smith*, 176 Mass., 595; *Johnson* v. *Hallend*, 211 Mass., 363, 4 R. C. L., 413, 52. See also exhaustive note, *Hoadley* v. *Savings Bank of Danbury, Conn.*, L. R. A., 44, 32.

The present case, however, does not fall within either of the above rules entitling a broker to his commission. The contract between the parties to the alleged sale, upon which the plaintiff claims his commission, was not one by which the parties were mutually bound; it was unilateral, the vendor alone was bound. The character of this contract appears from an observation of its terms. It describes the parties, the tracts of land to be conveyed, the terms of payment, the price per acre, the time of performance and the consideration which is to be allowed as an initial payment upon the consummation of the contract. The concluding paragraph of this instrument is as follows: "In the event that the party of the second part shall fail to fulfill the agreements herein entered into, then the sum of one thousand dollars already acknowledged as paid shall be forfeited to the party of the first part." This clause, read in connection with the rest of the contract, clearly confines the contract to the exercise of an option on the part of the vendees. For definition, see Option, Words and Phrases, Vol. 6; Second Edition, Vol. 3.

An agreement in writing to give a person the option to purchase lands within a given time, at a named price, is neither a sale nor an agreement to sell. It is simply a contract by which the owner of property agrees with another person that he shall have the right to buy his property at a fixed price at a given time. The rights of a broker in case of an option granted by his principal to a would be purchaser are well stated in 4 R. C. L., 315, 53. "Where a broker is engaged to negotiate a transfer or sale of certain real or personal property, the mere procurement of a prospective purchaser who enters into an option to buy the property in question but never in fact does so is not sufficient to constitute a performance by the broker

of his contract of employment, and he is not entitled to his commissions, nor even to a percentage of the earnest money deposited by the defaulting optionee. The fact that the employer consents to entering into a conditional or optional contract to purchase cannot be construed as a waiver by him of the original terms of employment and an acceptance of such services as a complete performance on the part of the broker. It is a matter of common knowledge that sales are frequently effected through options. By granting the option, the owner is merely helping to bring about the sale which he employed the broker to make. It is a step in that direction. It is not the end, but rather the means to an end. Consequently such action on the part of the owner does not imply that he has made a new contract with the broker by which he agrees to pay for something different from the services he originally contracted for, but merely indicates a desire upon his part to aid the broker in the performance of the original agreement." See also exhaustive note in *Warnekros* v. *Bowman*, 43 L. R. A., (N. S.), 91. It is therefore evident as a matter of law, that an optional contract to purchase land is not a compliance with a broker's contract to sell land. A broker has not found a purchaser so as to be entitled to compensation until the option has been exercised and the contract completed.

There is no claim that the option in the present case has been completed by a sale of the property in accordance with its terms. But the fact that an option for the purchase of real estate has not been exercised does not, per se, conclude the broker. It is well settled that if the optionee is ready and willing to exercise the option, but is prevented by the refusal of the owner to comply with the terms of the agreement, the broker is then entitled to his compensation. The rule is stated in 4 R. C. L., 315, 53, as follows: "While, as above shown, according to the great weight of authority the mere procuring of one to take an option does not entitle the broker to commissions if the optionee elects not to exercise the same, yet it is apparently well settled that the broker is entitled to his commissions if the option is actually exercised, or the optionee is willing to exercise it but is prevented from so doing by the refusal of the owner to comply with his part of the agreement." See also L. R. A., (N. S.), 94, note.

This brings us to the one question of fact involved in the case: Who was in fault in refusing to abide by the terms of the option? It

is not our purpose to discuss the evidence in detail, as it is so fragmentary as to just what the optionees were able to do after getting the option, as to practically preclude such discussion. In the first place it is apparent that the optionees were not able to finance the proposed purchase. They were evidently trying to find some one whom they could induce to finance it for them. But the evidence fails to show that any one appeared who was ready or offered to comply with the terms of the option. But in order to hold the option this must be done. It is as much incumbent upon an optionee to comply with the terms of his option, as upon a direct contractee in an agreement of sale, to comply with the terms of his agreement. And we have before seen that such compliance is minutely required. R. C. L., 315, 52, supra. The option provided that "on or before the first day of August, 1916, the parties agree to meet at Farmington" where they were to carry the agreement into effect. Nothing was done at this time. The optionees did not appear. On the 31st day of July one of them, Mr. Mason, met the defendant on her way to Farmington and said to her: "I have been unable to raise this money, but I have a new proposition which is a cash deal. I have an explorer by the name of Mr. West with me, and I have some bankers that are interested, and upon the report of Mr. West, if his report is favorable I can put in the money for the whole tract, and I would like a little more time. Q. What answer did you give him? A. I told him that I was on my way to Farmington to carry out my part of this agreement and in event this deal didn't go through and he wanted—no, I asked how much time that he wanted. He stated, "Let me see. It will take two or three days to explore the land, a day to return to Lewiston, a day to make my report," he says, "Mrs. Blanchard, one week is sufficient." She gave Mr. Mason one week.

That was an entirely new contract, proposed by the optionee Mr. Mason, and relieved the defendant from the charge of any default, in not being present at Farmington, on the first day of August, to carry out the terms of the option. This option, declared on in the plaintiff's writ, and upon which he relies as the contract of the parties procured by him, became invalid after August first, both by lapse of the time, and by the substitution of a new contract. But the new contract was to run a week, and nothing being done within this time, all the contractual relations of the optionee and the defendant early in August

came to an end. The evidence of Mrs. Blanchard is fully corroborated by Mr. John C. West, the very party referred to by Mr. Mason in the conversation above testified to by Mrs. Blanchard. Mr. West had been approached by Mason and O'Brien to finance this proposed purchase. He accordingly in September had an interview with Mrs. Blanchard in regard to the matter, which on direct examination he recites as follows: Q. What did she say to you at this time that you had this conversation with her? A. I talked with her about financing the deal and taking it up on a cash basis. I had parties that had the money and had a proposition to finance it, to take up the whole tract, as well as other tracts there that we have under consideration. And I explained it to her, and she said that well, she didn't know but she would look at it favorably, but she wanted to consult someone, and I told her that I wanted her to. I says "It means a cash deal if I can have the deeds in a certain way." I explained it. He saw her again the next day. In answer to the question, What did she say then, he testified: A. She said that she couldn't consider it, it was only a drag out, or something like that, and it was all off; and I told her under those circumstances I wasn't going to say any more about it—probably the other parties would have something to say, but as far as I was concerned, I should stop.

Neither the testimony of Mrs. Blanchard nor Mr. West is in any way contradicted or modified. It is accordingly clear that the optionees were never prepared to comply with the terms of their option, nor did they furnish any one who was. They were working upon an entirely new scheme of trading upon a cash basis to which the defendant was willing to accede and gave an option, on a cash basis, for a week. It accordingly results that the optionees, in their agreement of July 5, failed to comply with its terms, and that their option was lost by their own fault and not the fault of the defendant, Ella J. Blanchard.

Judgment for defendant, Ella J. Blanchard.

THE PEOPLES' TRUST COMPANY

vs.

MOUNT WALDO GRANITE WORKS,
and Its Trustees in Bankruptcy,
and THE INGERSOLL SARGENT DRILL COMPANY.

Waldo. Opinion December 13, 1918.

Right of holders of bonds to enforce payment of same. Rule where the bonds were given as collateral security. Right of holders of such bonds to have trustee under the trust mortgage proceed to enforce the conditions of the mortgage. Rights under trust mortgage where the records fail to show that same has been properly recorded.

This is a bill in equity, brought for the purpose of foreclosing a mortgage alleged to have been given by the Mount Waldo Granite Works to the Peoples' Trust Company, a banking corporation of New York.

The bill alleges the issuance by the Mount Waldo Granite Works of $150,000 of its negotiable bonds, secured by a mortgage upon its plant and property. At the time the suit was brought the bonds were held by a number of banks in Maine as collateral security for the notes of the Mount Waldo Granite Works.

All the records of the corporation were destroyed by fire; but in the affidavit of Mr. Albert Pierce, clerk and treasurer of the corporation, used by agreement as his testimony, he distinctly states that every necessary vote was passed by the corporation and recorded. We also have before us a copy of the trust deed which recites that the maker, the Granite Works, passed the necessary votes.

The trust deed purports to convey personal property as well as real property, but there was no proof of the record of the deed in the town of Frankfort, where the personal property was situated.

Held:

1. That these facts constitute sufficient evidence of authority.
2. That a party holding bonds as collateral for the security of his debt is, to the extent of his debt, at least, subrogated to such an interest in the property mortgaged to secure the bonds as will enable him to require the trustee, when authorized by the mortgage, to foreclose the mortgage for payment of his debt.

3. If there is personal property described in the trust deed, not forming a part of the realty, that such personal property cannot be foreclosed under the mortgage, and that what articles are so attached to the realty as to become real estate, and what so separated as to retain their character as personal property, must be ascertained.

Bill in equity to foreclose a trust mortgage given by the Mount Waldo Granite Company to the Peoples' Trust Company of the State of New York. Cause was heard upon bill, answer and replication. Judgment in accordance with opinion.

Case stated in opinion.

A. S. Littlefield, for plaintiff.

E. E. Richards, and Arthur Ritchie, for defendants.

SITTING: CORNISH, C. J., SPEAR, HANSON, PHILBROOK, DUNN, MORRILL, JJ.

SPEAR, J. This is a bill in equity, brought for the purpose of foreclosing a mortgage alleged to have been given by the Mt. Waldo Granite Works to the Peoples' Trust Company, a banking corporation of New York.

The bill alleges the issuance by the Mt. Waldo Granite Works of $150,000 of its negotiable bonds, secured by a mortgage upon its plant and property. At the time the suit was brought the bonds were held by a number of banks in Maine as collateral security for the notes of the Mt. Waldo Granite Works.

The plaintiff claims two defaults in the conditions of the mortgage given to secure the bonds; first, a failure by the Granite Works to pay the coupons on said bonds, and, second, a failure to pay the taxes duly assessed thereon. On July 14, 1901, the Mt. Waldo Granite Company, by its officers, proceeded to execute a deed of trust to the Peoples' Trust Company to secure the payment of said bonds, ratable and equally, without preference one over another, and also to secure the coupons attached thereto. The indenture of mortgage was recorded in the Registry of Deeds for the County of Waldo, and purported to mortgage the property, real, personal and mixed, and all fixtures, rights, privileges, franchises and easements, and rights under the lease of all and every kind owned and used by the party of the first part in its business of quarrying and selling granite, as described

in said mortgage. Among the described real estate are the quarries, quarry-fixtures, railroad, engines and engine-houses, blondin cable, boarding-houses, stables, shops and dwelling-houses of the Mt. Waldo Granite Works. On another lot of real estate was conveyed the railroad, and blocks with storehouses and derricks thereon belonging to said corporation, the real estate being subject to certain agreements made by the said corporation, duly recorded. The mortgage also covered all the derricks, engines, cars, implements, tools and apparatus of every kind and nature now owned or which may hereafter be owned by said company, used or to be used in quarrying, finishing and shipping granite. The mortgage also provided that whenever any of the property, fixtures or implements described shall have become destroyed or worn out they should be replaced by the mortgagor, so that, at the end of the term the property should be in the same condition that it was at the date of the deed. It was further provided that, upon default of payment of interest upon the aforesaid bonds, or any of them, such default continuing for ninety days thereafter, and payment of said interest having been demanded and refused, all of said bonds should, at the option of the respective owners, become immediately due and payable, principal and interest, and that the Mt. Waldo Granite Works agreed to pay and discharge all taxes, assessments or other charges that are now a lien, or hereafter shall be legally levied, assessed or imposed, become a lien upon the premises or any part thereof. It is agreed that default was made in the payment of coupons attached to said bonds for July, 1909 and all subsequent coupons, and that in January, 1916, formal demand was made for payment of coupons attached to said bonds and payment refused; that the holders of all of said bonds requested the Peoples' Trust Company to foreclose said mortgage.

The Mt. Waldo Granite Works has been adjudicated a bankrupt in the District Court of the United States for the District of Maine, and said court, on petition therefor, authorized and assented to this suit being brought for the foreclosure of said mortgage in this court, and that this court may take charge and possession of said mortgaged property for the purpose of foreclosure.

The plaintiff filed a supplemental bill alleging, in substance, that the Ingersoll-Sargent Drill Company, a corporation under the laws of the State of New York, claim to have a mortgage for an air compressor,

which it claims was a part of the fixtures and property included in the description in said mortgage, and asks that said Ingersoll-Sargent Drill Company be made a defendant. Service was made upon said company, and it appeared and filed an answer, claiming said property by virtue of a mortgage given by the Mt. Waldo Granite Works. The mortgage, of the Mt. Waldo Granite Works as stated above, was recorded in the Registry of Deeds, but was not recorded in the town clerk's office in the town where the corporation has its home and its property.

Under this state of facts defendants assert three defenses which are entitled to consideration. Many minor questions were raised to which it is not necessary to allude.

First: The defendant claims that there is not sufficient proof that the mortgage and bonds were duly authorized by the corporation—the Granite Works. It appears that all the records of the corporation have since been destroyed. In the affidavit of Mr. Albert Pierce, clerk and treasurer of the corporation, which the parties agree is to be taken as his testimony, he distinctly states that every necessary vote was passed by the corporation and recorded. Further than that, we have before the court, according to the stipulation of the parties, a copy of the trust deed, and that recites that the maker, the Granite Works, passed the necessary vote.

It is the opinion of the court, therefore, that the foregoing facts furnish sufficient evidence that the trust deed and bonds were properly authorized by the Granite Works.

Second: The defendants contend that the mortgage cannot be foreclosed by the plaintiff because the bonds are issued as collateral security for the Granite Works' notes. There is no merit in this defense. The mortgage expressly provides for the proceedings herein pursued. The whole purpose of the trust mortgage was to secure the holders of these bonds. The banks which hold them as collateral are bona fide holders for the purposes of foreclosure, as much as though they had purchased the bonds, instead of loaning money on them. In New Memphis Gas Light Company cases, 105 Tenn., 268; 80 Am. St. Rep., 880, this principle is affirmed as follows: "While it is true the parties taking bonds as collateral security for preexisting debts, under the rule then prevailing in this State, were not holders for value in due course of trade, yet it being clear that the debts they were

given to secure were honest debts of the company, created by its making the very improvement the bonds were issued to pay for, the creditors receiving them as security were bona fide holders, and as such entitled to full protection save as against such equities as might be inherent in the bonds."

The property in the mortgage is the real security. The bonds are merely issued for the convenience of enabling the mortgagor to obtain money, from time to time, as wanted, from several sources instead of but one. The only possible way in which they can realize anything on the collateral for their respective loans is by enforcing payment of the bonds; and the only way they can enforce payment on the bonds of a bankrupt corporation is by foreclosure of the mortgage and a sale of the mortgage property given to secure the payment of the bonds. The banks which hold all these bonds have requested the trustee to pursue the prescribed course which, it would seem, is not only reasonable but the only effective way they could adopt to realize upon their securities, as the bonds of a concern in bankruptcy can have no market value. In fact, the banks must have a right to do this, otherwise, if the trustee should decline to proceed, suo moto, to foreclose, then the holders of the collateral would be helpless, and their security might become worthless. Such should not be the status of the law, nor is it. The different rights and duties of a party holding negotiable paper as security are discussed in detail in a note to the case of *Griggs* v. *Day*, 32 American State Report, 704, at page 711. From the rules of law enunciated in this note it seems clearly deducible, that a party holding defaulted bonds as collateral for the security of his debt, is, to the extent of his debt, at least, subrogated to such an interest in the property, mortgaged to secure the bonds, as will enable him to require the trustee, when the mortgage authorizes it, to foreclose the mortgage for the payment of his debt.

The following rule is specifically laid down in a New York case, and found in principle in many other cases.

"As the holder of collateral security is entitled to its possession and, to the extent of his interest, is substantially the owner thereof, he must to a certain extent at least assume the duties of ownership; and furthermore must protect the interests of his obligor as well as his own, because the latter by giving the collateral security, has parted with the power to protect himself. The contract carries with it the

implication that the security shall be made available to discharge the obligation." *Wheeler* v. *Newbald*, 16 N. Y., 396. *Griggs* v. *Day*, 32 American State Report, Note 718. See also R. C. L., 21 Pledge, 24.

We are of the opinion, therefore, that under the facts in this case it was not only the right, but the duty of the trust company, upon the request of the bond-holders, to proceed to foreclose the mortgage and apply the proceeds of the foreclosure to the payment of the bonded debts.

Third: The Trust Deed purports to convey personal property as well as real property, and there is ample language in the deed to cover personal as well as real.

Now it appears, and undoubtedly is the fact, that the mortgage was not recorded in the town of Frankfort. The records of Frankfort have since been destroyed by fire. The defendant therefore says that all personal property described in the Trust Deed which did not become a part of the reality as a part of the plant, did not pass under the deed as against the unsecured creditors of the Granite Works. This point is not without merit. The answer that, inasmuch as there is no positive evidence that the mortgage was not recorded in Frankfort, the court can and should find that it was so recorded, does not impress us as sufficient. The evidence points the other way. There is no minute of the Clerk "noting on the mortgage the time when it was received" as required by R. S., Chap. 96, Sec. 2. The presumption is that the clerk observed the law and the omission becomes evidential.

Upon the conclusion that it was not recorded in the Town Clerk's office, it follows that, if there is personal property described in the Trust Deed, which cannot be held by the court as forming a part of the realty, then that personal property cannot be foreclosed under the mortgage.

Unquestionably a large part of that property did form a part of the plant and became real estate under the decisions in this State. But it does not seem to us that this court from only the description of the personal property and its value, as given in the record, can safely determine just what personal property was covered by that mortgage as against the creditors of the Granite Works, who are entitled to share in the personal property not so covered.

The rules of law governing the question as to when personal property becomes a part of the realty are not in dispute in this State. Our court has defined them with clearness. It is applying the rules to the particular article that is the difficult matter.

It should appear in evidence that the article is physically annexed, at least by juxtaposition to the realty or some appurtenance thereof; that it is adapted to and usable with that part of the realty to which it is annexed; and that it was annexed with the intention on the part of the person making the annexation to make it a permanent accession to the realty. *Hayford* v. *Wentworth*, 97 Maine, 347. As to many of the articles in the record before us none of these facts appear.

It will not be claimed we assume that the articles of personal property that are nowhere near the plant, have never been connected with it, although perhaps intended to be used in case of a breakdown to repair the plant, are in fact a part of the plant. We, accordingly, think the bill and supplemental bill should be sustained as to the first and second contentions, and remanded to the sitting Justice upon the third proposition, to be heard by him, or sent to a master to ascertain and report to him, what articles or classes of personal property enumerated in this mortgage have become parts of the real estate, and held as such under the mortgage, and what articles or classes, are so disconnected with the real estate, and use thereof, and are so separated therefrom, as to retain their character as personal property.

So ordered.

A. RAYMOND GREENLAW

vs.

AROOSTOOK COUNTY PATRONS MUTUAL FIRE INSURANCE COMPANY.

Aroostook. Opinion December 14, 1918.

Contracts of fire insurance. Construction of renewals. Rights of parties after application for insurance has been accepted. Distinction between a contract or agreement to issue a policy of insurance and renew a policy already issued. Rule where by-laws and contract of policy of insurance conflict. Which shall govern in fixing the rights and liabilities of parties.

In the year of 1912, the defendant company issued to the plaintiff, a policy of insurance against fire, to the sum total of $3000.00 for the period of five years then next ensuing, in varying amounts, on his dwelling house, ell, wood-house, barn and shed, and on hay and grain, "while contained in said buildings" in Presque Isle. The policy was in statutory form, and carried a rider that sanctioned and concerned the use about the insured premises, of gasolene and kerosene engines and electric motors; related to the placing of supply and storage tanks thereat; and inhibited the use of stove-pipe projecting through the roof or wall of any of the insured buildings, "or any building within one hundred feet." It contained no other provision limiting the company's liability.

Somewhat less than two years later, it issued to the plaintiff another policy of insurance, this time for $800.00 on his potato-house, and for $500.00 on his farming tools, for a five year term. This policy also is of standard form; it restricts insurance on farm tools too "while contained in his farm buildings" and attached is rider counterpart to that on the first.

When the first policy was about expiring, plaintiff applied for its renewal. On the day that the policy expired the application for renewal was accepted, but new policy was not made up until two days later, when it was antedated so as to run from the expiration of that renewed. While it was still in the course of transmission to the plaintiff through the mails, the property it insured was completely devastated by fire. The same fire destroyed farming tools of the admitted value of $445.00, insured by the 1914 policy. At the time of the fire the tools were contained in the buildings covered by the third or renewal policy.

The renewal policy carries a rider differing from those on the first and second policies in that it superadds a clause in these words: "This company shall not be liable on any risk, for a greater amount than $3000.00 on any policy, or policies issued by this company, on any one set of buildings, or their contents. Meaning hereby to limit the total liability of this company to the aggregate sum of $3000,00 whether one or more policies be issued, covering the same subject matter."

Held:

1. The rider provision of the renewal policy is prospective only. It does not act backward. It does not relate to and impair the obligation of the second contract.
2. When the by-laws and policy conflict, if the contract is within the power of the corporation, the policy will prevail over the by-laws, and determine the rights and liabilities of the parties. By that instrument the conventional obligations of the company are fixed.
3. Unless otherwise expressed, a renewal will be construed to be subject to the terms and conditions contained in the original policy. From the moment that the application is accepted by the company, the plaintiff is entitled to insurance protection effective from the expiration of the first policy. Not evidenced by a policy, for the policy had not been made; nor existing validly as an oral contract of insurance, for the undertaking of the contract was not to be performed within one year. But a valid, oral contract in and by which the defendant agreed, for the sufficient consideration that in the usual course of business and from the very nature of the agreement within one year, it would make and deliver to the plaintiff, in conformity with their compact in that behalf, a policy of insurance in his favor.
4. The distinction between a contract to issue a policy of insurance or to renew one already issued, and the policy to be issued or renewed in pursuance of such agreement has always been recognized by the courts and the text writers.
5. The agreement to issue or renew a policy is one thing. The policy issued or renewed is another and different thing. The contract to renew having been made, the mere want of a policy will not prevent the plaintiff from recovering. Having furnished the agreed consideration for the undertaking of the other, each party is entitled to its promised benefits.

Action on the case to recover upon two policies of insurance issued by defendant company. Defendant filed plea of general issue; also brief statement. At close of evidence case was reported to Law Court upon certain agreed statements and stipulations. Judgment in accordance with opinion.

Case stated in opinion.

Doherty & Tompkins, for plaintiff.

W. R. Roix, and Shaw & Thornton, for defendant.

SITTING: CORNISH, C. J., SPEAR, HANSON, PHILBROOK, DUNN, MORRILL, JJ.

DUNN, J. As its name suggests, and the record of this case evinces, the Aroostook County Patrons Mutual Fire Insurance Company is a domestic mutual fire insurance company. In other words, it is an aggregation of persons, endowed by the State of Maine with the attributes of corporate existence, and in that manner providing a mutual basis method, by which the associated individuals help to bear the burden of pecuniary loss incident to the destruction, by the happening of the peril of fire, of the property of one of their number. Fire insurance thus conducted, means that if, during a prescribed period of time, any of the associated persons shall suffer loss by the accident of fire, the corporation of which they are members will indemnify him, having reference to the actual value of his insured property when it was destroyed, to an amount not exceeding the sum of money specified in an executory contract called a policy. Every person who takes insurance in such a company is both an insurer and insured. He insures not only his own property, but he helps to insure the property of all the other members, during the term of his own membership in the mutual system corporation, that is to say, during the term of his policy. R. S., Chap. 53, Sec. 35. He proportionately contributes, in the first instance by an assessable premium note (R. S., Chap. 53, Sec. 36), to the assets of the company. Out of the assets, he is entitled to indemnification, within and as contemplated by the terms of his policy.

Acceptance by a mutual fire insurance company of an application for insurance makes the insured a member of the company. *Carleton* v. *Insurance Company*, 109 Maine, 79. In that way, on September 11, 1912, the plaintiff became a member of the defendant corporation. It thereupon issued and delivered to him, a policy of insurance against loss or damage by fire, to the sum total of $3000.00, for the period of five years then next to ensue, in varying amounts, on his dwelling-house, ell, wood-house, barn and shed, and on hay and grain "while contained in said buildings," in Presque Isle. For convenience, that policy will be referred to herein as the first. In form it was of statutory standard. It fittingly carried what is known as a rider. The rider, which was printed as a part of the slip or sheet of paper that

contained the blank form on which the insurance was distributed and described, sanctioned and concerned the use about the insured premises, of gasolene and kerosene engines and electric motors; related to the placing of supply and storage tanks thereat; and inhibited the use of stove-pipe projecting through the roof or wall of any of the insured buildings, "or any building within one hundred feet." It contained no other provision limiting the Company's liability.

On June 19, 1914, somewhat less than two years later, plaintiff applied to defendant company for another policy of insurance, this time for $800.00 on his potato-house, and for $500.00 on his farming tools. Policy issued for a five year term, restricting insurance on farming tools too "while contained in his farm buildings." This policy, which will be styled the second, also is of standard form, and attached has rider counterpart of that on the first.

By application bearing date of August 30, 1917, in anticipation of its expiration on September 11th, the plaintiff applied for renewal of the first policy. His application was made on a blank which the Company had prepared to be used for such purpose. Excepting as to the term for which insurance was desired, and as to the date thereof, this application and that submitted for the first policy were practically identical. There was nothing about either even remotely to give an inkling of the defense endeavored to be made in this case. Defendant's directors, at a meeting held on the day that the first policy expired, accepted the application for renewal. But a new policy was not made up until two days later, when it was antedated so as to run from the expiration of that renewed. Late in the day on which the policy issued, it was mailed by the defendant to the plaintiff in the same town. The plaintiff's mail was supplied by a carrier route which started from a nearby town. For some reason, the policy did not come to the plaintiff, in the mail, until after noontime on September 15th, four days after its date, and two days later than the date of the day on which it is said to have been mailed. While it was still in the course of transmission through the mails the property it insured was completely devastated by fire. The same fire destroyed farming tools of the admitted value of $445.00, insured by the second policy. At the time of the fire, the tools were contained in the buildings covered by the third or renewal policy.

The renewal policy too carries a rider. This rider differs from those attached to the first and second policies in that it superadds a clause in these words:

"This company shall not be liable on any risk, for a greater amount than $3000 on any policy, or policies issued by this company, on any one set of buildings, or their contents. Meaning hereby to limit the total liability of this company to the aggregate sum of $3000, whether one or more policies be issued, covering the same subject matter."

It is the contention of the defendant, as a first proposition, that notwithstanding it issued to the plaintiff, and he paid for and relied upon, two different policies of insurance or indemnity, to the aggregate amount of $4300.00, and regardless of his loss by fire to the extent of $3445.00, both policies in force, of property covered by them, yet the rider provision of the renewal policy operates to restrict recovery to $3000.00, the maximum of the particular policy to which it is attached. Expressed somewhat differently, to recovery of $445.00 for the burned farming tools, and of $2555.00 for the dwelling house and other buildings ravaged in totality by fire, for the reason that the casualty consumed all the property together, and that it then comprised "one set of buildings and their contents," as well as the "same subject matter," within the purpose of the rider on the renewal policy. Or, if not that, then the greatest possible liability under both policies, in view of the rider provision of the last, is $3000.00.

The proposal to renew the first policy moved from the plaintiff, almost two weeks in advance of its expiration by limitation of time. He accompanied the offer by his promissory note in advance payment of the premium. What he said, must be held to have been equivalent in significance to saying to the company: "If agreeable to you, when the first shall have expired, issue to me a new policy of insurance, for a further period of five years, on the same terms as the old. Counting that it will be acceptable to you to comply with my request, here is advance payment of the premium charge." The company accepted the proposal or offer of the plaintiff. Its secretary so swears. There was mutual assent; the minds of the parties had met. And the agreement was founded on consideration. Nothing remained to be done to perfect fully the renewal of the insurance, excepting the execution by the company of the policy, in accordance with the terms agreed upon, and the delivery of it in that form to the insured. Unless other-

wise expressed, a renewal will be construed to be subject to the terms and conditions contained in the original policy. *Bickford* v. *Insurance Company*, 101 Maine, 124. From the moment that his application was accepted, plaintiff had insurance protection, effective from the expiration of the first policy. Not evidenced by a policy, for the policy had not been made. Nor existing validly as an oral contract of insurance, for the undertaking of the contract was not to be performed within one year. R. S., Chap. 114, Sec. 1. But a valid, oral contract in and by which the defendant agreed, for a sufficient consideration, that in the usual course of business, and from the very nature of the agreement within one year, it would make up and deliver to the plaintiff, in conformity with their compact in that behalf, a policy of insurance in his favor. Said Chief Justice APPLETON: "The distinction between a contract to issue a policy of insurance or to renew one already issued, and the policy to be issued or renewed in pursuance of such agreement, has always been recognized by the courts and the text writers. It is the same as that existing in bills of exchange, between an agreement to accept, and the acceptance of the bill. They are distinct. The agreement to issue or renew a policy is one thing, the policy issued or renewed is another and different thing." *Walker* v. *Metropolitan Ins. Co.*, 56 Maine, 371.

The contract to renew made, the mere want of a policy would not prevent the plaintiff from recovering. *McCullough* v. *Eagle Ins. Co.*, 1 Pick., 278; *Commercial Insurance Company* v. *Union Insurance Company* 19 How., 318. Having furnished the agreed consideration for the undertaking of the other, each party is entitled to its promised benefits. The defendant company made up a policy and sent it to the plaintiff. Ordinarily, the policy of insurance is to be regarded as the final contract between the parties, and the effect of its acceptance is to supersede all preliminary agreements in respect to the insurance. 16 A. & E., Enc. of Law, 856. In the case in hand, the policy was not in accordance with the accepted proposal. Before even suggestion to him that the new policy varied from that which it renewed, the plaintiff went to the company's office, and there, still without hint of any change in the form of the policy, from the application that he had filed, and from information to him imparted by the company, he made and submitted proof of loss under the renewal policy. At the same time he submitted proof of loss under the second policy. Later

on, in the same day that he filed the proofs, he received the renewal policy, and since has retained it. Unless that policy substantially conformed to the accepted proposal, he was not bound to take it. As Justice Swayne said, in *Insurance Company* v. *Young's Administrator*, 23 Wall., 85; "The law involved is expressed by the phrase, it takes two to make a bargain." Equity would enforce specific performance. *Tayloe* v. *Insurance Co.*, 9 How., 390. An action at law would have lain against the company for breach of its agreement. *Commonwealth Insurance Company* v. *Union Insurance Company*, 19 How., 318. But the plaintiff, though he testified he made objection when the rider was called to his attention, retained the policy, and based his suit upon it, and upon the second policy. The defendant asserts, that having elected to take the renewal policy, and having instituted suit upon it, the plaintiff must be held to have taken it in entirety. From one point of view, the contention is not without merit. But as we see the situation, the plaintiff's rights were not abridged by the acceptance of the renewal policy. The rider provision of that policy is prospective only. It does not act backward. It does not relate to, and impair the obligation of, the second contract. So far as the second policy is concerned, it is as if the invoked rider provision had never been. As to that policy, the rider may recede into the region of shadows. Moreover, we find that the second policy and the renewal policy, within the meaning of the rider attached to the latter, relate to different subject matters. The by-laws of the company, concerning risks, to which defendant points, is not applicable to the loss of the farming tools. It expressly relates to risks on buildings, and to such risks exclusively.

The defendant, however, argues that the rider is merely declaratory of another clause of the same by-law in force when the policies respectively were issued. And that the plaintiff, as a member of the corporation, is presumed to have known the provisions of the by-laws, from the beginning of his membership in the company, and by that fact thereby is bound. Of the contract of mutual insurance the by-laws may be a part, even by reference. *Russell* v. *Mutual Fire Ins. Co.*, 107 Maine, 362. Under the doctrine of consent and waiver, the company may waive the by-laws, in whole or in part. When the by-laws and the policy conflict, if the contract is within the power of the corporation, the policy will prevail over the by-laws, and determine

the rights and liabilities of the parties. *Union Mut. Fire Ins. Co.* v. *Keyser,* 32 N. H., 313; *McCoy* v. *Northwestern Mutual Relief Assn.,* 92 Wis., 557. The statutes of the state relating to such corporations, the by-laws of the company, and the contract define the rights and liabilities of the member as a member. His rights and liabilities as insured are defined by the contract. *Com.* v. *Mass. Mut. Ins. Co.,* 112 Mass., 116, 22 Cyc., 1413. Whether a by-law of a mutual Insurance Company is part of the contract between the company and the insured, will depend, not on the fact that the by-law has existence, but on the correct interpretation of the terms of the policy. By that instrument the conventional obligations of the company are fixed.

In this case, the defendant had power to make binding contracts of insurance, agreeably to the terms contained in the Maine standard policy. It issued such a contract. It now contends that that contract bound it as an insurer, not according to the policy, but according to an inconsistent by-law. The tender and delivery by it of the several policies was tantamount to a declaration in relation to each, that there were no by-laws inconsistent with their terms. It is sufficient to say, in relation to the by-law, that the company that made and adopted it also had the power to unmake it or to waive it; it cannot be held that an action is without foundation simply because a policy of insurance in suit is in violation or apparent violation of a by-law of the company. *Stoehlke* v. *Hahn,* (Ill.) 42 N. E., 150. It is a question of the interpretation of the plaintiff's policy.

The change in the form of the rider is significant, but by no means conclusive or inexplicable. Still, unexplained, it would seem that there would have been no need to make the change, if the by-law already was part of the policies previously issued.

Under the stipulation of the report, we are of the opinion that the plaintiff is entitled to recover in this action under the second policy, for the property loss by fire, the sum of $445.00; under the third or renewal policy, as for a total loss, the further sum of $3000.00; making in all $3445.00, to which shall be added interest from November 15, 1917, the date when the indemnity became and was due and payable.

Judgment accordingly.

MARIA C. HAMBLEN *vs.* CHARLES F. IRISH.

Cumberland. Opinion December 14, 1918.

Trespass. Adverse possession. Rule where the right to use a way or crossing is based upon permission. Rule as to such use becoming and constituting adverse possession.

When one is permitted to cross the land of another by reason of the friendly terms between the two, and the crossing was a matter of permission and accommodation, the important element of adverse user disappears and the defense fails.

Action of trespass quare clausum. Defendant filed plea of general issue and also brief statement, setting forth in substance a right in defendant to pass and repass over said land upon which the trespass had been alleged to have been committed. The case was withdrawn from the jury and reported to the Law Court. Judgment in accordance with opinion.

Case stated in opinion.

Erald Harmon, and William Lyons, for plaintiff.

Carroll L. Beedy, for defendant.

SITTING: CORNISH, C. J., SPEAR, HANSON, PHILBROOK, DUNN, MORRILL, JJ.

PHILBROOK, J. Case on report. The plaintiff alleges trespass quare clausum, the acts complained of being those of crossing plaintiff's land; and the defense is justification of the admitted acts by reason of a right of way gained by prescription. The defendant does not claim that he has used the way during the full prescriptive period, but claims that he and his predecessor in title have so done. But that predecessor in title was a witness in the case and testified that both he and his father before him were on friendly terms with the former owner of the lot over which the defendant claims the prescriptive way, and their crossing of the lot, or user of the way, was by permission and as a matter of accommodation. This testimony was not

successfully overcome. Thus the important element of adverse user disappears and the defense fails. *Rollins* v. *Blackden*, 112 Maine, 459; *Dartnell* v. *Bidwell*, 115 Maine, 227. The plaintiff only asks nominal damages and the report contains a stipulation as to costs. The mandate will accordingly be,

Judgment for plaintiff.
Damages assessed at one dollar.
This decision to carry with it only the costs of the lower court.

EUGENE A. MERRILL

vs.

LIVERMORE FALLS LIGHT AND POWER COMPANY.

Androscoggin. Opinion December 14, 1918.

General rule of law covering the rights of public service corporations to cut off and refuse a supply of water or electricity.

Action to recover damages sustained by the plaintiff through the acts of the defendant, a public service corporation, in severing its service wire connected with the plaintiff's blacksmith shop and refusing to supply him with electric current for light and power;

Held: That a public service corporation is not justified in refusing to supply a consumer merely because he refuses to pay for overdue service at some other place, or for a separate or distinct transaction from that for which he is demanding a supply.

Action on the case to recover damages which the plaintiff claims to have received by reason of defendant company cutting its wires which furnished light and power to the blacksmith shop of the plaintiff. Defendant filed plea of general issue. The case was heard before Justice of the Superior Court, Androscoggin County, without

jury. Judgment was rendered for plaintiff in the sum of $150.00. To the findings of the presiding Justice exceptions were filed by defendant. Judgment in accordance with opinion.

Case stated in opinion.

George C. Wing, and George C. Wing, Jr., for plaintiff.

Newell & Woodside, for defendant.

SITTING: CORNISH, C. J., SPEAR, HANSON, PHILBROOK, DUNN, MORRILL, JJ.

PHILBROOK, J. This is an action to recover damages sustained by the plaintiff through the acts of the defendant, a public service corporation, in severing its service wire connected with plaintiff's blacksmith shop, and refusing to supply him with electric current for light and power. The cause was heard by the Justice of the Superior Court in Androscoggin County, without jury, reserving the right of exception upon matters of law. Judgment was rendered in behalf of the plaintiff and the Justice ruled as matter of law that the defendant's conduct was not justified. The case is before us upon exceptions to that ruling.

From the record it appears that in May, 1916, the plaintiff bought this shop, situated on Church Street, in the village of Livermore Falls, and from that time until the time of hearing the cause he continuously occupied and used it. When he bought the shop it was supplied with an electric meter, and connected with the light and power wires of the defendant company over which he was furnished electric current for lighting and power purposes. In July, 1916, the plaintiff bought and moved into a dwelling house situated in the same village, but on a street other than the one on which the shop was situated. The house was wired for electricity before the purchase but the meter had been removed. After that purchase the meter was replaced in the house and current there furnished the plaintiff for lighting purposes. At the expiration of a year of service in the house, a dispute arose regarding the refunding of the meter fee, whereupon the plaintiff refused to pay his house bill and directed the defendant to remove the meter from the house and to discontinue that service. This was done September first, 1917. At about the same time the defendant undertook to remove the shop meter, which plaintiff refused to allow, and the latter

continued to receive electricity at the shop until November 24, 1917, when the defendant severed the wire outside the shop. About two weeks before that date the plaintiff was notified that if he did not pay the amount due on the house, by the twenty-fourth his current would be shut off from the shop. He did not pay as demanded and the shop wire was severed, although there were no overdue charges for the shop service.

The defendant seeks to justify its conduct by virtue of a regulation, approved by the Public Utilities Commission, which provides that "Service to customers may be discontinued at any time by the company for non-payment of charges for current, with or without notice to the customer. No renewal of service shall be made to such customer until all arrears are paid in full, together with the charge of one dollar for renewal of the service." That such a regulation is reasonable is not in dispute, but the issue between the parties is whether a public service corporation may cut off one service, not in arrears, to enforce payment of arrears in another and independent service which is in arrears.

It should be observed that after the controversy over the house bill, and after the discontinuance of the house service, the defendant not only furnished current to the shop but accepted pay for the same, at least three payments being made and accepted for shop service after discontinuance of the house service, the dates of those payments being September 30, October 31, and November 3, all in the year 1917. In *Wood* v. *Auburn*, 87 Maine, 287, where a public service corporation furnishing water shut off the supply to the plaintiff, the court said: "The only trouble is over an old and disputed bill. The aqueduct company could have insisted on payment of this bill in advance, but did not. It could have shut off the water during the time covered by the bill, but did not. It preferred to let the bill and the dispute stand. Its successors, the city, with presumed knowledge of the facts, did not shut off the water. It accepted Mr. Wood's money for the next installment; furnished water for that six months to him as one within his rights and its rules; allowed him to suppose that the old bill in dispute would be ignored, or would be adjusted as are disputes between other parties. After having resumed these relations with Mr. Wood and taken his money therefor, the city now insists that he shall now be summarily deprived of an instant and

constant necessity in order to coerce him into a surrender of his position of defense against the old bill. Assuming that the rules of the old company and the city contemplate this course, we think they are unreasonable, and therefore without legal force." If this position obtains with reference to a particular service, and we here re-affirm the principle, how much more must it obtain where the supply is denied when the service is other than and separate from the service over which the controversy arose.

In *Turner* v. *Revere Water Co.*, 171 Mass., 329, the court said, "If gas is supplied to the owner of different houses under separate contracts, failure to pay the gas bill on one house does not authorize the cutting off of the gas from the other," citing *Gas Light Co.* v. *Colliday*, 25 Md., 1, and *Lloyd* v. *Washington Gas Light Co.*, 1 Mackey, 331.

In *Crumley* v. *Watauga Water Co.*, 99 Tenn., 420, 41 S. W., 1058, a patron of the defendant company became indebted thereto for water and piping and gave his due bill therefor. For a short time he voluntarily ceased to be a water taker, then decided to again take the water, but the company denied him the same unless he should pay all, or at least a portion, of the old bill. The court declined to uphold the contention of the company and awarded the plaintiff damages sustained by not being given the water supply. The language of the court, in part, is "The defendant in the present case cannot justify its declination to furnish water to the plaintiff by the fact of his failure to pay the whole or a part of his outstanding due bill, given for water and piping a year or two before. Upon the tender of the regular rates he was entitled to the water like other persons, and without reference to his past due obligation. The company had given him credit for the matters covered by the due bill, and could not thereafter coerce payment by denying him a present legal right," citing, among other authorities, *Wood* v. *Auburn*, supra, *Merrimac R. Savings Bank*, (Mass.) v. *City of Lowell*, 26 N. E., 97, and *American Waterworks Co.* v. *State*, (Nebraska), 64 N. W., 711.

In *Hatch* v. *Consumer's Company*, 17 Idaho, 204, 104 Pac., 670, it was held that a water company cannot refuse to furnish water to compel payment for water alleged to have been used by the applicant while residing at different places, where he tenders payment of the established water rates in advance for the service he is demanding.

Such a claim, the court declares, is a wholly separate transaction, and the obligation must be collected in the usual way in which other debts are collected.

The rights and duties of public service corporations have been perhaps more frequently the subject of litigation when water was the commodity to be furnished, but of course the principles governing public service corporations like the defendant in this case are the same as those governing other such corporations furnishing other services essential to the comfort, convenience and health of citizens in any community.

We might lengthen greatly the authorities in support of our conclusions for it seems to be quite generally held that a public service corporation may not refuse to supply a consumer merely because he refuses to pay for overdue service at some other place, or for a separate or distinct transaction from that for which he is demanding a supply.

Exceptions overruled.

THOMAS T. SIDELINKER *vs.* YORK SHORE WATER COMPANY.

York. Opinion December 18, 1918.

Right to take private property under power of eminent domain. Rule as to liability of company instituting proceedings under power of eminent domain, alleging the taking to be for public use; when in truth the alleged taking is for private purposes. Facts necessary to constitute a taking under power of eminent domain.

The defendant corporation having by legislative grant the right of eminent domain, attempted to condemn and take timberland owned by the plaintiff. Notice of taking, and later a petition for assessment of damages, were filed as provided by its charter. The damages were not determined. Before the time set for hearing the plaintiff applied to this court sitting in equity for an injunction, on the ground that the proposed taking was for private purposes. A bond was filed and temporary injunction issued.

Somewhat more than two years later, after decision rendered for the plaintiff, in the similar injunction suit of *Bowden* v. *York Shore Water Company,* 114 Maine, 150, the defendant formally abandoned the land and gave the plaintiff notice of abandonment. By consent, and without hearing, the plaintiff's equity suit was sustained, and a perpetual injunction ordered to issue.

In the meantime the plaintiff, who at the time the notice of taking was filed, had planned and prepared for an immediate lumbering operation on his land, suspended such operation by reason and in consequence of the notice of taking by the defendant. The defendant did not take possession of the plaintiff's property or any part of it.

The plaintiff alleges that by the defendant's acts above outlined he was "hindered and prevented from operating said described timberland," and that he is entitled to damages.

Held:

1. The decree in the injunction suit, though granted by consent and without actual hearing, estops the defendant from denying in the present case that the taking was for private purposes.
2. A private individual enjoying no special privileges, who without malice wrongfully asserts and presses by suit or otherwise a claim to the property of another, provided he does not physically interfere with such property or its possession, is not, under the common law, guilty of a tort. But a different and stricter rule should be applied to a corporation armed with the right of eminent domain. Authority in some measure determines accountability. Responsibility is a corollary of power. Privilege and duty grow on the same stem. The defendant was entrusted by the State with the power of taking private property

by eminent domain. This power is an attribute of sovereignty. Its possession is a privilege of high import. While nothing in this case shows that it was so used by this defendant, it may be made an instrument of oppression. Its exercise should be sedulously guarded. Atonement should be made for its abuse.

3. When this defendant filed in the office of the County Commissioners its notice of taking the plaintiff's land, stating therein that "it has taken and does hereby take" such land professedly for public but in fact for private uses, and also filed its petition for determination of damages, it committed an act tortious as to the plaintiff notwithstanding it did not by any physical means interfere with the plaintiff's possession.

Action on the case to recover damages on account of the alleged wrongful taking, by right of eminent domain, by the defendant company of certain lands of the plaintiff. Defendant filed plea of general issue and also brief statement. At close of evidence, by agreement of parties, case was reported to Law Court upon certain agreements and stipulations. Judgment in accordance with opinion.

Case stated in opinion.

E. P. Spinney, for plaintiff.

Ralph W. Hawkes, and Josiah Chase, for defendant.

SITTING: CORNISH, C. J., SPEAR, HANSON, PHILBROOK, DUNN, DEASY, JJ.

DEASY, J. The defendant corporation having by legislative grant the right of eminent domain attempted to condemn and take timber land owned by the plaintiff. A notice of taking and later a petition for assessment of damages were filed, as provided by its charter. The damages were not determined. Before the time set for hearing the plaintiff applied to this court sitting in equity for an injunction on the ground that the proposed taking was for private purposes. A bond was filed and temporary injunction granted.

Another suit in equity brought against the same defendant by Samuel M. Bowden was pending at the same time involving other lands which the defendant was attempting to condemn and take. The Bowden case was reported to the Law Court and in the opinion (114 Maine, page 150) the purpose of taking in that case was held to be a private purpose. On this ground the bill was sustained and a permanent injunction ordered issued.

After the decision in the above case was announced defendant abandoned its attempt to take the plaintiff's (Sidelinker's) land and filed with the County Commissioners and gave to the plaintiff notices of such abandonment. Later the plaintiff's bill was sustained without hearing and the injunction made permanent. It seems to be conceded that there was an agreement between the parties to the pending suit that it should abide the result of the Bowden case. In the meantime the plaintiff who had at the time the notice of taking was filed, planned and prepared to operate his land, suspended such operation until after the defendant's abandonment.

The plaintiff brings this action of tort alleging that by the defendant's acts above outlined he has been "hindered and prevented from operating said described timber land." There is no proof and no allegation that the defendant entered upon the plaintiff's land or in any way interfered with the plaintiff's possession of the same, other than by filing notice of taking and petition for assessment of damages as above stated.

The acts complained of as above outlined, stated in chronological sequence are as follows:

July 12, 1913, Bowden Equity suit begun.

September 26, 1913. Notice filed by the defendant in the office of the County Commissioners of York County setting forth that the defendant "has taken and hereby does take" the plaintiff's land involved in this suit.

September 27, 1913. Letter written by the defendant's attorney to the plaintiff enclosing copy of notice and saying "Under the charter of the York Shore Water Company the filing of the paper of which the enclosed copy is an exact duplicate constitutes a taking of your land and timber for all purposes subject to their paying the fair value for the same."

November, 1913. Petition filed by the defendant with the County Commissioners of York County praying for determination of compensation.

December 8, 1913. Plaintiff's bill against defendant praying for injunction filed and subpoena issued. Temporary injunction granted upon filing bond.

November 24, 1915. Rescript from Law Court having been received, Bowden bill sustained and writ of permanent injunction ordered to issue.

January, 1916. Notice of abandonment by defendant given to plaintiff, and filed with County Commissioners.

January 23, 1916. Plaintiff's (Sidelinker's) bill sustained and perpetual injunction ordered to issue.

In the meantime from the Autumn of 1913 until the Autumn of 1916 the plaintiff suspended operation on his land described in the condemnation proceedings. The plaintiff says this suspension was by reason of the defendant's attempted taking of the land.

The essence of the plaintiff's case is the charge that the attempted condemnation while professedly for public was in truth and in fact for private purposes.

Granting a lawful taking the abandonment was warranted for at its date damages not having been determined the rights of the parties had not become reciprocally vested. *Furbish, Petitioner,* v. *County Commissioners,* 93 Maine, 117.

The abandonment before determination of compensation of property properly taken for public purposes does not ordinarily cause liability. Damages suffered by the land owner are in such case incident to the ownership of property.

It has been held however that undue and unreasonable delay or other misconduct in the proceedings will render the corporation liable for damages. *Winkelman* v. *Chicago,* 213 Ill., 360, 72 N. E., 1066; *Cushman* v. *Smith,* 34 Maine, 247.

What the plaintiff in this case complains of is not delay or misconduct in a condemnation proceeding lawfully initiated, but the wrongful beginning of such proceeding. His complaint is that the defendant having power to take his land for public purposes proceeded by legal formalities to take it for illegal purposes.

The attempted taking was as stated in the notice "the protection of the water of Chase's Pond." There is no testimony in this case showing the situation of the plaintiff's land with reference to the pond. But prior to the beginning of this action a suit in equity was begun by the plaintiff against the defendant praying that it be enjoined from proceeding with its condemnation for the reason that the purpose was private; the very ground upon which this case rests. An answer and replication were filed; and a decree obtained sustaining the bill and directing that the temporary injunction be made permanent.

This decree although granted apparently by consent without actual hearing estops the defendant from denying in the present case that the taking was for private purposes. *Corey* v. *Independent Ice Company,* 106 Maine, 485. *Wilson* v. *Lacroix,* 111 Maine, 324.

This brings us to the main issue. Did the filing by the defendants in the County Commissioners Court of a notice of taking stating that the defendant "has taken and hereby does take" the plaintiff's land, such act being ostensibly for a public and lawful purpose but really for a private and unauthorized purpose, render the defendant liable in this action of tort?

A private individual enjoying no special privileges who without malice wrongfully asserts and presses by suit or otherwise a claim to the property of another provided he do not physically interfere with such property or its possession is not under the common law guilty of a tort.

But a different and stricter rule should be applied to a corporation armed with the right of eminent domain.

Authority in some measure determines accountability. Responsibility is a corollary of power. Privilege and duty grow on the same stem.

The high standard demanded in the conduct of trustees; the rule of trespass ab initio applied in the case of public officers and the extraordinary degree of care required of common carriers are some of many illustrations of the broad application of this principle. The defendant was entrusted by the state with the power of taking private property by eminent domain. This power is an attribute of sovereignty. Its possession is a privilege of high import. While nothing in this case shows that it was so used by this defendant it may be made an instrument of oppression. Its exercise should be sedulously guarded. Atonement should be made for its abuse.

While counsel have not cited nor have we discovered any authority directly in point, we hold that when this defendant filed in the office of the County Commissioners its notice of taking the plaintiff's land stating therein that it "has taken and hereby does take" such land professedly for public but in fact for private purposes and also filed its petition for determination of damages it committed an act tortious as to the plaintiff notwithstanding it did not by any physical means interfere with the plaintiff's possession.

In determining the amount of damage the rule in this case as in all cases is that the plaintiff should be made whole. He should have actual but not speculative damages. The plaintiff claims that his damages were enhanced by reason of a contract that he had made to sell the lumber on the lot. The evidence does not satisfy us that his legal damages were affected by this circumstance. On the other hand the weight of evidence is clearly opposed to the defendant's contention that the growth wholly offsets the loss.

The plaintiff shows that the cost of operation increased considerably during the suspension. But it also appears that the market value of lumber increased in about the same proportion.

We find that the plaintiff was justified in suspending his lumbering operation. A corporation vested with the right of eminent domain having filed notice in proper form and in the proper office that it had taken his land he rightly determined to submit until by orderly legal procedure the rights of the parties could be settled.

But on November 24, 1915, the Bowden case was decided by the Law Court. We are not convinced that the continued suspension after this time was due to the defendant's acts.

From September 25, 1913, to November 24, 1915, the plaintiff suspended his lumbering operation and was justified in so doing by reason of the defendant's attempted condemnation.

The plaintiff was deprived of the use of his land for a period of about two years and two months. He paid two years' taxes which presumably would have been much less if he had stripped the land in 1914. He suffered some damages caused by sacrifice of his preparations for operating in that year.

Upon all the evidence without extending this opinion by further analysis or comment we think that the plaintiff will be made whole if he is awarded damages in the sum of six hundred dollars.

Judgment for the plaintiff for $600.

JOHN J. NISSEN *vs.* PATRICK H. FLAHERTY.

Cumberland. Opinion December 19, 1918.

Right to allowance of exceptions. Statutory enactment in relation to same. Powers and rights of Law Court as governed by Statute.

This is a petition to establish the truth of certain exceptions alleged to have been taken to the ruling of the Justice of the Superior Court in the County of Cumberland, and who, upon presentation, refused to allow them.

Held:

1. The right to establish exceptions is a statutory proceeding. Neither the court below nor the Law Court have any jurisdiction or power beyond the express jurisdiction of the statutes.
2. We find no statute which provides for the establishment of the truth of exceptions from either of the Superior Courts.

Petition under R. S., Chap. 82, Sec. 56 and Rule 43 of Supreme Judicial Court to establish the truth of certain exceptions to the rulings of the Justice of the Superior Court, Cumberland County. The moving party in the matter of exceptions was the defendant in an action entered at the Superior Court, Cumberland County. The plaintiff filed motion to amend his writ, which motion was allowed by the Justice presiding. To the ruling of the Justice granting the amendment, the present plaintiff filed exceptions, which were not allowed by the court. Judgment in accordance with opinion.

Case stated in opinion.

Carroll L. Beedy, for plaintiff.

William H. Gulliver, and William B. Mahoney, for defendant.

SITTING: SPEAR, HANSON, PHILBROOK, DUNN, MORRILL, JJ.

SPEAR, J. This is a petition to establish the truth of certain exceptions alleged to have been taken to the ruling of the Justice of the Superior Court in the County of Cumberland, and who, upon presentation, refused to allow them.

It is unnecessary to further state the facts in the case as the question, upon the above statement, becomes one of purely statutory solution.

The question, whether the petition comes within any provision of the statute, seems to be conclusive upon the defendant. The right to establish exceptions is a statutory proceeding. Neither the court below nor the Law Court have any jurisdiction or powers beyond the express provisions of the statute. *Cole* v. *Cole*, 112 Maine, 315.

This case comes from the Superior Court in the County of Cumberland. We find no statute which provides for the establishment of the truth of exceptions from either of the Superior Courts. The petitioner's proceedings are brought under R. S., Chap. 82, Sec. 55, and Rule 43 of the Supreme Judicial Court.

In civil cases neither the statute nor the rule purport to cover any proceeding in the Superior Courts. With reference to the statute it is so specifically held in *Cole* v. *Cole*, 112 Maine, 316. Rule 43 was made to carry out the statute. But the rule cannot broaden the statute. Hence, if the statute does not apply, the rule does not. Nor by necessary implication do we find any statute that applies. Prior to 1893 there was no statutory right to establish the truth of exceptions from any court. Chap. 174, Public Laws of 1893, giving the right, amended R. S., 1883, Chap. 77, Sec. 51. This section applied to a court held by "one Justice" of the Supreme Court. But, two of the Superior Courts were established long prior to this date. The omission therefore to include the Superior Courts must be regarded as intended on the part of the legislature; and this omission is emphasized by the provision, in the section amended, that "this section applies to criminal proceedings in either of the Superior courts."

This distinction is expressly noted in *Cole* v. *Cole*. The court say: "But sec. 55 relates, in civil cases, only to the procedure in the Supreme Judicial Court. The distinction is marked in the statute, for it is declared that the section is to apply 'to exceptions filed in any criminal proceedings in either of the superior courts.' The implication is that it does not apply in other cases. This is not a criminal proceeding."

Section 95 does not apply to a criminal proceeding, being inconsistent with Section 55 in this regard.

Inasmuch as the proceeding herein sought must be based wholly upon statutory provision, and no such provision is found, the entry must be,

Petition dismissed.

CALVIN S. DAVIS, et al., *vs.* MARY A. BRIGGS, et al.

Piscataquis. Opinion December 19, 1918.

Water rights. Easements. How easements may be created. Easements by estoppel. Doctrine of equitable estoppel. Easements in gross or appurtenant with the land. How the same are to be determined.

In 1894 Judson Briggs, who was husband of one of the defendants and father of the other defendant, owned a spring from which a water-pipe had been laid for a short distance toward land owned by Joseph W. Davis, who was the father of the plaintiffs. Davis owned property at some distance from the spring. Upon the north of the Davis property were three tenements and a stable owned by Briggs, and on the south of the Davis property was the homestead of Briggs. Davis desired the use of the spring water for domestic purposes. In the spring or summer of 1894, Davis and Briggs entered into a contract whereby Briggs was to extend the water-pipe to a point in the public highway easterly of the Davis property, Davis was to extend the pipe across intervening land to his own property, allow Briggs to connect with the extended pipe by means of two tees, one to his tenements and stable on the north and the other to his homestead on the south, and in addition thereto Davis was to pay Briggs the sum of fifty dollars in cash. So far as the contract required action on the part of Davis it was completed. The pipes were laid, the cash was paid. the tees were adjusted, and connection was made by Briggs to the pipe which Davis extended. There was no limit of time during which Davis was to have the benefit of the water. During the balance of the life of Briggs, a period of about twelve years, and for the further period of about five years after his death, Davis and his heirs enjoyed the use of the water, until the defendant severed the pipe because the heirs of Davis, who are these plaintiffs, would not pay water rate.

Held:

1. That by virtue of the contract, long continued, long acquiesced in and long enjoyed by the parties, an easement was created by equitable estoppel.
2. Under the circumstances of this case this was an easement appurtenant to the Davis land and not an easement in gross.
3. As such easement appurtenant to the land of Davis it runs with the land.

Bill in equity asking that defendants be restrained from cutting off supply of water running to the plaintiff's property. Cause was heard upon bill, answer and proof, and by agreement of parties case was reported to Law Court. Judgment in accordance with opinion.

Case stated in opinion.

Hudson & Hudson, for plaintiffs.

Charles W. Hayes, and W. E. Parsons, for defendants.

SITTING: CORNISH, C. J., SPEAR, HANSON, PHILBROOK, DUNN, MORRILL, JJ.

PHILBROOK, J. Bill in equity. The docket entries in the court below, made part of the record, show that the sitting Justice made a finding sustaining the bill, from which appeal was taken, but upon a later date, by agreement of parties, the same Justice signed an order to report the case to this court, which tribunal is to determine the cause "according to the equitable rights of the parties."

Comparatively few issues of fact exist. From a careful consideration of all the evidence we think the following statement of the case is correct.

The plaintiffs are respectively son and daughter of Joseph W. Davis, who died in 1904. The defendants are respectively widow and daughter of Judson Briggs, who died testate in 1906. By the terms of the latter's will all his estate was devised to these defendants. Since the beginning of these proceedings Mrs. Briggs has died and Mrs. Henderson, her daughter and co-defendant, and executrix of her will, defends individually and as such executrix.

On May 1, 1894, Joseph W. Davis, owned a double tenement house situated on the easterly side of Briggs Street in the Village of Brownville, while at the same time Judson Briggs owned a homestead on land adjoining the Davis property on the south, and also a stable and three tenement houses on land adjoining the Davis property on the north. Briggs Street runs in a northerly and southerly direction. Parallel to and easterly from Briggs Street, and between one hundred and fifty and two hundred feet distant thereform, is Church Street. Between the easterly line of the Davis land and the westerly line of Church Street is land known as the Dunning land. From the latter land, passing some distance northerly along Church Street, we come

to the Highland Quarry Road, leading toward the east, and at a point some distance east of Church Street and north of the Quarry Road is to be found a spring, which was owned by Judson Briggs, in 1894, and since his death has been owned by the defendants.

In the year 1894 Judson Briggs and Joseph W. Davis entered into an agreement substantially upon these terms; Briggs was to complete a partly constructed water-pipe from the spring to the Dunning land, while Davis was to lay a connecting pipe from Church Street, across the Dunning land, across his own land to his own house, permit Briggs to tap the connecting pipe with a tee to his homestead on the south of, and his stable and tenement houses on the north of the Davis house. Davis was also to pay Briggs the sum of fifty dollars. When all this was done Davis was to have water from the spring without any limit of time thereto being agreed upon. The water-pipes were laid, the connecting tees attached and used by Briggs, the fifty dollars paid, and from that time, during the remainder of the life of Judson Briggs, a period of about twelve years, and for the further period of about five years after his death, Davis and his heirs, these plaintiffs, received water from these pipes without charge or demand of payment for any water thus received. On the twenty-second of August, 1911, Mrs. Henderson notified the plaintiffs that the water would be cut off unless arrangements were made by August twenty-eighth, and thereafter the pipe was cut by Mrs. Henderson and the supply ceased. The plaintiffs ask this court to order the defendant to re-connect the severed pipe and to thereafter refrain from any act which would prevent the enjoyment of this water supply.

What are the "equitable rights of the parties" which we are to determine. The plaintiffs claim an easement. This the defendants deny.

An easement is defined to be a right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a specific purpose, not inconsistent with a general property in the owner, a right which one proprietor has to some profit, benefit, or beneficial use, out of, in, or over the estate of another proprietor, 2 Washburn on Real Property, 25; *Pomeroy* v. *Mills*, 3 Vt., 279. Our own court, in *Bonney* v. *Greenwood*, 96 Maine, 335, said that an easement may be concisely defined as a privilege without profit which one has, for the benefit of his land, in the land of another. But as to the

manner of creating an easement, it was declared in *Brown* v. *Dickey*, 106 Maine, 97, that the same was by (1) express or implied grant, (2) reservation or exception in the deed of conveyance, (3) prescription, (4) statutory proceedings, (5) estoppel. In the case at bar there is no express grant, no reservation or exception, no prescription, and no statutory proceeding upon which the plaintiffs may rely. May they find support for their claims by an implied grant or by estoppel. In *Watson* v. *French*, 112 Maine, 371, the court declared the rule to be firmly established in this State that there can be no implied grant unless the easement be one of strict necessity, mere convenience, however great, being insufficient. Nothing in the agreement between Davis and Briggs, heretofore recited, can be construed as an implied grant under the circumstances of this case. Was an easement created by estoppel. Equitable estoppel has its foundation in the immutable principles of natural justice; *Shurtleff* v. *Wiscasset*, 74 Maine, 130. The doctrine of equitable estoppel is founded upon the principles of equity and justice, and is applied so as to conclude a party, who by his acts and admissions intended to influence the conduct of another, when, in good conscience and honest dealings, he ought not to be permitted to gainsay them; *Rogers* v. *P. and B. Street Railway*, 100 Maine, 86; *Horton* v. *Wright*, 113 Maine, 439.

In *Shurtleff* v. *Wiscasset*, supra, we find our court, in no uncertain terms, declaring that an estoppel may grow out of a long continued acquiescence in or enjoyment of the fruits of a contract. In the case at bar a contract was made by Davis and Briggs. The contract, so far as Davis was concerned, was fully completed according to all its terms. The convenience, the benefits, the fruits of that contract were enjoyed and acquiesced in by Briggs during all the rest of his life, and for about five years thereafter by these defendants. The pipe laid by Davis afforded a conduit for the water to the homestead, tenements and stable of Briggs. The money paid by Davis to Briggs, in part at least, defrayed the expense incurred by the latter in extending the pipe from its prior terminus to the Dunning land. Briggs and his successors in title having thus, and for so long a time, enjoyed and acquiesced in the fruits of that contract, we have no hesitation in declaring, under the rules already referred to, that by equitable estoppel an easement was created in favor of Davis, a right to have the Davis pipe connected with the pipe laid by Briggs, and to have a flow of water through it uninterrupted by any act of the defendants.

Is this an easement in gross which, because of its personal nature, by the weight of authority, is not assignable or inheritable, Washburn on Easements, 4th Ed., page 11, 9 R. C. L., 739, and cases there cited; or is it an easement appurtenant, which runs with the land, Washburn on Easements, 4th Ed., page 40. In *Cadwalader* v. *Bailey*, 17 R. I., 495; 23 Atl., 20; 14 L. R. A., 330, an opinion amply fortified by citations, it is said, "Whether an easement in a given case is appurtenant or in gross, is to be determined mainly by the nature of the right and the intention of the parties creating it. If it be in its nature an appropriate and usual adjunct of the land conveyed, having in view the intention of the grantee as to its use, and there being nothing to show that the parties intended it to be a mere personal right, it should be held to be an easement appurtenant to the land, and not an easement in gross, the rule for the construction of such grants being more favorable to the former than to the latter class. Though an easement, like a right of way, may be created by 'grant in gross,' as it is called, or attached to the person of the grantee, this is never presumed when it can fairly be construed to be appurtenant to some other estate, and if it is in gross it cannot extend beyond the life of the grantee, nor can it be granted over, being attached to the person of the grantee alone. The greater weight of authority supports the doctrine that easements in gross, properly so called, are not assignable or inheritable. If, however, a right to take soil, gravel, water from a spring, and the like, from another's land may properly be denominated an easement, then it is proper to say that an easement in gross,—for such it might doubtless be constituted—might be both assignable and inheritable, for the rights enumerated are so far of the character of an estate or interest in the land itself, that if granted to one in gross it is treated as an estate, and may therefore be one for life or of inheritance."

In more concise language it was said in *Lidgerling* v. *Zignego*, 77 Minn., 421, 80 N. W., 360, 77 Am. St. Rep., 677, that "an easement is appurtenant, and not in gross, when it appears that it was granted for the benefit of the grantee's land."

Without reiterating the facts as they appear in the record, the gist of which has been already stated, the court is clearly of opinion that the easement created is an easement appurtenant, running with the land, and hence enjoyable by the plaintiffs who are heirs of Joseph W. Davis.

The record discloses that the defendants, in addition to the tenements owned by themselves, supplied six or eight other tenements, and in argument they claimed that their system of supply constituted a public utility but we cannot accede to this claim.

It is therefore the opinion of the court that the defendants should forthwith, without expense to the plaintiffs, reconnect the severed pipe and thereafter refrain from interfering with or interrupting the natural flow of water from the spring through this connected pipe. The mandate will be, bill sustained; with costs.

Case remanded to the court below for the preparation and execution of a decree in accordance with this opinion.

JOSEPH F. CREEDON

vs.

INHABITANTS OF THE TOWN OF KITTERY.

York. Opinion December 19, 1918.

Actions on account of defective ways. History of law governing notice in such cases. General rule to be applied in determining the sufficiency of such notice. General purpose of notice. Necessary description as to injuries to person. Rule as to description where claim is made for injuries to property.

Action to recover for personal injuries sustained by the plaintiff, and for damages done to his automobile, by reason of an alleged defective road or way, which by law defendant town was obliged to repair. The defendants claim that the notice required by R. S., Chap. 24, Sec. 92, was deficient. The case comes to us upon the question of the notice, with a stipulation that if the notice is sufficient the case shall stand for trial, otherwise plaintiff to become non-suit.

Held:

1. Notices in this class of cases are not to be very strictly construed. The main object of the notice is that a town may have an early opportunity of investigating the cause of an injury and the condition of the person injured before changes may occur essentially affecting such proof of the facts as may be desirable for

the town to possess; and a minor purpose of such notice would be perhaps that the town should have a favorable chance to settle the claim before being sued for it should they see fit to do so.

2. That the notice sufficiently specifies the nature and the location of the defect that caused the injury.
3. That the notice sufficiently specifies the nature of the plaintiff's bodily injuries.
4. That while in actions of this kind the notice must specify the nature of his bodily injuries, yet the statute does not require such specification as to the damage to personal property.
5. The notice is sufficient with reference to the nature of the damages to personal property in the case at bar.

Action on the case to recover damages for injuries sustained through and on account of a defective highway or bridge. Question was raised as to the sufficiency of the statutory notice, and by agreement of parties the question of the sufficiency of the notice was submitted to the Law Court with certain stipulations and agreements. Judgment in accordance with opinion.

Case stated in opinion.

Page, Bartlett & Mitchell, Arthur R. Sewall, and Hiram Willard, for plaintiff.

Aaron B. Cole, and Emery & Waterhouse, for defendant.

SITTING: CORNISH, C. J., SPEAR, HANSON, PHILBROOK, DUNN, MORRILL, JJ.

PHILBROOK, J. This is an action to recover for personal injuries sustained by the plaintiff, and damages done to his automobile, by reason of an alleged defective road or way which, by law, the defendant town was obliged to repair. The right of action is given solely by statute, R. S., Chap. 24, Sec. 92, and as a prerequisite to bringing such action it is provided that "any person who sustains injury or damage, as aforesaid, or some person in his behalf, shall within fourteen days thereafter notify one. . . . of the municipal officers of such town, by letter or otherwise, in writing, setting forth his claim for damages and specifying the nature of his injuries and the nature and location of the defect which caused such injury." The injury occurred July 11th, 1917, and on July 24th, 1917, by his counsel, the plaintiff served the following notice on the municipal officers of the defendant town.

"To the Board of the Selectmen of the Town of Kittery, in the County of York and State of Maine and to the County Commissioners of said County of York.

You are hereby notified that Joseph F. Creedon of Laconia, N. H., on the 11th day of July, 1917, was injured while attempting to drive his automobile across the Spruce Creek bridge in said Kittery on the highway leading from York to Portsmouth and that he claims damages against the said Town in the sum of Five Thousand Dollars ($5000). The cause of his injuries was the careless, dangerous and negligently manner in which the Selectmen were repairing the bridge, aforesaid and their failure to warn him of the dangerous condition of the said bridge. The bridge at the time of the accident was being repaired by the Selectmen by planking lengthwise over the old planking of the bridge, and only one-half of the width of the bridge had been newly planked, thus leaving the easterly half of the bridge two or three inches higher than the westerly half, while at the end of the bridge toward York the old planking was four inches higher than the road-bed of the highway on the west side of the bridge and five or six inches higher than the bed of the highway on the east side of the bridge. No warning of this condition was posted and when the automobile struck the planking of the bridge, the steering-gear was wrenched from his control and the automobile with its occupants ran over the side of the bridge and fell into Spruce Creek, whereby the said Joseph F. Creedon was nearly drowned, suffered a severe nervous shock and internal injuries and was greatly bruised and otherwise damaged and his automobile was badly wrecked and injured.

Dated at Portsmouth, N. H., this twenty-fourth day of July, 1917."

The defendant town challenges the sufficiency of this notice. By agreed statement, the parties appear before us with the stipulation that if this tribunal determines that the notice is sufficient the case is to stand for trial, otherwise the plaintiff is to be nonsuited.

Prior to the enactment of Chap. 215, Public Laws, 1874, although the statutory right of action against towns for injuries sustained by reason of defective ways then existed, no notice like the one under consideration was required. The legislature of that year added the provision that "any person who sustains any injury or damage as aforesaid, shall notify the . . . . municipal officers of such town . . . . within sixty days thereafter, by letter or other-

wise, setting forth his claim for damages, and specifying the nature of his injuries." From the quotation of the existing statute first above given it will be observed that this requirement of notice has obtained until the present day, although the time in which it must be given has been abbreviated, the method has been strictly confined to writing, and the requirement has been added of specifying the "nature and location of the defect which caused the injury."

Since the passage of the act first requiring notice, at least one score and ten times this court has been required to pass upon its purpose and announce the spirit in which it should be construed.

Kind, degree, and causes of injury, or damage, arising from accidents upon defective ways, in the very nature of things, present so many different instances and circumstances, that it will readily occur to one possessing even ordinary powers of observation and reflection how difficult, if not well-nigh impossible it would be to establish a hard and fast rule, or precedent, as to form of notice required by the statute in this class of cases. In the very early judicial interpretation put upon such notice, *Blackington* v. *Rockland*, 66 Maine, 332, our court said "Notices, in this class of cases, are not to be very strictly construed. They will often be given directly by the persons concerned, and without the aid and intervention of counsel; and the statute should not be so narrowly interpreted that they cannot ordinarily be given by such persons with safety to themselves, and at the same time be sufficient to protect the interests of the town. In many cases, too, the persons injured will not be able, at so early a date as required by the statute," then sixty days but now only fourteen, "to define the precise nature or estimate accurately the probable extent of the injury received. The main object of a notice is, that the town may have an early opportunity of investigating the cause of an injury and the condition of the person injured, before changes may occur essentially affecting such proof of the facts as may be desirable for the town to possess; and a minor purpose of a notice would be, perhaps, that the town should have a favorable chance to settle a claim before being sued for it, should they see fit to do so. In this view, we think a notice is sufficient, which describes the facts substantially and in general terms, so that thereby a town may have statements and intimations that would be likely to lead them, acting reasonably, into such inquiry and investigation as would result in

their acquiring a full knowledge of the facts of the case." This early rule, promulgated in eighteen hundred seventy-six, two years after the legislative requirement of notice, was again recognized that same year in *Sawyer* v. *Naples*, 86 Maine, 453, in these words: "The object of the notice is to enable the town seasonably to investigate claims for injury before the proof of the facts shall become unattainable from lapse of time or loss of life or memory. It is for the benefit of the town. Notifying the town of an injury received enables its officers to proceed to ascertain the facts and contest or settle with the party claiming damages as they may deem expedient." The same rule as to the object of the notice is stated in *Low* v. *Windham*, 75 Maine, 113, in *Kaherl* v. *Rockport*, 87 Maine, 527, in *Chase* v. *Surry*, 88 Maine, 468, in *Marcotte* v. *Lewiston*, 94 Maine, 233, in *Joy* v. *York*, 99 Maine, 237, where it is also re-affirmed that the notice is not to be very strictly construed, in *Spear* v. *Westbrook*, 104 Maine, 496, where the court said "This statutory requirement of the fourteen days notice has never been construed to impose upon the sufferer any unreasonable or burdensome duty," and in *Beverage* v. *Rockport*, 106 Maine, 223, where the court declared that "In view of the limited time within which these notices must be served, and the fact that they are often necessarily prepared without the aid of a professional draftsman, their construction should not be strangled by technicalities, nor distorted by captious criticism, but full effect should be given to their natural and obvious meaning."

Thus it will be seen that this court has consistently maintained an interpretation of the object and requirements of the notice under discussion, which has been fair and protective to municipalities, but at the same time favorable and equitable to parties suffering injuries to their persons or damages to their property through defective ways which municipalities, by law, were bound to keep in repair.

Guided by this rule of interpretation we will consider the objections raised by the defendant town in the case at bar.

First that the notice does not specify the nature and location of the defect that caused the injury. In this respect the notice is quite specific. It declares that the nature of the defect was the faulty condition of the planking of a certain bridge, and the difference in height of the old and new planking; while as to location it declares not only that the defect was on this certain bridge but specifies the end of the

bridge which was more defective. In *Chapman* v. *Nobleboro*, 76 Maine, 427, cited by the defendant town, the court held that a location was sufficiently described by the words "about sixty to eighty rods northerly" of a given point, and adds that "the generality of the distance mentioned puts the officers upon their guard and it can be no hardship for them to examine the road, the distance required, for the defect so fully described as readily to be recognized when seen." In *Kaherl* v. *Rockport*, supra, also cited by the defendant, the court held a notice to be precise, definite and sufficient which said "a defect and want of repair in the sidewalk of a highway known as Commercial Street, at a point in said highway nearly abreast" a certain factory; and added further, "The defect and want of repair through which said injuries were occasioned, consisted of deep depression of the sidewalk at the termination of the planking on that evening." In that case, however, the court was obliged to nonsuit the plaintiff on another ground, namely, that in truth and in fact the defect was not at the place indicated by the notice but at a point some distance therefrom. See also *Hignett* v. *Norridgewock*, 105 Maine, 189, *Beverage* v. *Rockport*, 106 Maine, 223, and *York* v. *Athens*, 99 Maine, 82.

Second, that the notice does not specify the nature of the plaintiff's bodily injuries. Upon this objection the defendant town places much emphasis and relies with much confidence. It must be admitted that the question presented is a close one, but we think it may be properly answered in favor of the plaintiff. The law is well settled that one of the conditions precedent to a recovery, in an action like this, is the giving of a written notice specifying the nature of the injuries. It is not enough for the plaintiff, in his notice, to merely say that he has been injured. *Low* v. *Windham*, supra, nor that he has received severe bodily injuries, *Goodwin* v. *Gardiner*, 84 Maine, 278; he must specify the nature of his injuries. The very full and admirable discussion of this point in *Joy* v. *York*, supra, makes further citation unnecessary. In the case at bar the plaintiff gives notice that he "was thrown into the water under said bridge, and was nearly drowned, and was greatly injured both externally and internally, and suffered great mental and physical pain and anguish, and received a severe and nervous shock, and was greatly bruised and otherwise damaged." In most cases the injuries received in a struggle to preserve life from drowning would have no attribute of locality on the body or limbs,

such as many of the decided cases have demanded; *Spear* v. *Westbrook*, supra; *Goodwin* v. *Gardiner*, supra; while it may in fact describe "the nature of the injury with sufficient particularity to enable the town to inquire into and ascertain the true condition of the sufferer;" see *Joy* v. *York*, supra, wherein the court has also well said "If he can do no more, he can state the apparent physical condition caused by the injury, and this he may do by comprehensive terms."

The third and last objection presented is that the notice does not specify the nature of the injuries and damages to his personal property. Here we must turn to the statute and carefully examine its provisions. Right of recovery is given to anyone who "receives any bodily injury, or suffers damage in his property." Two distinct and different things are provided for. When the recovery sought is for bodily injuries it is later provided that his notice must specify the nature of those injuries. Not so as to damage to personal property. The reason for the difference readily occurs to the thinking mind. The frequent tendency to depend upon subjective symptoms, and to exaggerate injuries to the person were well known to the legislature. A man may be able to practice an imposition as to his own personal injury, but would find it difficult to do so in respect to damage to his personal property. *Joy* v. *York*, supra. Subjective symptoms may greatly overstate an injury like a sprain. A broken spring or windshield of an automobile speaks for itself. It tells the truth and cannot exaggerate. The party suffering damage to personal property must make claim for damage, but he is not required in his statutory notice to the town, to specify the nature of the damages to that personal property.

After a careful consideration of all the objections to the notice, urged by the defendant, we are constrained to declare that it is sufficient for the requirements of the statute in this case and the mandate must be,

Case to stand for trial.

JOHN H. MCCANN *vs.* JOSEPH P. BASS.

Penobscot. Opinion December 20, 1918.

Landlord and tenant. Facts constituting abandonment of rights under lease. How lease may be terminated.

This case involves an alleged eviction by the defendant and comes up on report. The plaintiff had a written lease of the premises, which he had vacated, but claimed not to have surrendered. The defendant claimed the premises had been surrendered by mutual consent.

While several questions of law are raised in the briefs on each side, the case is finally resolved into a simple question of fact: Did the plaintiff abandon and surrender his leasehold rights?

Held:

1. That the defendant has sustained the burden of proof upon the question of abandonment and surrender.
2. That R. S., Chap. 78, Sec. 16, does not prevent proof of surrender by "act or operation of law."
3. That surrender was so accomplished in the present case.

Action for covenant broken. Defendant filed plea of general issue, and also brief statement setting forth in substance that the tenancy by the plaintiff in the premises was simply a tenancy at will and that the plaintiff had voluntarily abandoned and surrendered any tenancy which he held in the premises. Judgment in accordance with opinion.

Case stated in opinion.

Edward P. Murray, for plaintiff.

Matthew Laughlin, for defendant.

SITTING: SPEAR, HANSON, PHILBROOK, DUNN, MORRILL, JJ.

SPEAR, J. This case comes up on report, and is stated in the plaintiff's brief as follows:

This case was heard at Penobscot County, October Term, A. D. 1917, and by agreement was reported to the Law Court for its determination upon so much of the evidence as is legally admissible.

"The defendant in 1910 leased a store on Main Street, in Bangor, to the plaintiff for a period of five years, with the right of a further renewal of five years. Provided that the leasee at least three months before the expiration of said term or any renewal thereof, gave the lessor notice in writing of his election to claim such renewal. The first five years the rent was to be $700 per annum, and the other two periods the rental not to exceed $750 per annum. The plaintiff occupied the premises under the lease from its date, January 1st 1910, up to sometime in September, 1916, well into the second year of the second period of said lease. He did not give the notice in writing as stipulated in said lease, but did pay the higher rental, namely $750, stipulated in lease, beginning January 1st 1915. In September, 1916, after talking with the defendant, the plaintiff moved to another store, and was endeavoring to sell his lease when he was notified by the defendant that there was no lease in existence, and the defendant assumed control of the premises against the will of the plaintiff, remodelling the store, taking part of the basement and letting the balance of the store at an increased rental. And this action is for this eviction."

While several questions of law are raised in the briefs on each side, based upon different views of interpreting the evidence, the case is finally resolved into a simple question of fact: Did the plaintiff abandon and surrender his leasehold rights? It will serve no purpose to do more than give a summary of the facts upon which the decision of this question is based.

The plaintiff had a written lease, renewable on written notice. It is admitted that such notice of renewal was not given. But the want of such notice was not necessarily conclusive upon the plaintiff, as the notice might be waived, either expressly or by inference from the conduct of the parties, and the term of the lease continued by such waiver. By another provision of the lease the plaintiff could not sublet without the written consent of the defendant. Written consent was not given. The plaintiff, however, contends that the defendant orally agreed to permit him to sublet. The defendant stoutly denies any such agreement. We think the plaintiff fails to sustain the burden of proof on this issue. His contention contradicts (1) the terms of the written lease, in a provision that is vital to his interest, namely, written consent to sublet; (2) the positive testi-

mony of the defendant that he gave no oral permission to sublet. In his denial of an agreement the defendant is corroborated by this provision of the lease. While important, the fact that the plaintiff could not sublet, is not conclusive upon him, as he could have kept the store and paid the rent, at a loss. It is important in its bearing upon abandonment. There are also other admitted transactions which, in connection with the other circumstances, seem to be conclusive. First, the plaintiff had actually vacated the premises for business purposes. Second, he actually gave up the key. The plaintiff, however, says he qualified the surrender of the key by saying to Mr. Hubbard, he "would maintain his rights under the lease." Mr. Hubbard, the defendant's agent, contradicts this and says, "he gave it (the key) to me willingly." Here again the fact that he gave up the key at all corroborates Hubbard, as it was an act inconsistent with the plaintiff's general contention that, after all these violations of the written terms of the lease, he still retained it upon oral grounds.

We are of the opinion that the defendant has sustained the burden of proof upon the question of abandonment and surrender.

The plaintiff, however, invokes R. S., Chap. 78, Sec. 16, that "there can be no estate created in lands greater than a tenancy at will, and no estate in them can be granted, assigned or surrendered, unless by some writing signed by the grantor, or maker, or his attorney." But this statute was not intended to prevent the operation of a mutual agreement between the parties, when consummated by the acts of the parties. That is, when the lessee does the acts which prove his intention to abandon and surrender, like vacating the premises and giving up the key, and the lessor, in pursuance of such acts, goes into actual occupation, then, by acts and operation of law, the lease is terminated.

This construction has been fully endorsed by the court of Massachusetts, and by analogy, by our own court. In *Talbot et al.* v. *Whipple,* 14 Allen, 177, it is held: The rule of law, as now settled by the recently adjudicated cases, is, that any acts that are equivalent to an agreement of the part of a tenant to abandon, and on the part of the landlord to resume possession of the demised premises, amount to a surrender of a term by operation of law."

The court then recites the mutual acts of the parties, which prove a surrender and abandonment of the term, and add: "The minds of

the parties, therefore, concurred in the common intent of relinquishing the relation of landlord and tenant, and they executed this mutual intent by acts that are tantamount to a stipulation to put an end to the lease."

Heselton v. *Seavey*, 16 Maine, 212, involves the same principle, although the parties to the action are reversed. In this case the lessor took possession of the leased building and relet it for the balance of the unexpired term, and at the same time sued the lessee for the rent for the unexpired term, on the ground that the surrender of the premises was not in writing, as required by the statute of frauds. The defendant pleaded the re-rental, and the court decided the case upon the rule of ouster by the plaintiff. But the fact remains that the court gave effect to the acts of the parties, regardless of the statute. At the beginning of the opinion, on page 214, we find this signficant sentence: "Since the statute of frauds there is no doubt that the surrender of a lease can be legally proved, only by deed or note in writing, *or, by act and operation of law.* While the case does not define the phrase "by act or operation of law," the inference is inevitable that a lease may be terminated by proof other than a deed or note in writing. We are unable to conceive of stronger proof by "act and operation of law" than a vacation of the premises and surrender of the key by the lessee, and the complimentary act by the lessor of taking actual possession.

The surrender of the premises by the lessee and acceptance thereof by the lessor, being incompatible with the continuance of the lease, the entry is,

Judgment for defendant.

MEMORANDUM DECISIONS

CASES WITHOUT OPINIONS

EDMUND JODOIN *vs.* MAINE CENTRAL RAILROAD COMPANY.

Androscoggin County. Decided December 21, 1917. This case falls so completely within the facts and law laid down in the recent opinion of *Blanchard, Administrator*, v. *Maine Central Railroad Company*, 116 Maine, 179, that we deem it unnecessary to discuss either the law or the facts. If we adhere to the doctrine of this opinion and the cases there cited, only one conclusion can be drawn from the facts in the case at bar. As we see no reason for departing from the rule in the Blanchard case, we must hold that the plaintiff was guilty of contributory negligence. Motion sustained. *H. E. Holmes, and W. R. Pattangall*, for plaintiff. *White & Carter*, for defendant.

FRANCES E. HURLEY, In Equity, *vs.* LUCY C. FARNSWORTH, Admrx.

Knox County. Decided December 21, 1917. This is a bill in equity brought to redeem certain mortgages and is before the court on an appeal from the decree of the sitting Justice sustaining the bill.

The sitting Justice entered the following decree:

"This case came on to be heard, and was fully heard and argued by counsel, and thereupon and in consideration thereof it is ordered adjudged and decreed as follows:

That said bill be sustained.

That the mortgages described in said bill are cancelled by the tender of the money due thereon, it being the sum of nine hundred

and ten dollars, which tender has been paid into court, and that the defendant, the administratrix of said estate, be and hereby is required to accept said sum, and to release and discharge all of said mortgage.

That the plaintiff recover her costs in said proceeding to be taxed by the Clerk."

The points raised at the hearing and the facts in issue are all stated with precision in the finding of facts. The sitting Justice had an opportunity to weigh the testimony and pass upon its credibility at the hearing. That advantage is denied the court sitting as a Law Court. It remained for the court to examine the record, independently, and in view of the arguments of counsel on the one side and the other. This duty we have performed carefully, and our conclusion is that the appellant has not sustained the burden imposed upon her. It does not appear that the findings of the sitting Justice are clearly wrong.

The decree appealed from must be affirmed. Bill sustained. Decree in accordance with this rescript. *A. S. Littlefield*, for plaintiff. *White & Carter*, for respondent.

JOSEPH GAGNON *vs.* LEWISTON, AUGUSTA & WATERVILLE ST. RY.

Androscoggin County. Decided January 29, 1918. This action is for damages to plaintiff's automobile which was struck by defendant's car, at the intersection of Chestnut and Lisbon Streets, in Lewiston. The only dispute is as to the facts and there is sufficient evidence to justify the jury's verdict of $169.50 in the plaintiff's favor. The motion filed by the defendant is therefore overruled. *McGillicuddy & Morey*, for plaintiff. *Newell & Woodside*, for defendant.

HARRY GROSSMAN *vs.* ALLEN W. TIBBETTS.

Penobscot County. Decided February 18, 1918. This is an action brought by the plaintiff, Harry Grossman, to recover from the defendant certain damages for breach of an implied warranty in the sale of personal property by the defendant to the plaintiff. The only

question involved at the trial was whether or not the defendant sold to the plaintiff the goods in question. A verdict was rendered for the plaintiff in the sum of two hundred nineteen dollars and sixty-one cents by the jury at the January term of the Supreme Judicial Court, 1917. After verdict the defendant filed a general motion for new trial, and several months afterward, in addition thereto, filed a motion for new trial on the ground of newly discovered evidence.

An examination of the testimony clearly shows that the general motion should be denied. A pure question of fact was in issue and the evidence was conflicting, but not so one-sided as to warrant the disturbance of the verdict. Nor do we discover any reason for granting a new trial under the alleged newly discovered evidence. First, we think the circumstances are quite conclusive that this evidence could have been discovered before the trial, with the exercise of due diligence. Second, the evidence discovered is not pertinent to the material issue involved. Third, we should hesitate to say, if it had been offered and admitted at the trial, it would have changed the result.

For these reasons we think the entry should be: Motion for a new trial overruled. Motion for a new trial on newly discovered evidence overruled. *Simon J. Levi,* for plaintiff. *Wilfred G. Conary,* for defendant.

GEORGE H. BEAN, Admr. of Estate of S. M. BEAN,

vs.

WILLIS G. THORNE.

Androscoggin County. Decided February 18, 1918. This case comes up on a motion by defendant for a new trial. This is an action on account stated, alleged to be due from the defendant to S. M. Bean, the plaintiff's intestate. The question stated by the presiding Justice was, whether there was a settlement between this Mr. Thorne and the deceased, Mr. Bean, where thirty dollars was agreed to be paid. On this issue the jury found for the defendant. While the evidence was flatly conflicting, it presented a pure question of fact for the jury upon which their decision must, under our judicial system, be regarded

as final. It is the constitutional right of the party having gained the favor of the jury's verdict to have that advantage sustained if there is any substantial evidence upon which it is founded. In this case we find no such lack of evidence as warrants setting aside the verdict. Motion overruled. *Edgar M. Briggs*, for plaintiff. *George C. Wing, and George C. Wing, Jr.*, for defendant.

HANNIBAL H. CAMPBELL *vs.* DR. W. C. PETERS.

Piscataquis County. Decided February 18, 1918. This is an action brought by the plaintiff against the defendant for alleged malpractice in the performance of a surgical operation. The case comes up on motion for a new trial upon both the ground of liability and the damages awarded. Upon the question of liability arose the usual conflict of testimony between medical men when called to testify upon the one side and the other of a medical or surgical case. The jury found for the plaintiff upon this issue, and their verdict, if accorded the benefit of the well established rules of law, should not be disturbed.

Nor do we think, under the testimony, we would be warranted in cutting down the amount of the verdict. The jury is as much a part of the judicial system, under our constitution and laws, as the presiding Justice or the Law Court. While we might have a different judgment from the jury in any particular case, yet we are not authorized to substitute our judgment for theirs, when they have exercised a judgment not so inconsistent with the most favorable interpretation which the evidence will bear, as to indicate bias, prejudice or improper influence. Motion overruled. *McGillicuddy & Morey*, for plaintiff. *W. R. Pattangall, and H. E. Locke*, for defendant.

MADELINE A. HUNTER, by next friend, *vs.* JOHN H. MOUNTFORT.

Cumberland County. Decided February 21, 1918. This case is before the court on a motion to set aside the jury's verdict in plaintiff's favor, for personal injuries resulting from a collision between a bicycle ridden by her and an automobile driven by the defendant.

Defendant was operating a right hand drive five passenger touring car on Bowdoin Street, in the City of Portland going towards the Western Promenade. As he approached Chadwick Street, which entered Bowdoin at a sharp angle on the right, the plaintiff, a girl of about eighteen, entered Bowdoin Street on the left from the drive-way of a private residence, and collided with the auto.

After careful study of the evidence we feel that with due care on the plaintiff's part the accident would have been avoided. The automobile was moving in broad day light at a moderate rate and must have been seen by the plaintiff whose plain duty it was to watch the traffic in the street she was about to enter. Yet with no warning from the bell with which her wheel was equipped she ran directly in the path of the car, when the defendant's attention was properly given to watching for the approach of traffic from Chadwick Street. Motion granted. *William A. Connellan, and Harry H. Cannell*, for plaintiff. *Payson & Virgin*, for defendant.

MATTIE E. D. EMMONS *vs.* WILLIAM M. KING.

Lincoln County. Decided February 21, 1918. It was stipulated in this case that the case and all briefs should be filed on or before February 1, 1918, or defendant's exceptions should be overruled.

The designated time having expired and no papers having been received, it is thereupon ordered that the exceptions be overruled. *George A. Cowan*, for plaintiff. *W. M. Hilton*, for defendant.

ANTOIN LUBIN *vs.* THE BENTON AND FAIRFIELD RAILWAY.

Kennebec County. Decided March 11, 1918. A careful study of the testimony in this case fails to reveal any sufficient evidence of liability on the part of the defendant. The allegations in the writ are reduced in the testimony to the single charge of incompetency of an employe of the defendant, through deafness, and a want of due care on the part of the defendant in failing to discover such incom-

petency. The plaintiff was a brakeman on a train of defendant, consisting of an electric shifter, and empty freight car. The alleged incompetent servant was motorman.

While under the familiar rules of law, we think the plaintiff has failed to sustain the burden that the defendant, under the circumstances of the case, was guilty of negligence in failing to discover the defective hearing of this motorman, there is another undebatable reason why the plaintiff cannot recover. If we assume the motorman to be deaf and incompetent, to the extent claimed by the plaintiff, we utterly fail to find any casual relation between the motorman's deafness and the plaintiff's injury. In other words, there is a failure of evidence to show that the deafness had anything to do with the accident. As it can serve no useful purpose to analyze the testimony upon a question so plain as this seems to be, without further discussion, we think the entry must be made: Motion sustained. New trial granted. *Weeks & Weeks*, for plaintiff. *W. R. Pattangall, Frank E. Brown, and Herbert E. Locke*, for defendant.

CAROLINE T. WILLEY *vs.* UTTERBACK-GLEASON COMPANY.

Knox County. Decided March 11, 1918. On motion by defendant, this is an action for the recovery of damages for an injury received in an automobile collision. The plaintiff charges the defendant with negligence in the operation of his car at the time of the accident, and that she was in the exercise of due care. We think she has sustained the burden of proof. The case was submitted to a jury upon pure questions of fact and they found in favor of the plaintiff. Whatever conclusion this court might come to, sitting as a jury upon this case, is not the question. The jury by our constitution and law, is as much a part of our judicial system as is the court. When their verdict comes to us for review, on the facts, we are legally bound to let that verdict stand, if there is substantial evidence which warranted the jury in their finding.

We cannot ignore the fact, from a careful study of the testimony, that the jury did have sufficient evidence upon which to find a verdict for the plaintiff. Motion overruled. *O. H. Emery, and John Nelson*, for plaintiff. *Donald F. Snow, and Morse & Cook*, for defendant.

ROCKLAND & ROCKPORT LIME CO. *vs.* COE MORTIMER CO.

Knox County. Decided March 15, 1918. Action to recover damages for injuries received by plaintiff's barge, incurred by reason of defendant's failure to provide reasonably safe docking place. The verdict is for defendant and plaintiff moves for new trial on the customary grounds.

A careful and painstaking examination of the evidence, which it would be profitless to discuss at length, leads the court to decide that the jury manifestly erred in the application of the evidence to the rules of law governing the case. Motion sustained; New trial granted *A. S. Littlefield*, for plaintiff. *Alan L. Bird, and Wardner & Cavanagh*, for defendant.

LOUIS ROBASH *vs.* MAINE CENTRAL RAILROAD COMPANY.

Franklin County. Decided March 30, 1918. This was an action on the case for personal injuries sustained by the plaintiff while in the employ of the defendant as a section hand. At the conclusion of the plaintiff's testimony, upon motion, the presiding Justice ordered a non-suit, upon exceptions to which the case comes to this court.

We think the ruling was right. This action was brought under the Federal Employers' Liability Act, and, as agreed, the only question involved is the negligence of the defendant. The negligence charged is that the defendant failed to properly instruct the plaintiff as to the manner of operating the new electric hand car and to inform him with respect to the danger incident to its operation.

A careful reading of the testimony, we think, clearly fails to show proof of any negligence on the part of the defendant which tended to produce or even contribute to the accident which caused the plaintiff's injury. We think about all that can be said with respect to what the testimony proves, is that it shows the hand car jumped the track and injured the plaintiff. We are unable to discover any causal relation between the want of instructions and the accident which injured the plaintiff. Exceptions overruled. *Thomas D. Austin*, for plaintiff. *White & Carter, and Frank W. Butler*, for defendant.

MARK BERMAN *vs.* E. P. LANGLEY.

Androscoggin County. Decided June 17, 1918. This is an action of assumpsit to recover eight hundred dollars paid by the plaintiff as part of the agreed price of one National Highway Six Automobile, and is before the court on the plaintiff's exceptions, (1) to the ruling of the presiding Justice excluding the contract between the parties, and (2) an order of nonsuit.

The declaration contained four counts, the first two alleging a breach of warranty in the sale of the automobile, the third for money had and received, and the fourth the general omnibus count, with the specification "that under the latter the plaintiff will rely upon the evidence to be introduced under counts one and two in this declaration as constituting grounds for the rescission of his contract and that the evidence to be introduced under these counts will amount to a rescission of his contract and thereby entitle him to recover the money paid by him on account of said automobile."

The plaintiff in his brief abandons the first count, and as to the second says, "plaintiff under this count does not seek to enforce the contract, he does not attempt to recover damages for its breach. Nor does he attempt to enforce his rights under it. But, on the contrary, he says the sealed contract has been terminated—ended—and as a result of its termination the defendant is unjustly enriched and has of the plaintiff's money the sum of eight hundred dollars. Plaintiff offers the sealed contract in evidence, not to support his claim for damages for its breach, but to prove the status of the parties, and to show the circumstances under which the defendant unjustly came into possession of his money."

The contract in question contained the usual clause that the automobile to be delivered should be "in good order and condition," and a further and final provision "that the vendor shall keep said car in repair for the term of one year from this date on account of any imperfections in the construction of said car at time of delivery to said purchaser or his agent." The contract is printed in the record; the only provisions of moment here are as quoted above.

A perusal of the evidence in the case, in view of the plaintiff's pleadings and contention that (1) there was a written contract

between the parties, (2) that the contract contained the provision that the automobile should be in good order and condition when delivered, (3) that the vendor shall keep said car in repair for the term of one year, etc., etc., and (4) that the contract was broken by the defendant and for that reason rescinded by the plaintiff, persuades us that in directing a nonsuit the trial Judge erred. The questions involved were nearly if not quite all properly for the jury and not for the court. The entry must be. Exceptions sustained. *Benjamin L. Berman, and Jacob H. Berman,* for plaintiff. *J. G. Chabot,* for defendant.

FRANK R. HAYDEN *vs.* MAINE CENTRAL RAILROAD.

Androscoggin County. Decided June 17, 1918. This is an action on the case to recover damages for injury to three horses shipped by the plaintiff from Lewiston, Maine, to Lexington, Kentucky. The plaintiff recovered a verdict for $772.92, and the case is before the court upon general motion and exceptions by the defendant.

The action was at common law to enforce a common law liability. The theory of the plaintiff throughout the case, and not abandoned in argument, was that the negligence alleged was in fact the negligence of the defendant, and not that of a connecting carrier, and that the delay causing the damage was on the defendant's railroad in the State of Maine. The defendant asked for a directed verdict and was refused. The refusal was the subject of the third exception.

It was incumbent on the plaintiff to prove liability on the part of the Maine Central Railroad. The plaintiff's evidence taken as a whole failed to prove that fact, and therefore the motion of the defendant to direct a verdict in its favor should have been granted. The conclusion here reached necessarily disposes of the motion. Exceptions sustained. *McGillicuddy & Morey,* for plaintiff. *White & Carter,* for defendant.

ALZADA THURSTON

vs.

BENTON AND FAIRFIELD STREET RAILROAD COMPANY.

Kennebec County. Decided July 3, 1918. In this case the jury found a verdict for the plaintiff for $3,737.50. The case comes up on the usual form of motion. The verdict of the jury upon the question of liability cannot be disturbed. But the damages are manifestly excessive. It is the opinion of this court that $1500. is ample and liberal. It is therefore ordered: Motion sustained, unless the amount of the verdict above $1500. be remitted within 30 days from the certification of this decision. *F. W. Clair*, for plaintiff. *Weeks & Weeks*, for defendant.

ROSE ANNA FOURNIER *vs.* ALPHONSE GAGNE.

Aroostook County. Decided July 3, 1918. Action to recover damages, actual and punitive, for a criminal assault. The jury returned a verdict for the plaintiff and assessed damages in the sum of fifteen hundred forty-one dollars and sixty-seven cents. The defendant moves for a new trial on the customary grounds. No exceptions to any ruling, or to the charge of the presiding Justice, are presented. The issue was solely one of fact. As usual the defeated party claims that the verdict of the jury was clearly and unmistakably wrong. We should not overlook the truth that the right of trial by jury, and the right to have controverted questions of fact settled by a jury, are fundamental and important rights which should not be lightly overthrown by the interference of the Appellate Court sitting in banc. That court has no moral or legal right to so interfere unless the jury has been swayed by passion or prejudice, or committed error from some other reason, to such an extent that an impartial, intelligent tribunal, sitting as an appellate body, and having before it only the printed record, can truly say that the error of the jury is plain and unmistakable.

In the case at bar the jury saw the witnesses and heard the testimony from living lips, giving proper weight, we must assume, to the appearance, age, lack or otherwise, of proper environment and early training of the plaintiff, estimated her mental and moral characteristics in the light of existing circumstances, and believed her unsupported testimony. They also, in like manner, heard the testimony of the defendant and his witnesses, and noted all his claims of inconsistency in the plaintiff's conduct and story. The result, as we have seen, was favorable to the plaintiff. We are not to say what our verdict would have been, had we been rendering an initial finding, but rather we are to declare whether the verdict was so clearly and unmistakably wrong that it must be set aside. This we are unable to do after a careful examination of the record. Neither are we inclined to say that the damages are too large when the element of punitive damages is fairly considered. Motion overruled. *John B. Pelletier, and Powers & Guild,* for plaintiff. *L. V. Thibodeau, Shaw & Thornton, and A. S. Crawford, Jr.,* for defendant.

ABBIE J. ROLFE *vs.* LEWISTON, AUGUSTA & WATERVILLE ST. RY.

Androscoggin County. Decided July 14, 1918. This is an action to recover damages caused by the alleged negligence of employees of the defendant in negligently starting a car of defendant, on Court Street, in Auburn, whereby the plaintiff was thrown to the pavement and sustained injuries. The case comes before the Law Court upon motion for a new trial specifying the usual grounds.

The testimony was conflicting; the account given by the plaintiff and her witnesses would, if believed, warrant a verdict in her favor; on the other hand, the testimony of the defendant's witnesses would warrant the opposite conclusion. In weighing this conflicting evidence, the opportunity of the jury to see and hear the witnesses, to consider their appearance and demeanor on the stand, and to judge of the spirit with which they testified, must have been of great assistance in arriving at a correct decision; and we cannot say that upon the question of liability their conclusion was clearly wrong.

Upon the question of damages, however, we think the jury have exceeded the amount which will afford full and just compensation. Upon a careful consideration of the evidence we conclude that the following entry should be made: Motion granted unless within thirty days after this decision is received by the Clerk of Courts for Androscoggin County, the plaintiff remit all of the verdict in excess of $750; in which case, motion overruled. *Clifford & Clifford,* for plaintiff. *Newell & Woodside,* for defendant.

JOHN H. KING *vs.* WENTWORTH B. JORDAN.

Androscoggin County. Decided July 14, 1918. By writ dated August 6, 1917, the plaintiff sued to recover the sum of four hundred and seventeen dollars and fifty cents which he claimed to be due to him as wages for his personal labor, and for board and materials performed and furnished the defendant by the plaintiff at the former's request. The defendant denied liability, and asserted upon trial at the Androscoggin session in April, 1918, that previously to the commencement of the suit, he had already fully paid the defendant for all that he had done. The jury returned a verdict for the defendant, and the case is here on plaintiff's motion for a new trial. No sufficient reason is perceived why the motion should be granted. Motion overruled. *Newell & Woodside,* for plaintiff. *Pulsifer & Ludden,* for defendant.

KATHERINE J. GERARD

vs.

LEWISTON, AUGUSTA & WATERVILLE STREET RAILWAY.

Androscoggin County. Decided July 14, 1918. Action to recover damages for personal injuries. No questions of law were reserved for consideration by the court. In addition to a general denial of liability and a claim that the damages awarded were excessive, the defendant

also depended upon a release under seal, executed by the plaintiff, which purported to be an acknowledgment of satisfaction of damages. The plaintiff's reply is that the release was prematurely obtained, was misunderstood by her when she signed it, and was obtained under circumstances amounting to a fraud, in view of her mental and physical condition at the time when the alleged release was given. These claims of the plaintiff were strenuously denied by the defendant. All these issues of fact were submitted to the jury and we cannot say that their finding was so manifestly wrong as to call for interference by this court. On the contrary the court is of opinion that the verdict was amply justified and the damages exceedingly moderate. Motion overruled. *Seth May*, for plaintiff. *Newell & Woodside*, for defendant.

SADIE C. SEELEY

vs.

CUMBERLAND COUNTY POWER & LIGHT COMPANY.

Cumberland County. Decided July 14, 1918. In this action to recover damages for personal injuries sustained on March 27, 1915, the plaintiff obtained a verdict for $927.

After careful consideration of the case it is the opinion of a majority of the court that the verdict is not so clearly wrong, either on the question of the defendant's liability or on the amount of damages, as to require the intervention of the Law Court. The entry will therefore be: Motion overruled. *John B. Kehoe*, for plaintiff. *Bradley & Linnell*, for defendant.

ROCKLAND HARDWARE COMPANY *vs.* H. C. GOULDING AND TRUSTEE.

Knox County. Decided July 14, 1918. The case is before the court on motion by the defendant to set aside the verdict rendered in favor of the plaintiff. No questions of law are raised and the issue is

whether there was sufficient evidence to warrant the jury in finding the existence of agency on the part of one Ames and one Allen so as to charge the principal defendant for goods sold and delivered by the plaintiff.

After a careful examination of the record the court is of opinion that there is sufficient evidence upon which to base the verdict of the jury, and the entry must be: Motion overruled. *Charles T. Smalley*, for plaintiff. *Frank B. Miller*, for defendant.

ISAAC E. GAYTON *vs.* DORA MAUD GAYTON.

Androscoggin County. Decided July 14, 1918. This was an action on a promissory note. The verdict was for $105.32, being full amount of the note and interest. The execution and delivery of the note were not denied. The only question was whether the plaintiff, to whom the note was delivered, surrendered it to the defendants. Upon this issue there was an irreconcilable conflict of testimony, the plaintiff declaring that he did not surrender the note, and the two defendants testifying that he did. There are no circumstances or probabilities in the case which rendered the testimony of the plaintiff inherently false. The jury evidently believed the plaintiff. The value of the testimony was a question for the jury and not for the Law Court. The jury having passed upon it their decision must prevail. Motion overruled. *McGillicuddy & Morey*, for plaintiff. *Newell & Woodside*, for defendant.

BENJAMIN H. COFFIN *vs.* ELLA M. JOHNSON.

Androscoggin. Decided September 7, 1918. This is an action of assumpsit to recover for services rendered during a period of five and one-half years. That services were rendered is not controverted. Their amount and value were the contested issues. The verdict was in the sum of $1772. Had these issues been submitted to the court in the first instance our finding would have been somewhat less. But we are unable to say that the conclusion of the jury in

this case, which was of a character peculiarly within their knowledge and experience, was so grossly excessive as to indicate passion or prejudice on their part or a failure to appreciate the force of the evidence. The entry must therefore be: Motion denied. *McGillicuddy & Morey*, for plaintiff. *J. H. Rousseu*, for defendant.

GEORGE H. CURTIS *vs.* L. O. NIXON.

Kennebec County. Decided September 7, 1918. The plaintiff recovered a verdict of $406.33 for damages sustained in an automobile collision. The issue was legal liability on the part of the defendant. As is usual in this class of cases the testimony was sharply contradictory. The jury sustained the plaintiff's contentions, and the evidence abundantly justifies the verdict. The responsibility was placed, where it belongs, on the defendant. Motion denied. *Andrews & Nelson*, for plaintiff. *Harvey D. Eaton, and Frank O. Dean*, for defendant.

H. L. SMITH, Trustee in Bankruptcy, *vs.* MURRAY BROTHERS CO.

Piscataquis County. Decided September 9, 1918. This is an action on the case brought by plaintiff, as trustee in bankruptcy of the estate of one Charles W. Mitchell, adjudged a voluntary bankrupt, May 20, 1916, to recover for the benefit of the estate, the amount of an alleged preference made by bankrupt to the defendant on the fifth day of May, 1916. The trial of the case below resulted in a verdict for plaintiff and defendant files a motion for new trial upon the usual grounds.

Upon a careful examination of the evidence the court is of opinion that the evidence and the inferences properly to be drawn from it are sufficient to warrant the jury in arriving at their verdict. Certainly it is not manifest that the jury acted from improper motives. See *Batchelder* v. *Bank*, 218 Mass., 420, 423; *Donohue* v. *Dykstra*, 247 Fed., 593, 594. Motion overruled. *H. L. Smith, and John S. Williams*, for plaintiff. *Phillips B. Gardner*, for defendant.

GENEVA A. GRANT

vs.

PATRONS ANDROSCOGGIN MUTUAL FIRE INSURANCE COMPANY.

Waldo County. Decided September 23, 1918. The facts essential to the decision of this case are as follows: The plaintiff took of the defendant company a policy of insurance upon her real estate. She then placed a mortgage upon the insured property and by direction of the bank to which the mortgage was given went to see the agent who procured the insurance, to get him to stamp it "or sign it." She says he told her to write on the mortgage, "in case of fire pay with interest to the order of the Belfast Savings Bank." This was written by her on the policy. The agent admits her coming to see him but denies that he told her to endorse anything upon the policy, but on the contrary says he told her he had no authority to do so, and that she must write the secretary of the company. After this transaction she paid, and the company accepted, assessments from her in 1914, 1915, 1916, and that they have never been returned.

This case comes up on report. Under our statute 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," and that "the company is bound by their knowledge of the risk and all matters connected therewith" and the interpretation, time after time, of this statute, defining the scope and effect of its meaning, it is evident that the only question before us is one of fact, involving the recollection of a transaction and the conversation regarding it, between the plaintiff and the agent of the company.

It is the opinion of the court that the plaintiff is corroborated by the circumstances surrounding the disputed transaction and conversation, and that she has fairly sustained the burden of proof.

According to the stipulation in the report the entry must be: Judgment for the plaintiff for eighteen hundred dollars and interest from 90 days after the proof of loss. *Fellows & Fellows*, for plaintiff. *Tascus Atwood*, for defendant.

MADELINE HUNTER, by next friend, *vs.* JOHN H. MOUNTFORT.

Cumberland County. Decided September 23, 1918. This case has been tried before, and a verdict for the plaintiff set aside.

After the plaintiff's evidence was all in upon the present trial, a motion for nonsuit was sustained, and exceptions taken. By an inadvertence it was assumed that the testimony taken at the former trial was a part of the present case and could be considered in the exceptions before the Law Court.

But such not being the fact, the only question is, whether the plaintiff's undisputed evidence was sufficient to warrant her in having it presented to the jury. We think it was. Exceptions sustained. New trial granted. *William A. Connellan, and Harry H. Cannell*, for plaintiff. *Payson & Virgin*, for defendant.

LEWISTON BUICK COMPANY

vs.

ARTHUR W. NELKE AND LEWISTON TRUST CO., Trustee.

Androscoggin County. Decided September 23, 1918. This is an action for money had and received to recover the amount paid the defendant for an automobile alleged to have been stolen property. The case was tried and a verdict rendered in favor of the plaintiff. It is unnecessary to recite the facts, as the decision of the case depends upon precisely the same legal principle, as was involved in *Royal Insurance Company* v. *Nelke*, 117 Maine, 366. The two cases were tried at the same term of court and the exceptions were filed and allowed at the same time. A motion was filed to dismiss the exceptions for the same reasons stated in the latter case. While we think the verdict was warranted by the evidence, yet, for the reasons stated in *Royal Insurance Company* v. *Nelke*, the entry must be: Exceptions dismissed. *Ralph W. Crockett*, for plaintiff. *McGillicuddy & Morey*, for defendant. *Pulsifer & Ludden*, for trustee.

THE MORSE COMPANY *vs.* FRED G. BARNES.

Oxford County. Decided September 23, 1918. This case comes up on motion for a new trial by the defendant. The plaintiff brought an action to recover for intoxicating liquors sold and delivered to the defendant. The amount claimed including interest was $10.45. The defense set up was, that the liquors were intended for illegal sale and were so disposed of. Under the well settled law in this State, the only question presented to the jury was whether the defendant when he purchased the intoxicating liquors in question intended to dispose of them in a manner prohibited by law. It is claimed that the uncontradicted testimony of the defendant shows that the liquor was intended for illegal sale, although it might not have been known to the defendant that the method by which he intended to dispose of it was illegal.

The defendant admits the contract and the receipt of the liquors, but undertakes to avoid payment by setting up the defense in question. The burden is upon him to sustain his contention by a preponderance of the evidence. The only evidence by which he undertook to do this was his own. A reading of his testimony shows that it is uncertain, and either through stupidity or intention to evade, lacked frankness. It was for the jury to say what construction they would place upon this uncertain and evasive attitude of the defendant. So far as anything appears in the case it may be that the jury disbelieved the defendant's testimony.

Allusion in argument is made to the charge of the presiding Justice but as the charge is not printed it must be assumed to have been correct and to have properly presented all the issues in the case. We do not feel justified in disturbing this verdict. Motion overruled. *Albert J. Stearns,* for plaintiff. *Eugene T. Smith, and Alton C. Wheeler,* for defendant.

EDWIN A. SHEPHERD *vs.* S. L. CROSBY COMPANY.

Penobscot County. Decided October 15, 1918. This is an action brought to recover damages for an alleged breach of a contract to

deliver automobiles. The jury returned a verdict for the plaintiff for $909.73, and the case is before us on general motion for a new trial.

The plaintiff ordered fifteen Maxwell touring cars, and the defendant agreed in writing to deliver to the plaintiff fifteen cars as follows: Five in October, 1916; three in March, 1917; three in May, 1917, and four in June, 1917. The defendant delivered the first lot of five cars, but before the time for delivery of the March allotment, the price of the touring cars was advanced by the manufacturers, and the defendant refused to deliver the cars at the contract price, the plaintiff refused to pay the advanced price, and this suit followed. It will serve no useful purpose to recite the evidence. It clearly appears that the defendant broke its contract, and the remaining question as to damages presented questions for the jury, under proper instruction, which we must assume was given.

The testimony justifies the verdict, and is so manifestly right as to conclusion and damage that it must stand. Motion overruled. *Charles W. Hayes*, for plaintiff. *George H. Worster, and Myer W. Epstein*, for defendant.

CHARLES LAWRENCE COMPANY *vs.* W. F. BUZZELL, et al.

Aroostook County. Decided October 17, 1918. This is an action of debt brought by Charles Lawrence Company, a Massachusetts corporation, doing a wholesale grocery business in Boston, against W. F. Buzzell and George Q. Nickerson, both of Houlton, Maine, sureties on a bond given the plaintiff company by Fred H. Harmon, plaintiff's travelling salesman in Aroostook County, conditioned on the said Harmon's accounting to said company for any and all moneys, checks, securities, etc., received by him from any of the debtors of said company. The cause was heard before a jury at the November Term, 1917, of said court. At the conclusion of plaintiff's evidence the presiding Justice directed a non-suit, with the stipulation on the part of the defendants, that if the Law Court overrules the order of non-suit, the Law Court are authorized to assess such damages as the

law and the evidence requires. The case is before the court on exceptions to such order.

The defendants contend that they are not liable upon the bond for two reasons:

First: that it was the duty of the plaintiff to make known all facts of which they had knowledge, that were material for the defendants to know before signing such an instrument; that they did not inform the defendants that the agent of the plaintiff was a criminal defaulter, which fact was material to the defendant, and that they had ample opportunity to notify them. On the contrary they fraudulently concealed this fact from the defendants, and that, therefore, the bond was never valid, and the defendants are not bound by it.

Second: Assuming the bond was valid at its inception, it was the duty of the plaintiff to make known to the defendants any default on the part of the principal which occurred after signing the bond; that the principal did default and that these defaults were never disclosed to the sureties, and that therefore the bond was avoided at the time the first default occurred, which was not disclosed to the defendants. The amount already paid, $350.00, would be more than enough to discharge all defaults, occurring prior to the plaintiff's learning of Harmon's default.

The pleadings present issues of fact, and the plaintiff's testimony was directed to meeting the allegations in the defendants' brief statement, while proceeding in the usual way in the attempt to make out a prima facie case. We think the plaintiff succeeded and that there was much evidence which from its very nature, being part oral and part documentary, tended to support the plaintiff's claim, and which if believed by the jury would have justified a verdict for the plaintiff. We are of the opinion that the case should have been submitted to a jury, but under the stipulation on page 26 of the case we are authorized to find, and do find, that the plaintiff is entitled to judgment for $650, and interest from May 27, 1915. So ordered. *Andrews & Nelson*, for plaintiff. *Pierce & Madigan, and Shaw & Thornton*, for defendants.

HARRY L. ILSLEY, et al. *vs.* JOHN KELLEY.

ASA M. SEAVEY *vs.* JOHN KELLEY.

York County. Decided October 17, 1918. Two actions of trespass quare clausum for cutting and removing timber. The cases were tried together, and are before the court on the plaintiffs' general motion for a new trial.

The land in suit is in Range D. in the town of Limerick. Range D. is divided into 16 lots. The defendant admits the cutting and removing the timber, but says he owns the land on which it was cut. There was but one question involved, namely,—where is the division or check line running north and south between lots 14 and 15? Two lines were set up, the plaintiffs claiming the westerly line as the true one, the defendant claiming the easterly line to be the true original line between lots 14 and 15. The strip of land lying in the disputed limit is one hundred and seventy-five and one-half feet wide at the north end, and one hundred and seventy-three feet at the south end.

These cases were tried before, with a similar result. The issue was the same. The case is a close one, and the jury having found for the defendant, we are not authorized to say that the verdict is so manifestly wrong as to require interference. The entry will be: Motions overruled. *Elias Smith, and Emery & Waterhouse,* for plaintiff. *J. Merrill Lord, and Hiram Willard,* for defendant.

GERTRUDE FOSS *vs.* JOHN C. FOSS.

Aroostook County. Decided October 22, 1918. This case comes up on a motion for new trial by the plaintiff. The only witnesses were the plaintiff and defendant. The testimony was squarely conflicting. It was for the jury to settle the conflict. They did it in favor of the defendant. Whatever might be the opinion of the court upon the evidence, they cannot intervene unless it appears that the verdict is inherently wrong or so evidently influenced by bias, prejudice or misunderstanding as to work a wrong. This is not a case where we can interfere. Motion overruled. *Shaw & Thornton,* for plaintiff. *W. S. Lewin,* for defendant.

OLIVENE MORRISSETTE, Admrx.,

vs.

GRAND TRUNK RAILROAD COMPANY.

Androscoggin County. Decided October 22, 1918. This case comes up on motion and exceptions. As the motion is decisive of the case the exceptions need not be considered.

The plaintiff's intestate was a brakeman on the Grand Trunk Railroad. On the first day of May, 1917, he received injuries while coupling cars to the tender of an engine from which shortly after he died. The case was tried and a verdict rendered for the plaintiff. The only question upon the motion is, whether there was any evidence upon which the verdict can be sustained. We are unable to find any. Nor, in view of the undisputed evidence as to where the decedent was found after the accident, are we able to form a satisfactory conjecture as to how the accident happened.

The car was coupled to the tender. The pin was in the coupling. He was sitting astride the coupling on top the pin, with one leg, between the hip and knee, jammed between the jaws of the bumpers, and the other leg on the other side of the coupling. The way he was caught shows he could not have been standing on the ground and guiding the apparatus for making the coupling. The undisputed evidence also shows this to be the fact. The engineer says he went between the cars to adjust the coupling, stepped back, gave him the signal to back up, and he did back the engine to the car, and the coupling caught. The engineer further said that Morrissette had completed his duties for coupling when he signalled to back up, and had no occasion to go between the tender and the car after he had given the signal. The plaintiff furnishes no evidence as to how the accident occurred. She claims that the inference may be properly drawn that the decedent went in between the tender and the car to further adjust the coupling, but we are unable to see how either the way Morrissette was caught or the evidence, has any tendency to warrant the inference. So far as the evidence goes the negligence of the defendant has not been shown to have contributed to the accident and injury for which the plaintiff seeks to recover. Motion sustained. New trial granted. *McGillicuddy & Morey*, for plaintiff. *H. P. Sweetser, and Dana S. Williams*, for defendant.

JOHN MARTIN *vs.* NATHANIEL M. JORDAN.

Aroostook County. Decided October 30, 1918. This is an action of trover for the value of logs alleged to have been converted by the defendant. The verdict was for the plaintiff. The case comes up on motion to set aside the verdict, (1) because it is excessive, (2) because it is against the law and evidence. We do not think the verdict need be disturbed on the first ground, the real contest being the ownership of the land upon which the logs were cut. The plaintiff claims to own the land by prescription, and his title depends entirely upon this right. The defendant has a record title, excepting the public lots, and lots conveyed to settlers and one or two other matters not important here.

It will avail no purpose to enter in detail upon an analysis of the testimony. A general statement of the case shows that the plaintiff's father, William Martin, began to occupy the premises about 75 years ago. The plaintiff succeeded to the rights of his about 50 years ago, or in about 25 years after his father began to occupy. The question is, whether the character of this occupancy, through ample years to do so, was such as to give a prescriptive title. There is evidence, if believed by the jury, to show that the area which the plaintiff claimed, had for 50 or 60 years been fenced and pastured by a "large stock" as expressed by John Martin, who at the time of the trial was 77. One of the defendant's witnesses testified to the fence on the road for 50 or 60 years and "perhaps longer."

The jury were also warranted in finding that this territory had, at some time been cut over, and later, and at the time of the trial, largely covered with second growth, and that portions of the area had been cultivated and planted.

Upon all the facts viewed in the light of the circumstances in which they occurred, we are inclined to the opinion that the verdict should stand.

The court will take judicial notice of the fact, as a matter of common knowledge, that 50 or 75 years ago timber lands were of but little value. The owners then paid but little attention to what occupants upon their lands were doing. This very case shows how careless occupants and owners were in these early times. The owners

then conveyed to Martin senior the wrong lot, and afterwards corrected it. In later years any kind of timber land has become very valuable; and lands that, 50 years ago, were sacrified for the pittance of the tax assessed upon them have, in later years been sought with avidity. But William and John Martin's occupancy began many years ago. If they, either singly or successively, occupied this lot for 20 years in a manner consistent with all the elements of prescriptive title, at the expiration of 20 years of such occupancy, whether under William or John, then, title was acquired and became absolute. Of this title neither could be subsequently divested except by conveyance or loss by adverse usage. While much evidence occurring of recent date was contradictory to the plaintiff's claim, we are yet inclined to the opinion that the jury upon all the evidence were warranted in finding that the occupancy of William and John Martin may have ripened into a title many years ago. Motion overruled. *Shaw & Thornton,* for plaintiff. *Doherty & Tompkins, and W. I. Butterfield,* for defendant.

EBENEZER SPINNEY *vs.* RANSOM M. DERRICK.

York County. Decided October 30, 1918. This case comes up on motion by defendant. It is a case in which the plaintiff brings suit against defendant alleging that defendant polluted the water percolating into the plaintiff's well thereby making the plaintiff sick. The case was tried and a verdict returned for the plaintiff for $181.25. The evidence in this case presents a pure question of fact peculiarly adapted to the determination of a jury. The only question which can be fairly raised upon the motion is, whether the testimony was sufficient to support the verdict. While the amount may have been larger than the court would have found upon the testimony, yet the court has no right to disturb the verdict in this respect unless it was so excessive as to show bias, prejudice or a failure to understand the case. Motion overruled. *Elvington P. Spinney,* for plaintiff. *Aaron B. Cole,* for defendant.

FRED H. HARVEY *vs.* SIMON HARVEY.

Aroostook County. Decided November 16, 1918. Verdict was rendered for plaintiff and defendant moves for new trial on the customary grounds. The plaintiff claimed that he was deceived by the defendant in a trade for exchange of horses, that the defendant stated, when the trade was made, that the horse was "all right in every way," that the horse, in fact, was wind broken and of an ugly disposition, which facts were well known by the defendant at the time the trade was made, that finally the horse sickened and died. The defendant denied any representations as to the conditions of the horse at the time of the trade, and urged that the plaintiff's ill treatment of the horse after he obtained him was the real cause of the bad condition of the horse and of his death.

We must judge the testimony from the colorless pages of a printed record. The jury saw the witnesses, heard them testify and weighed the testimony in the light of such opportunity to see and hear. We have examined the record carefully and are unable to say that the verdict, based upon the testimony as the jury saw and heard the witnesses, was so clearly wrong, or was the result of such bias or prejudice, as would warrant us in declaring that the verdict is a palpable error. Motion overruled. *Shaw & Thornton*, for plaintiff. *Powers & Guild, D. L. Theriault, and Benedict F. Maher*, for defendant.

ERNEST H. DYER

vs.

CUMBERLAND COUNTY POWER & LIGHT COMPANY.

Cumberland County. Decided November 19, 1918. On March 26, 1917, the plaintiff sustained severe injuries in a collision between an auto truck which he was driving, and an electric car of the defendant corporation, and has recovered a verdict for the damages sustained by him. The defendant moves for a new trial on the usual grounds.

The sole issue is upon the alleged negligence of those in charge of the Saco car.

Without quoting the testimony at length we may say that the evidence entirely fails to establish the charge of negligence on the part of the defendant's employes. The testimony of the conductor, of five passengers on the Saco car, and of one White, a watchman for the Standard Oil Company, who saw the collision from the sidewalk, shows beyond question that when the plaintiff crossed from right to left behind the electric car, the truck took the inbound track and ran for a short distance along the rails, until both truck and electric car were approaching the end of the double track and the switch; that then in attempting to leave the track, the plaintiff turned his truck to the left, the rear wheels skidded upon the rails, and the truck ran diagonally across the roadway, there thirteen feet wide, striking the curb on the southerly side of the Street; then in the plaintiff's attempts to regain control of the truck, it shot back across the street and collided with the electric car in the manner described by the motorman and other witnesses in the vestibule. The evidence is plenary that this unfortunate accident happened substantially in the manner we have stated, and that the motorman acted promptly in stopping his car upon the instant when danger became apparent.

Very serious injuries were undoubtedly sustained by the plaintiff for which he has recovered a verdict; we are disposed to apply the most severe tests to the evidence before disturbing that verdict; but the evidence, carefully and painstakingly considered, "so strongly preponderates against the plaintiff upon points vital to the result as to amount to a moral certainty that the jury erred in the conclusion reached by them." *Smith* v. *Ins. Co.*, 85 Maine, 348; and the mandate must be: Motion sustained. Verdict set aside. New trial granted. *Hinckley & Hinckley*, for plaintiff. *Bradley & Linnell, and William Lyons*, for defendant.

EDWIN G. BAILEY *vs.* MAINE CENTRAL RAILROAD COMPANY.

Penobscot County. Decided November 27, 1918. Two actions of replevin between the same parties, reported by agreement to this

court for determination. The plaintiff, Edwin G. Bailey, replevined from the Maine Central Railroad Company two carloads of hay, the first car consisting of thirty-six (36) tons, and the second carload consisting of twelve (12) tons of hay. The plaintiff leased a farm to C. H. Southard, and Southard sold the hay to one Bean, whose possession of the hay was interrupted by these suits.

Held: 1. The case clearly shows that the lessee owned the hay crop of 1916, that he had the right to sell the same to Mr. Bean or any other person. In this case he sold to Mr. Bean, who from the evidence was a purchaser for value, and without notice of any defect in the title of Mr. Southard, if a defect had existed. But no mistake of the parties or defect in title appears. The defendant is therefore entitled to judgment in both cases, and judgment for a return of the property. *Washington Ice Co.* v. *Webster*, 62 Maine, 341. So ordered. *Percy A. Hasty, and Gillin & Gillin*, for plaintiff. *Morse & Cook, and Fellows & Fellows*, for defendant.

DAVID A. CLARK *vs.* JOSEPH W. LUCE, et al.

Penobscot County. Decided November 27, 1918. The plaintiff in this action of assumpsit sued to recover for money loaned, and for wages for his personal labor on the defendants' farm. The jury returned a verdict for the plaintiff in the sum of $152.56, and the case is before the court on defendants' general motion for a new trial.

The record discloses much conflict in the testimony, and the jury believed the plaintiff and his witnesses. The questions legally arising in the case were all for the jury, and on examining the evidence we find no reason to interfere with the verdict. Motion overruled. *L. B. Waldron*, for plaintiff. *W. B. Pierce*, for defendants.

STATE OF MAINE *vs.* BARTHOLOMEO ERASMO.

Cumberland County. Decided December 20, 1918. Complaint alleging illegal transportation of intoxicating liquors. The case was

opened to the jury, and at the close of the State's evidence the respondent filed a motion for the court to direct a verdict for the respondent. The motion was denied, to which ruling the respondent excepted. The jury found the respondent guilty. After the verdict and before judgment, the respondent also filed a motion in arrest of judgment which was also denied by the court, to which ruling the respondent excepted. The case is now before this court on the respondent's exceptions.

We think the evidence is ample to sustain the verdict of the jury, and we have examined the complaint which seems to us to sufficiently describe the offense. *State* v. *Lashus*, 79 Maine, 540, 543; *Com.* v. *Hutchinson*, 6 Allen, 595. Exceptions overruled. *Carroll L. Beedy*, County Attorney, for State. *W. C. Whelden*, for defendant.

MELVILLE H. REED *vs.* J. BURTON REED.

Lincoln County. Decided December 20, 1918. Action for forcible entry and detainer. This is the fourth time the case has been before us. The controversy revolves about the question, whether or not there was delivery of a certain deed from the father of these parties to the plaintiff's wife. At the first nisi prius trial the presiding Justice directed a verdict for the plaintiff, to which order the defendant excepted. Those exceptions were presented to us accompanied by motion for new trial on the ground of newly discovered evidence. The exceptions were overruled but upon the motion based upon newly discovered evidence a second trial was granted. In effect this court said at that time, under the evidence at the first trial, that there was delivery of the deed. *Reed* v. *Reed*, 113 Maine, 522.

At the second trial, with the old and the newly discovered evidence presented to the jury, a verdict was returned for the plaintiff. Thus a jury verdict also proclaimed that the deed was delivered. The defendant raised a question upon his right to open and close. His claim was denied at nisi prius, and exceptions were allowed. The exceptions were sustained and the parties sent back for a third trial. *Reed* v. *Reed*, 115 Maine, 441.

At the third trial before a jury the defendant prevailed and the plaintiff presented a motion to have that verdict set aside. After a very careful examination of the evidence this court held that the finding of the jury was manifestly wrong and set aside the verdict, thus holding a second time that there was delivery of the deed. *Reed* v. *Reed*, 117 Maine, 281.

Thus the parties were sent back for a fourth trial. At that trial, by agreement of counsel, the evidence taken at the third trial was used as the evidence in the fourth. In other words, the evidence which the full court had said was insufficient to support a verdict for the defendant was relied upon in the fourth trial. Thereupon, at the conclusion of evidence, the presiding Justice directed a verdict for the plaintiff. To this order an exception was taken and allowed.

After careful consideration of the evidence and the arguments of counsel we direct the mandate. Exceptions overruled. *McGillicuddy & Morey, and C. M. P. Larrabee*, for plaintiff. *A. S. Littlefield*, for defendant.

RULE OF COURT

STATE OF MAINE

SUPREME JUDICIAL COURT. IN LAW TERM AT AUGUSTA.
December 18, 1918.

It is ORDERED that the following Rule of Court be adopted, viz:

Clerks shall, without unreasonable delay, after the rendition of final judgment in civil actions, make extended records of proceedings in court in real actions, including actions for the foreclosure of mortgages, in complaints for flowage, libels for divorce and annulment of marriage, and petitions for partition. In all other civil cases at law, it shall be sufficient to record the names of the parties, date of the writ, petition or complaint, the term of the court at which it was entered, date of service or notice to defendant, verdict of jury, if any, the date of rendition of judgment, its nature and amount, and the number of the case upon the docket at the judgment term.

In equity cases it shall be sufficient, except in cases for dissolution of corporations, cases or proceedings involving title to real estate, and bills for the construction of wills, to record the names of the parties, date of filing bill and issue of subpoena or order of notice and return day thereof, dates of filing answer and replication, if any, date of filing decree that bill be taken pro confesso, date of final decree, and number of the case upon the docket; in addition to the foregoing particulars, in proceedings for the dissolution of corporations, the decree of dissolution shall be recorded in full; in bills for the construction of wills, the decree construing the will in question shall be recorded in full; in bills to quiet title to real estate the proceedings shall be recorded in full; in interlocutory proceedings by receivers, trustees and masters in selling real estate, the petition for authority to sell and the decrees authorizing sales shall be recorded in full, with date of decrees confirming the sales; and in cases in equity to enforce liens on real estate only final decrees authorizing sale of real estate shall be recorded in full, with date of decree confirming sale; provided

that the Justice signing the final decree in any case may by special order direct that such additional record be made as to him seems proper.

Upon application of any party in any civil cause, either at law or in equity, the court or a Justice thereof in vacation, may upon or within ninety days after judgment or final decree order a full record in any case, or such additional record as to him may seem proper.

This rule shall become effective January 1, 1919.

By the Court,

LESLIE C. CORNISH, Chief Justice.

GEORGE F. HALEY

IN MEMORIAM

SERVICES AND EXERCISES BEFORE THE LAW COURT, AT PORTLAND, JULY 8, 1918, IN MEMORY OF

HONORABLE GEORGE F. HALEY,

LATE JUSTICE OF THE SUPREME JUDICIAL COURT.

Born January 30, 1856. Died February 19, 1918.

SITTING: CORNISH, C. J., SPEAR, BIRD, HANSON, PHILBROOK, DUNN AND MORRILL, JJ.

Resolutions of the York County Bar, presented by HON. NATHANIEL B. WALKER.

RESOLVED: That the members of the York County Bar deeply regretting the death of their former associate at the bar and late Associate Justice of this court, GEORGE FRANKLIN HALEY, desire to place upon its records their tribute to his memory. His services upon the bench were a few days short of a single term, and yet in that time he established a high and honorable reputation as a jurist, and by his uniform courtesy and patience at trial terms and in chambers he won the highest respect, admiration and confidence of the members of the bar, and it is with a sense of personal loss that they now recall their relations with him.

While in practice of his profession no one was more courteous in his dealings with his associates than he, and the word of no one was taken with greater trust and confidence. He was faithful to his clients, true to his friends, and stood high in the esteem of all.

His life was one of continued effort and devoted entirely to the law, and although deprived of early training in the schools and hampered in his finances, by his industry, grit and perseverance he overcame the obstacles to his success and by reason of his great ability he secured a large and varied practice in the courts and a store of legal principles which qualified him eminently to discharge the duties of the high office to which he was called. Through his opinions in our Maine Reports he has established most honorable and enduring monuments to his memory.

We take pride in him as a member of our Bar, in his great ability and in the high honors to which he attained.

RESOLVED: That these resolutions be presented to the Supreme Judicial Court with the request that they be spread upon its records and a copy transmitted to the family of the deceased.

NATHANIEL B. WALKER
GEORGE L. EMERY
C. WALLACE HARMON

Following the presentation of the resolutions Hon. J. O. BRADBURY of Saco, delivered the memorial oration, speaking as follows:

"MAY IT PLEASE THE COURT:

For the second time during the present term of the Supreme Judicial Court, its usual functions have been suspended in order that appropriate tribute may be rendered in memory of an Associate Justice whose earthly career has been terminated, who has been graduated from the School of this life and who has entered the University of God: The activities of our minds at this impressive hour are centered in memoriam.

"As has been officially announced by the representative of the Bar of York County, Associate Justice GEORGE FRANKLIN HALEY died at his home on the 19th day of February, 1918. He was born in Saco on the 30th day of January, 1856, the son of Henry U. and Martha P. Haley. His parents were upright and industrious people, busily engaged in making a comfortable home for their children and themselves. The father wrought with his hands and was efficient in his

daily toil. The mother cared thoughtfully for her home and her family. The necessities of life made it advisable for GEORGE FRANKLIN HALEY to early leave the common schools and to engage in labor in the mills and shops at an age when many boys were still in the school room. He was earning his daily bread and he did it intelligently and well.

"In the late 70's an agitation was created throughout the country by a systematic organization of manual labor and it was manifested in Saco and Biddeford. The rights, liabilities and duties of the employer and employee were vigorously discussed in the work shops and mills. Our friend entered into these mental activities with interest. During this season a young man of good physique and a mind quick to absorb and discern mooted questions of law took occasion to appear in the Municipal Court of Saco on some minor matter to discuss quite fully and pointedly some of the troublesome questions then rife in these matters, in the matter of defense of the employee. The presiding Judge was a young man and attempted brusquely perhaps, to reprove the young advocate for some of his utterances. After the court had adjourned this young man said to the Judge, 'You know more law than I do now, but the time will come when I shall know as much or more law than you will.' That young man became a distinguished lawyer and justice in this court, GEORGE FRANKLIN HALEY.

"His active mind had become aroused. He talked with the late associate of this court, Rufus P. Tapley. Judge Tapley liked him and in an informal way instructed him. But Judge Tapley's Ipse Dixit as to legal principles did not satisfy him. He wanted to read the reported cases wherein such principles were enunciated, Judge Tapley taught him how to use the digests and reported cases. With delight his laborer searched the books and assimilated in his active mind principles of law. An enticing field of research opened to him, a world of legal lore and knowledge. He was working at his bench but was absorbing the gist of the common law as modified by our Statutes through the opinions of our highest court. He left the workshop and enrolled as a student of law in the office of the Hon. Benjamin F. Hamilton, late of Biddeford. He did not study in an academic way with a fixed curriculum before him but taking up the matters in the office he searched for the underlying principles. It fascinated him like a wonderful book and his mental digestion never was cloyed with

law. He maintained himself meanwhile by attending to those matters which a student can do. From an employee in the workshop facing his daily task he became a lawyer with the broad field of law invitingly before him and at his command.

"Brother HALEY was admitted to practice law on the 17th day of January, 1882 at Saco. He established his office in Biddeford and later formed a partnership with his brother, Leroy Haley. Brother HALEY had grown manly and strong. The rugged path of his boyhood had brought him self-reliance and courage. Brother HALEY blasted his pathway to success through his energy, economy, his labor and his great natural ability. He never wearied in his researches. His mind acted quickly and vigorously, guided by his familiarity with our law in its different phases. As an adviser in his office he was agreeable, thorough in his search for details, urging equitable settlements rather than litigation. As a trial lawyer he covered the scope of his case as well as that of his adversary in the most painstaking way both as to the law and the facts. His examination of his own witnesses in his office was critical, sometimes severe. His knowledge of human nature and of the curious workings of the human mind as well as of every day affairs made him a practical man to guide a case through the charted channels of the court. As an advocate before a jury or judge he presented his views with power and persuasion and assailed with energy the position of his opponent. While his ideas in legal matters were technical, yet they were softened by the equities of a cause and by an apparent Justice that might develop in the case.

"He obtained high rank as a lawyer and enjoyed an unusually broad and lucrative practice. It came to the speaker either to be associated with Brother HALEY or opposed to him in many cases during 20 years of his practice of the law. It mattered not how strong was the contest or the result, a warm and intimate friendship controlled both. This friendship continued as long as Brother HALEY remained with us and our mutual good wishes were expressed in his ideal home, when the sands of his life were few and were quickly running.

"This hard working boy, this strong lawyer and advocate continued to look forward. His successes opened before him a new vista, that most honorable and distinguished position that an eminent lawyer is justified in having ambitions for, the judiciary of the State of Maine. The bar of his home county was loyal to him as well as the

bars of the other counties in which he had practiced and it afforded us practitioners great pleasure when in April, 1911, he received his commission as an Associate Justice of the Supreme Judicial Court. Justice HALEY did not survive his first term of appointment. It is not prophetic to state that had he survived he would have been reappointed but it was not so ordained. Each year of his service he presided at the January term of court in Saco much to the satisfaction to the brethren of his home bar. He performed his duties on the bench with great learning, ability and independence of thought. The opinions drawn by Mr. Justice HALEY and preserved in the Maine reports constitute a noble and lasting monument to his administration of law and demonstrate the strong character and great ability of Justice HALEY.

"My friend was a genial large-hearted man. He was loyal to his friends whatever might be their plight. To them he gave bountifully of his time, his professional services and financial means. To many people he was a wall of defense in hours of misfortune and despair. His habits were simple; his ways democratic. On the street he spoke pleasantly with little urchins, with laboring men and women. He remembered his early life. Brother HALEY was not an ultra religious man. One evening, nearly 20 years ago we were enjoying socially an hour after a case was closed and our conversation turned to the serious side of life, the religious side of life, and my friend said that he did not know much concerning the articles of faith of the different denominations, but that to his mind the Golden Rule as stated by the Great Teacher contained enough to make the individual and the world better, if followed; that he looked at it as Lewis Barker once phrased it, that the individual was not responsible for his parentage or his environment, for his coming into the world or for his leaving it, that his plain duty was to make the most of himself and to do as much for others as he could, to follow the golden rule, that God did not require the impossible of any individual. In that simple belief my friend lived.

"The speaker has cited these instances in attempting to draw a mental picture of some of the prominent traits which constituted the character of Justice HALEY. His tall, imposing physique, his erect carriage, his kindly ways are a memory to us. Let the lasting impression on our minds be the noble qualities of his manhood.

"As the speaker said in the court room at Alfred on June 6, 1893, in commemoration of the life and death of the late Associate Justice, Rufus P. Tapley, so we may all say of Mr. Justice HALEY;

" 'Every thing animate and inanimate is in transition. The chilly gloomy days of Winter are always pressingly followed by the warm, bright hours and luxuriant foliage of Spring; and so with us other mortals, as with Justice HALEY, as we devoutly pray, may the Winter of life be endured in hope of that era of celestial Spring time when the soul, free from the encumbrances of flesh and disentangled from the limitations of time, may delight its industry and satisfy its desire for knowledge with the universe of God, and not one tiny world, as its resource and habitation.' "

The response was made by Chief Justice CORNISH.

RESPONSE FOR THE COURT

BY

CHIEF JUSTICE LESLIE C. CORNISH

GENTLEMEN OF THE BAR:

For the last time the name of Justice GEORGE F. HALEY is linked with ours on the records of this court, and as we say farewell to another loved and honored associate, we sorrowfully and yet gladly pay a tribute to his memory, a simple tribute as he would have it.

The outlines of Justice HALEY'S picturesque life as biographers would sketch it are these: Born in Saco on January 30, 1856, attending the common schools until the age of twelve, for eleven years a laborer in mill and factory, for two years a law student in the office of a local attorney, admitted to the York County bar in 1881, a practising attorney for thirty years, and on April 12, 1911, appointed Associate Justice of the Supreme Judicial Court of this State. So runs the meagre biographical record, but the real record is written deeper, marking a life full of inspiration to young members of the bar who have been deprived of early advantages, and illustrating the never-to-be-forgotten law, that success is achieved and fame is won through avenues quite dissimilar.

A few days ago and during the present term, Mr. Justice SPEAR paid an appreciative tribute to the memory of the late Justice JOHN B. MADIGAN, and drew a picture of his life and character with a faithful pen. In all that he said of Justice MADIGAN, as husband, father, citizen, lawyer and magistrate, we all most heartily concur. We respected, admired and loved him, and his memory will remain fragrant with us, as long as life shall endure.

No more conspicuous contrast can be well conceived than in the adventitious circumstances attending the careers of these two Justices, whom we are honoring this term. In their environment they were as far apart as the poles, and yet they reached the same goal and sat side by side on this bench performing the same important public work and rendering the same valuable service.

The one was born of an ancestry widely known in the annals of this State, the other of plain humble folk, of which, however, much of the solid fabric of democracy is woven; the one born into an atmosphere of culture and of legal study, the other into an atmosphere of manual labor; the one surrounded by wealth that forbade privations, the other encompassed by that rigid economy, which counted every penny and was compelled to sacrifice the school room for the factory; the one thoroughly trained in preparatory school, college and law school, the other with the grammar school for his alma mater; the one standing at the threshold of his professional life surrounded by influential and helpful friends, and the other standing almost alone.

Superficially it might seem that the advantages all lay with Justice MADIGAN, and in his case they did to some extent; but wealth and position too often beget snobbishness, indolence or vice. While the Good Book declares that it is easier for a camel to pass through the eye of a needle than for a rich man to enter the Kingdom, I am inclined to believe that that striking simile more often applies to the rich man's son than to the rich man himself, because of the temptations, distractions and lack of personal effort engendered by wealth. Both wealth and poverty place obstacles in the path of the young, and it is only by converting these obstacles into challenges that the rich boy or the poor boy can march straight on to the goal of a self-reliant, useful and worthy life. The dangers that lurk in the fullness of the one and in the paucity of the other are alike to be vanquished.

What was it then, that brought success to Justice HALEY, deprived as he was of all those aids usually deemed essential? It was the unconquerable spirit within him, the determination that could not be thwarted, the fire that could not be smothered. I venture to say that no man ever sat upon this bench who overcame more obstacles on the way than did he.

You, who are members of the York County bar and who practiced with him or against him during his thirty years of active work have in your resolutions and in the address of brother BRADBURY, portrayed him as he was, an able, skillful and successful attorney, one of the leaders of your bar. You appreciate his power with juries, the fullness and success of his active professional life, his standing as a citizen, neighbor and friend, and withal the kindliness and charitableness of his nature.

We, his associates upon the Bench, had not known him intimately before his judicial service, and then we too discovered the innate strength and forcefulness of his character coupled with a sweet reasonableness towards others that was a quiet undercurrent of his daily life. Justice HALEY came to the Bench thoroughly steeped in statute laws of our State and the decisions of our own court. He had a marvelous memory and decided cases were ready at hand when disputed points arose. His intellect was strong, his character rugged, his heart tender. He was resolute and firm in his convictions, and tenacious of his opinions once formed. When he had reached a conclusion he stuck by it. This not from perversity, but he could not yield without thinking himself untrue to his own sense of duty. I think you will find in our reports more dissenting opinions from him than from any other Justice during his term of service.

And yet he brought with him none of the prejudice which might unconsciously have arisen from his practice. Few, if any, of our number had acted as attorney for the plaintiff in as many personal injury cases as had he, and yet as a magistrate, none was quicker than he to detect a weak spot in the plaintiff's cause. His long experience gave him the power to perceive the weakness, his fairness of mind enabled him to promptly declare it.

At nisi prius his duties were patiently and satisfactorily performed. That he was a favorite with the profession is attested by the unanimity with which the attorneys throughout the State had asked for his reappointment, an honor which would have come to him had he lived until the expiration of his term on April 12, 1918.

Justice HALEY's opinions disclose his knowledge of the law and the rugged quality of his mind. This part of his work however was least agreeable to him. The lack of early advantages rendered composition somewhat difficult, a difficulty which he not infrequently referred to with regret. But that meant simply more time on his part devoted to the task. The finished product can receive only commendation, and his opinions will stand as the permanent evidence of a self-made, self-taught man of strong convictions and firm will, desirous of administering absolute justice between man and man in accordance with the well settled rules of law and equity.

And yet unlike many self-made men he gave no visible signs of pride or ambition. He was modest, unassuming, unaffected, and simple. He had a kindly spirit and his deeds of charity among the

poor and unfortunate were many, but they were quietly and unostentatiously done. His hand was open, but his lips were closed. Justice HALEY did not care for society as much, but he loved the companionship of his friends, and such men gather friends about them and hold them fast.

At the dinner given by the York County bar at the time of his appointment he closed an exceptionally appreciative and tender response with these words that well mark this human side of the real man and the real judge:

"The honor that has come to me is great, but I shall never cease to believe that I have sacrificed too much for it if your friendship grows cold or you cease to treat me as one of your number with the same kindness and confidence you have in the past. I am human and need both your friendship and your confidence in the new field even more than in the old. Give them to me and I will ever prize them and do my best to perform my new duties so that my appointment shall bring no discredit to our bar."

On February 19, 1918, less than three months before the expiration of his first term, he was called to another world. For weeks his suffering had been intense, and death came at last as a kindly messenger of mercy. It found him with his wish gratified. Not only had he retained the friendship of his own bar, which when entering upon the judicial office he had so earnestly craved, but he had also won the friendship, the respect and esteem of the profession throughout the State and of his associates on the Bench.

We mourn with you today the loss of an able public servant and of a well loved companion. With tender hearts and moist eyes we close another chapter in the rapidly changing personnel of this court.

The resolutions offered in memory of Justice HALEY will be inscribed upon our records, and as a further mark of respect this court will now adjourn.

JOHN B. MADIGAN

IN MEMORIAM

SERVICES AND EXERCISES BEFORE THE LAW COURT, AT PORTLAND, JUNE 28, 1918, IN MEMORY OF

HONORABLE JOHN B. MADIGAN,

LATE JUSTICE OF THE SUPREME JUDICIAL COURT.

Born January 4, 1863. Died January 19, 1918.

SITTING: CORNISH, C. J., SPEAR, BIRD, HANSON, PHILBROOK, DUNN AND MORRILL, JJ.

Resolutions of the Aroostook County Bar, and the remarks of Hon. FREDERICK A. POWERS, former Justice of the Supreme Judicial Court of the State of Maine, in presenting them:

MAY IT PLEASE THE COURT:—

It becomes my sad duty to formally announce to this court the death of Justice JOHN B. MADIGAN, who died in Houlton, on January 19th 1918.

In the unavoidable absence of Hon. PETER C. KEEGAN, the President of the Aroostook Bar, I have been requested to present to the court the following resolutions, adopted by a committee of that Bar, appointed for that purpose.

RESOLUTIONS

RESOLVED: That the members of the Aroostook Bar desire to express their appreciation of the life, character and public services of the late Justice JOHN B. MADIGAN, and to place upon the records of this court a tribute to the memory of the man they knew and loved, and whose untimely death they deplore as an irreparable loss to this Bar.

RESOLVED: That he was a patriotic and public spirited citizen, having close to his heart the welfare of the State and the community in which he lived; in private life he was a man of exemplary and unspotted character, an affectionate husband and father, who found his chief enjoyment in the domestic circle of his own fireside. He was true to his friends, the number of whom was only limited by his acquaintance, considerate, kind-hearted and charitable in his judgments. As a lawyer he was learned and upright, true to his clients, fair and courteous to his opponents, and absolutely straightforward with the court. His cases were carefully prepared, well tried and ably argued. In his all too short term of service as a Justice of this court, his courtesy, fairness, sound judgment and learning were universally recognized by litigants, members of the Bar and his associates upon the Bench. He loved justice for its own sake and firmly believed that the law, rightly understood and applied, could and should result in justice to all parties. His judicial opinions, while few in number are clear, concise and a valuable contribution to the law of the State.

He passed from us to the Great Beyond, not only regretted, but respected, admired and beloved by all whose good fortune it was to know him.

In making this announcement, I cannot but be impressed with the uncertainty of human life, how soon and often how unexpectedly are severed the ties formed or cemented by association upon the Bench. Of the ten members of this court with whom I had the honor to serve, one is now serving as an Associate Justice, ably and faithfully performing the duties of that position; two others have retired full of years and honors, and seven have passed on to that reward which we all hope and believe follows faithful service and duty well done. Three

times in the last year the silent messenger of death, which sooner or later brings peace to us all, has visited the Bench of Maine and taken from it three of its number, who, as long as memory endures, will be mourned and missed by the members of the Bar and their associates upon the Bench. Justice MADIGAN himself was stricken down almost in a day, and close upon the announcement of his illness followed the sad news of his death.

I knew Justice MADIGAN from his early boyhood, for a period of fifty years; for the last thirty years he was my friend, a friendship which grew and strengthened as the years went by, and for fifteen years we were engaged in practice at the same Bar. His was a pleasing personality, warm-hearted and generous, his hand was ever open for the relief of the unfortunate and those in distress. His sympathies were easily enlisted, and his indignation roused at anything which to him seemed to savour of wrong or injustice. His private life was pure, and in his public career he fully felt and endeavored faithfully to discharge, the great and responsible duties which rest upon any man to whom has been intrusted power. In his early manhood he was a member of the Legislature, at the close of his career a Justice of this court. I know of no greater responsibility than that which rests upon the men who make and administer our laws, none which more closely affects the welfare and happiness of the great mass of the people. Legislatures often, and courts sometimes, make mistakes; but the strength of our institutions is based upon the faith of the people that our law makers follow the light as they see it, that in the courts there exists a tribunal pure, learned, upright and fearless, which guarantees to all men equality under the law. If that faith and that confidence should ever fail, then with it will crumble the foundations of the Republic. Thankful are we, your Honors, that the law makers and law administrators of this State, ever have been deserving of that faith and that confidence. Justice MADIGAN not only felt this, but lived up to this high standard in thought and word and deed. In whatever path of duty his feet trod, his was a noble example for the admiration and emulation of his fellow men. Who shall set bounds to the influence of such a life? Who shall undertake to measure it in terms of honors or years or of great achievements? It permeates the whole community; it acts and reacts upon character, until not only a man's friends and associates, but remoter ages are its beneficiaries.

Justice MADIGAN came of a legal family, which has furnished six members to the Aroostook Bar. He was not only himself one of the leaders of that Bar, but so was his father before him and his nephew today. He received a liberal education at Georgetown University and studied law at the Boston University. The one gave him a broad outlook upon life, the other that legal knowledge and understanding of the great principles of the common law which go so far to make a successful lawyer and a good Judge. Those were the years of preparation for his life work and future achievements. He had his hours of leisure, but he

> "spent them not in toys, or lusts, or wine,
> But search of deep philosophy, wit, eloquence and poesy,
> Arts which you loved, for they, my friend, were thine."

He was admitted to the Bar in 1885 at the age of twenty-two and practiced his profession in his native town of Houlton until his appointment upon the Bench in March, 1916. It was but a few years before he was generally recognized as one of the strong men and leaders of our Local Bar, a sound lawyer, a wise counsellor, an eloquent, forceful and convincing advocate. It is all the more to his credit that he attained that position without being urged on by necessity, that spur.

> "Which the keen spirit doth raise.
> To scorn delights and live laborious days."

His practice of the law was upon a high plane and in accord with the best legal standards and ethics. Not what would benefit himself, but what was for the best interest of his clients and the community, controlled his action. He saw with clear vision that what was best for the community, was also best for his client and best for himself. Substantial right and justice was the touchstone he applied to every case. He brought no petty suits; he resorted to no quibbles, but was ever mindful of his duty as a sworn officer of this court. His courtesy, fairness, learning and ability won and retained for him the respect and confidence of all with whom he came in contact. In social life he was a good comrade, a man who made strong and enduring friendships and enjoyed the society of his fellowmen.

I had retired from practice many years before Justice MADIGAN took his seat upon the Bench. Others can and will more fittingly speak of his career as a Judge. One thing I know, that his highest ambition in all he did, was to render good service to mankind; more than that I believe that, had he been spared to fill out the span of years which we reasonably trusted were to be his, that ambition would have borne good fruit upon the Bench, and time would in him have revealed the strength,

> "To fill with worthy thought and deed
> The measure of his high desire."

To one who did not know him these remarks may seem the language of eulogy. They are, however, the words of truth and soberness. Doubtless he was human and may have had his faults, but in an acquaintance of fifty years, I never heard aught of him that was not good, and I know of nothing that is not good which can be truthfully said of JOHN B. MADIGAN.

And now, may it please your Honors, I move that these resolutions be accepted and spread upon the records of this court.

Remarks of R. W. SHAW, Esq., of Aroostook Bar:

I know that what has been said of Justice MADIGAN is true and that he is worthy of the honors offered in his memory, but I want to add a few words from the standpoint of a neighbor. For more than 30 years I lived near him and knew him so intimately that I can speak from personal contact with the man. His home life was ideal. His wife, a superior woman, was just the person to develop in him those finer qualities, which make the twain one. It was a privilege everyone who knew him appreciated to be invited to his house. Although he was rich, yet he never made display and the elegance of his home was marked by simplicity and those things which make for comfort and not for display.

He was kind hearted and of a sympathetic nature. He often put himself out to assist those who needed sympathy and help, and this he did without ostentation or show. He was always public spirited. He served his town in many ways and always without pay. His kindly manner caused many to go to him for counsel and he gave freely of his time to old and young, who sought his opinions on subjects of vital interest to them.

He was a good lawyer and a wise judge but his neighbors remember and honor him for his sterling neighborly qualities more than for his great learning. He was a man well born, well bred and by nature, education and practice a gentleman. A man, who has made a success of his business, who has honored his profession, who has claimed the attention of the great men of his Country and State, has done nobly and well, but it is not true that a man may achieve all these things and yet fail to be a good neighbor, and therefore not be mourned or missed of his own town.

JOHN B. MADIGAN, as you have already heard made good in every department of life, but the people of Houlton, his native town, mourn his departure because he was a good neighbor in the true Christian sense of the word. Friend and brother, farewell! The world honors thee for thy great qualities. Thy neighbors honor thee for thy pure and simple life!"

RESPONSE IN BEHALF OF THE COURT

BY

ASSOCIATE JUSTICE ALBERT M. SPEAR

For the third time within the year we are called upon to note the death of a Justice of the Supreme Judicial Court. Early in June Chief Justice SAVAGE passed away in the twinkling of an eye. Monday evening, January 14th, Justice MADIGAN, after his usual day's work, left the Court House, in apparent good health. On Saturday evening he lay dead in the Madigan Memorial Hospital, a public gift from the hands of his own family. Just a month later Justice HALEY, after a short illness, died.

There is something tenderly appropriate in the calm and resigned death of old age, when the duties of life have all been done. Then, surrounded by friends, with assurance of the welcome, "well done, good and faithful servant," death comes as a kindly messenger, leading from the path, grown weary with years, to an easier way. But nothing can be more sorrowful than death, when it comes to a life still useful and strong. All of our late associates were still in the strength of manhood and full of useful service. The year has, indeed, been a year of tragedy in the court.

Milton says: "Death is the golden key that unlocks the palace of eternity." A turn of that key, on the evening of January 19th, opened the door, through which Justice MADIGAN stepped from the seen to the unseen.

At the time of his decease he was fifty-five years of age, just at the edge of his career. His public life, during these years, was tranquil and useful; his home life ideal and exemplary. In his family he was the personification of good cheer and kindness.

In return he had the loving devotion of his wife and children. It is truthfully said, If you would see a man as he is, you must meet him in his own home. By this test, the life of Justice MADIGAN may be regarded as a model,—it was a model.

In the community his influence was wholesome and impressive. He was held in the highest esteem in the village, and in the county, in

which he lived. There was universal observance, by the people of Houlton, of the hour of his funeral. It was a tribute of homage to a friend that had gone.

He had the respect and confidence of his church. He was a good Catholic. He believed in that faith, which, indeed, more than any other influence, has held the world together and preserved the treasure of letters and art. His sincerity and devotion were in full accord with its best traditions. He lived up to its precepts and could but be a better man.

He was a man of harmonious mould, of big stature, strong mind, large heart, firm convictions, generous charity, loyal friendship. These attributes came to him by inheritance as well as habit. Without rehearsing his ancestry, suffice it to say, his father was an eminent lawyer, a finished scholar, a philanthropic citizen, who, without seeking, was sought, to serve the public on important occasions.

Before adverting to his public service, I trust it will not be considered inappropriate, if I indulge in a word of personal import. It was not my opportunity and pleasure to have an intimate acquaintance with Justice MADIGAN, until I met him in his office at the Court House, Houlton, at the November term of court, last past. I then shared, with him, his office. Through these days of intimate touch I learned to appreciate the charm and good-fellowship of his genial personality.

It has been said, there is only one way to be happy, and that is to make somebody else happy. This defines the nature of Justice MADIGAN as I saw him. He knew not how to be selfish. Though reared in affluence, he was without a taint of arrogance. On the other hand, he lived a simple, ingenuous life, that endeared him to all. I could not fail to note the feeling of good will, going out to him from the people, and the strong hold he had upon the confidence and affection of the bar. Nothing delighted him more than to go into the attorneys' room, light his pipe, and there engage in good natured banter and converse, with the members of the bar; and the pleasure was plainly mutual.

After all, his daily life and personal qualities may, perhaps, be best summed up by saying that he was a big man, intensely human, thoughtful of the frailities of human nature, full of good sense, honest, fearless, charitable and kind.

His official career is to be found mainly in his service upon the Bench. He entered upon the discharge of his judicial duties March 2, 1916, and served until January 19, 1918, a period of little more than twenty-two months. He brought to the discharge of his duties a well trained mind. His academic education was obtained in Houlton, St. Joseph's Academy, N. B., and Georgetown University, where he graduated in 1886. His legal education was obtained at Boston University Law School. After admission to the bar he pursued the practice of law in Houlton thirty years before his elevation to the bench. In his practice he attained high rank as a lawyer, and an enviable reputation for business sagacity and integrity. He served a term in the legislature, and many years upon the school board of Houlton, whose schools acknowledge to him, a debt of gratitude for their present prosperity and efficiency. He also served several years on the International Commission of the St. John River, and was acting in the capacity of Commissioner when the report was made.

Thus it will be seen that he brought to the bench ripe scholarship, thorough training, long practice at the bar, large business experience, and that wider knowledge which necessarily comes with these varied activities of life.

With these qualifications, a man might yet fail to meet the full measure of the Supreme Bench. In addition to great legal learning there is required another, almost indefinable, something, which, for want of better terms, is called judicial temperament.

Justice MADIGAN in his brief career clearly proved that he had not only the learning, but the temperament, essential to meet the full standard of the duties of his great office.

He was of lovable personality. He had won the love and respect of his associates. He equally loved them. He was open and frank in all his work. He was without conceit or pride of opinion. He was fearless, and tenacious until convinced, then acquiescent as if always agreeing. His mind was judicial, not technical. He saw justice through the big end of the glass. He was always solicitous that the rights of the people should be guarded and receive the full protection of the law.

It has been said that the court is the poor man's lawyer. Notwithstanding a life of plenty, of such a court was Justice MADIGAN.

At Nisi Prius he was efficient and pleasing. He at once commanded the respect and confidence of the bar, and ruled with such frankness and wisdom, that he was everywhere welcomed as a trial judge.

Suffice it to say that, in his judicial career of less than two years, Justice MADIGAN won the confidence and esteem of his associates, gained an enviable reputation for judicial learning and fairness, and established a place in the admiration and respect of the profession at large, as well as of the people, that will reflect the brighter as the years go by. His opinions will be found in Volumes 115, 116 and 117 of the Maine Reports, and will stand for all time as the most enduring monument to the excellence of his judicial work.

I heartily endorse every word of eulogy which has been so fitly spoken.

Resolutions on HON. NATHANIEL HOBBS, Judge of Probate for York County, 1873-1916.

Owing to the unprecedented fact that Judge NATHANIEL HOBBS held the office of Judge of Probate for York County for an unbroken service of forty-three years and died in office, the following resolutions prepared by a committee of the York County Bar and presented in the Supreme Judicial Court for that County at the May Term, 1918, are given a place in this volume.

RESOLUTIONS

While it is a sad fact that so many of our personal friends, associate members of this Bar, have recently passed away, it is a pleasant thought that Judge NATHANIEL HOBBS lived out his days of over four score and ten years.

NATHANIEL HOBBS was born September 10, 1824 in that part of Berwick, since erected into the town of North Berwick, and died there September 15, 1916. His father died when he was four years old and he went to live with his grandfather at the age of fourteen. When twenty-four years old he went to Danvers, Massachusetts, and was for two years employed in the manufacture of enameled leather, after which he spent two years in a commission business in Boston.

In 1857 he returned to Maine and read law with Abner Oakes, Esq., of North Berwick, completing his studies at the Harvard Law School and being admitted to the York County Bar in 1860. He at once opened an office in North Berwick and spent the remainder of his life there.

In 1866 and 1867 he was a member of the State Senate with Charles E. Wells, Esq., of Buxton and Jeremiah M. Mason of Limerick as his associates. The other men whose names became familiar, who were fellow members of the same Legislature were William Wirt Virgin, Lewis Barker, Joseph W. Porter, Frederick Robie, Samuel F. Hersey and Josiah Crosby. Herbert M. Heath was the page.

He was elected Judge of Probate for York County in 1872 and assumed the duties thereof January 3rd 1873, from which date, he gradually withdrew from the active practice of law, but prior thereto

he participated in many trials of note and was for many years general Counsel in Maine for the P. S. and P. Railroad which was terminated by the consolidation of said railroad and the Boston and Maine.

He was independent and firm—impartial and just—more anxious to do his duty and satisfy his own conscience than to gain temporary applause—with no uncommon natural powers to start on the voyage of life but with good sense and good purposes and amid difficulties and trials, keeping his eye fixed on his polar star, he steered his course, never relaxing his purpose or yielding to fear or despondency until his bark was safely moored in its last harbor and resting place.

The esteem in which he was held by his fellows is indicated by his continuous service as Judge of Probate for over forty-three years—a term of service unsurpassed in the history of the country and unequalled in any jurisdiction where popular elections are so frequently held. With no stain on his character as a citizen or as a Judge but with a high and enviable reputation in all his relations, he has gone down to the grave in the fullness of his years, without suffering and without the wasting pains of protracted sickness.

He was honored while living and now that he has passed from us, it is proper that a testimonial of his worth and of the estimation in which he was held by his brethren of the Bar should be permanently placed upon the records of the court.

To the able, courteous, punctilious, upright Judge—the trusted legal advisor of clients from all parts of the country the affable, considerate, manly man and the true and tried friend we, his associates inscribe this memorial.

HARRY B. AYER,
JOHN C. STEWART, } Committee
E. P. SPINNEY,

INDEX

ADVERSE POSSESSION.

It is well settled law in this State, that a use or occupancy of water rights for twenty years, which does no appreciable injury to the possession, or rights of the owner, does not ripen into a prescriptive title. Prescription not presumed unless damage is sustained.

Portland Sebago Ice Co. v. *Phinney*, 153.

The burden of proof of title by adverse possession is upon him who alleges it.

In order to constitute adverse possession, there must be a continuity of possession or occupation rather than acts of trespass long separated in time and fugitive in nature.

Webber, et als. v. *McAvoy*, 326.

It is well settled that if a mortgagee enters into possession of the mortgaged premises after condition broken without taking the steps provided by statute to foreclose the mortgage, it is open to redemption for twenty years. But if the mortgagor and those claiming under him permit the mortgagee to hold possession for twenty years without accounting and without admitting that he holds only as mortgagee, his title becomes absolute and the right of redemption is lost.

It is the adverse character of the possession, and not the mere fact of possession by the mortgagee for twenty years that will operate to convert the mortgage title into an absolute one.

Batchelder v. *Bickford*, 468.

When one is permitted to cross the land of another by reason of the friendly terms between the two, and the crossing was a matter of permission and accommodation, the important element of adverse user disappears.

Hamblen v. *Irish*, 522.

See *Martin* v. *Jordan*, 575.

AFFIDAVITS.

The affidavit provided for in R. S., Chap. 87, Sec. 127, is not admissible in evidence in a case where the defendant is administrator or executor.

Haswell v. *Walker, Admr.*, 427.

AGENCY.

Whether or not a principal is bound by the acts of his agent when dealing with a third person, who does not know the extent of his authority, depends not so much upon the actual authority given or intended to be given by the principal as upon the question, what did such third person, dealing with the agent believe and have reason to believe as to the agent's authority from the acts of the principal.

Feingold, et als. v. *Supovitz, et al.*, 371.

To permit the proving of agency by proving the declarations of an agent would be assuming without proof that which is a pre-requisite to the admissibility of the declaration.

Look v. *Watson & Sons*, 478.

AMENDMENT TO DECLARATION.

It has been held in many States that if an amendment in pleading is made of a matter of substance and the adverse party is surprised, he is entitled to a continuance.

Charlesworth v. *American Express Co.*, 222.

After verdict for plaintiff, which was set aside on defendant's motion, the former offered an amendment, setting forth defendant's acts of negligence other than those described in the original declaration, and which plaintiff declared were negligent acts of the defendant contributory to the same injury on account of which he brought his suit. The defendant claims that this amendment was not allowable because it introduced a new cause of action.

Held:

A cause of action may be defined, in general terms, to be the invasion of a legal right without justification or sufficient excuse.

The primary right belonging to the plaintiff, the corresponding duty resting upon the defendant, the breach of that right, without justification or sufficient excuse constitute a cause of action.

Several distinct negligent acts or breaches of duty of one person may contribute to cause an injury to another. Although any one of these negligent acts may be a ground on which the injured person could present his case, yet, as he has suffered but a single injury, he has only one cause of action.

An amendment alleging other negligent acts of the defendant at the same time which contributed to the injury, neither changes the form nor the cause of action.

The ultimate duty of the defendant was to so conduct its business as not to injure others. A breach of that duty, without justification or sufficient excuse, not necessarily the particular manner of that breach, gives the injured party a cause of action.

McKinnon v. *Bangor Railway & Electric Co.*, 239.

Where defendant files demurrer to plaintiff's declaration and plaintiff is given leave to amend and no exceptions taken, the ruling of the presiding Justice is final.

Where demurrer is sustained and plaintiff given leave to amend and no special time fixed for filing same, the amended declaration must be filed not later than the middle of the vacation following that same term of court.

Tibbetts v. *Ordway Plaster Co.*, 423.

See *Brown* v. *Rouillard*, 55.

APPEAL.

It being provided by section thirty-four of the Workmen's Compensation Act (R. S., Chap. 50, Sec. 34) that there shall be no appeal from a decree entered in equity, in accordance with an order or decision of the Industrial Accident Commission, from questions of fact found by the commission or its chairman, the only question presented upon appeal as to such questions is whether or not there was any evidence to support the finding.

Bertha B. Simmons' Case, 175.

Where, upon an appeal, a modification of the decree in equity made in accordance with an order or decision of the commission or its chairman is found necessary and neither such order or decision nor the evidence reported present sufficient facts to enable either the Law Court or the sitting Justice to determine the extent of the modification to be made, the case will be remanded to the Commission for its determination.

Corinne McKenna's Case, 179.

ASSAULT AND BATTERY.

See *Brann* v. *Leavitt*, 144.

ASSUMPSIT.

Where a party agrees to do work for a specified sum under a fraudulent representation as to the nature of the work, he can only recover in an action of indebitatus assumpsit according to the terms of the contract, although, when he discovered the fraud he might have repudiated the contract and sued for deceit.

The duty to pay damages for a tort does not imply a promise to pay them, upon which assumpsit can be maintained.

Where parties have made a contract for themselves, covering the whole subject matter, no promise is implied by law.

Prest v. *Inhabitants of Town of Farmington*, 348, 352.

ASSUMPTION OF RISK.

Assumption of risk implies prior knowledge of conditions from which accidents result.

Clement v. *Maine Central Railroad Company*, 48.

ATTACHMENT.

The giving of a receipt in the alternative dissolves an attachment as regards third parties, whether bona fide purchasers or creditors, making subsequent attachments, but as between the attaching creditor, the receiptors and the debtor, the liability of the attaching officer remains in force until dissolved by operation of law and the liability of the receiptors depends upon the existence of the liability of the officer and ceases with it.

Stewart, et als. v. *Stewart Drug Co.*, 84.

ATTORNEYS AT LAW.

It is well settled that a party for whom an appearance was made may prove by parol that it was without his knowledge or authority, and if the fact is established the appearance can in no way legally affect him.

American Sardine Co. v. *Olsen, et al.*, 30.

See *Stewart* v. *Inhabitants of York*, 385.
See *Marshall* v. *Inhabitants of York*, 390.

AUTOMOBILES.

In an action to recover damages between the owners of automobiles, the burden of proving that the plaintiff was not properly registered is upon the defendant.

When the defendant would avoid liability on the ground of a violation of law on the part of the plaintiff, he, the defendant, must introduce affirmative evidence to prove the violation. It is for one who asserts the illegality of an act on the part of another to first introduce the evidence tending to prove his assertion.

Wrong doing is not to be presumed. Illegality is not to be presumed. Affirmative evidence must be introduced to prove it. He who charges another with moral turpitude or legal delinquency must prove it.

Lyons v. *Jordan*, 117, 118.

In two actions of tort, the one by the wife, an invited guest in the automobile of the defendant's intestate, and the other by the husband, to recover damages arising from a collision at a grade crossing of a steam railroad when the automobile was struck by a locomotive, it is

Held:

The legal duty resting upon the intestate arose from a gratuitous undertaking on his part, and was assumed without consideration.

The true rule of liability on the part of such voluntary undertaker is that he be required to exercise that degree of care and caution which would be reasonable and proper from the character of the thing undertaken.

The thing undertaken here was the transportation of the guest in the intestate's automobile. The act itself involved some danger because the instrumentality is commonly known to be a machine of tremendous power, high speed and quick action. In a sense the guest may be said to have assumed the risks ordinarily arising from these elements, provided the machine is controlled and managed by a reasonably prudent man who will not, by his own want of due care, increase their danger or subject the guest to a newly created danger. The gratuitous undertaker should be mindful of the life and limb of his guest and should not unreasonably expose her to additional peril.

Avery v. *Thompson, et als.*, 120.

A certificate of registration issued to dealers under R. S., Chap. 26, Sec. 24 "to purchase, demonstrate, sell and exchange automobiles" does not confer a general and unlimited license, but only for the restricted uses named.

When a car so registered is being used solely for pleasure, it is an unregistered car in violation of R. S., Chap. 26, Sec. 28.

The fact that a car is unregistered in violation of this statute does not constitute negligence per se, and does not preclude a plaintiff from recovering in a common law action of negligence, unless such violation is the direct and proximate cause contributing to the act.

Cobb v. *Cumberland County Power & Light Co.*, 455.

BANKRUPTCY.

Under the provisions of the bankrupt law providing that any mortgage of personal property executed after the United States Bankruptcy law should go into effect should not be valid against a trustee, unless the mortgage is recorded within ten days after the date thereof, does not apply to conditional sales where the title does not pass until the consideration is paid.

Delaval Separator Co. v. *Jones, et als.*, 95.

BILL OF PARTICULARS.

A bill of particulars is an amplification of more particular specification of the matter set forth in the pleading. The declaration, plea, or notice of set-off, may be so general in its terms that the opposite party will not be fully apprised of the demand which will be set up on the trial, and he is therefore permitted to call in his adversary to give a more detailed and particular statement of the claims on which he intends to rely. When the bill is furnished, it is deemed a part of the declaration, plea, or notice to which it relates, and is construed in the same way as though it had originally been incorporated in it.

Brown v. *Rouillard*, 57.

BONDS.

See *Goodwin, Treas.*, v. *Nedjip, et als.*, 339.

BROKERS.

In the absence of express stipulation to the contrary, an agent is not entitled to commissions on renewal premiums paid after the termination of the agency.

Bowles v. *Sawyer*, 49.

To entitle a broker to his commissions the option must be exercised, unless prevented by the sellers.

Hanscom v. *Blanchard, et al.*, 501.

CARRIERS

Assuming that the car steps are in proper condition at the beginning of a specific journey, a carrier should not be held responsible under ordinary circumstances for snow and ice upon the steps accumulated through natural causes during the journey, until it has had reasonably sufficient time and opportunity, consistently with its duty to transport passengers, to remove such accumulation. To require the immediate and continuous removal of all snow from the steps during the journey would usually be impracticable.

A passenger on a railroad train has no right to assume that the effects of a continuous storm of snow, sleet, rain or hail will be immediately and effectually removed from the exposed platforms of the car while making its passage between stations or termini of its route, and it would be an obligation beyond reasonable expectation of performance to require a railroad corporation to do so.

A carrier of passengers for hire is legally responsible for injuries happening to a passenger from such an accumulation of ice upon its car steps as to cause a passenger, using ordinary care, to slip and fall, if sufficient previous opportunity has been had to remove the source of danger. The duty of the carrier in such regard is not performed simply by appointing servants whose duty it is to keep the car steps in a safe condition, nor is it any excuse that the servants neglected their duty, and where a substantial conflict as to the actual performance of such duties by the servants appears from the evidence, such conflict must be determined by the jury.

Davis v. *Waterville, Fairfield & Oakland Ry.*, 32, 33, 34.

In an action on the case to recover damages for injuries to horses while being transported from Watertown, Mass., to Portland, Maine, it is

Held:

That the general rule is that defendant is bound to exercise reasonable care and diligence in transportation, to transport in a reasonable time without unnecessary delay and to prevent, so far as is reasonable and practicable, any loss or damage which may be occasioned by delays in transit. What is reasonable in this class of cases, as in all others where reasonableness is the standard, must depend upon the circumstances of each particular case.

That the Uniform Live Stock Contract in this case required the horses to be transported "with reasonable despatch" and this imposed upon the carrier the duty of using all reasonable effort to move the live stock quickly to its destination.

That while the plaintiff should be held responsible for any injury resulting from lack of ventilation which he had directed and prescribed, yet in so specifying the amount of ventilation he had the right to expect that the transportation would be completed within the usual time, and if the delay beyond that time was the proximate cause of the injuries the defendant should be held responsible therefor.

Stockman v. *Boston & Maine Railroad*, 35, 36.

Where the interstate bill of lading of the form approved by the Interstate Commerce Commission provides, among other conditions, "that property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot, or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only" . . . . and the property transported remains in the car at its destination nine days after notice given of its arrival and is then destroyed by fire, the liability of the terminal carrier is that of warehouseman, and the initial carrier is liable for the damages negligently arising therefrom, under the provisions of the Federal Act of 1906 to amend "the act to regulate commerce."

The care required of a warehouseman of the property in his charge is ordinary care. He is liable only for neglect.

The plaintiff asserting the negligence of the warehouseman has the burden of establishing it. This burden does not shift. As it is the duty of the warehouseman to deliver upon proper demand, his failure to do so, without excuse, has been regarded as making a prima facie case of negligence. If, however, it appears that the loss is due to fire that fact in itself, in the absence of circumstances permitting the inference of lack of reasonable precautions, does not suffice to show neglect, and the plaintiff having the affirmative of the issue must go forward with the evidence.

Where the only evidence as to the cause and circumstances of the fire destroying property in the hands of a warehouseman is a statement agreed upon by the parties to the effect that the contents of a car "were damaged by fire originating either from defective heating apparatus or from a stove placed in the car without the knowledge of the terminal carrier," the cause was thus stated disjunctively, or in the alternative, and such statement excludes the operation of both as the cause. In such a case neither the statement agreed upon nor the inferences to be drawn therefrom are sufficient to justify the conclusion that the plaintiff has sustained the burden of proof imposed upon him to show neglect on the part of the warehouseman.

Briggs Hardware Co. v. *Aroostook Valley R. R. Co.*, 321, 322.

The accountableness created by the Congress of the United States, on the part of the initial carrier of goods in interstate commerce, does not preclude the right to enforce responsibility against the particular carrier on whose line loss, damage or injury was occasioned. Indeed, the statute expressly preserves such right. To maintain the action, when the suit is against other than the initial carrier, the evidence must establish the fact not merely that there was loss, damage or injury to the shipment in the course of its transportation in interstate commerce, but that such loss, damage or injury was caused by the carrier named as defendant.

Lewis Poultry Co. v. *N. Y. C. R. R. Co., et al.*, 482.

CITIES AND TOWNS.

A special town committee has no authority to contract after a vote of the town dismissing the committee.

Blaisdell v. *Inhabitants of York*, 379.

Where an attorney has been employed by a special town committee, and brings an action to recover from the town for his services so rendered the burden is upon him to show that the committee had authority to so employ him.

It is the duty of a person contracting with a special committee appointed by a town to ascertain the extent of the power and authority of said committee to bind said town.

Stewart v. *Inhabitants of York*, 385.

In actions to recover damages for injuries on account of defective ways, it is *held*,—

that the main object of the notice which is provided for under R. S., Chap. 24, Sec. 92, is that a town may have an early opportunity of investigating the cause of an injury and the condition of the person injured before changes may occur essentially affecting such proof of the facts as may be desirable for the town to possess; and a minor purpose of such notice would be perhaps that the town should have a favorable chance to settle the claim before being sued for it should they see fit to do so.

That while in actions brought for injury to person on account of defective ways the notice must specify the nature of the bodily injuries, yet the statute does not require such specification where claim is made for damage to personal property.

Creedon v. *Inhabitants of Town of Kittery*, 541.

See *City of Bangor* v. *Ridley*, 297.

See *Marshall* v. *Inhabitants of York*, 390.

CONDITIONAL SALES.

See *Delaval Separator Co.* v. *Jones, et als.*, 95.

CONFESSIONS.

The legal test of the admissibility of confessions is whether they were extorted by some threat or elicited by some promise; or on the other hand were made from a willingness on the part of the accused to tell the truth and relieve his conscience. The former are involuntary and inadmissible, the latter voluntary and admissible.

The term voluntary, in the legal sense, does not mean that such statements must be made spontaneously, that they must be volunteered. They are equally voluntary if made in response to interrogatories, provided they emanate from the free will of the accused.

State of Maine v. *Priest*, 223.

CONSTITUTIONAL LAW.

The police power of the State is the one inherent power of all government. It antedates and supercedes constitutions. It is founded upon the maxim that self-preservation is the first law of nature. The police power is inherent in every form of government.

It is a power over which the federal constitution has no control, except to see that it is not used as an excuse for violating private or federal rights.

The police power may be defined in general terms as that power which inheres in the legislature to make, ordain and establish all manner of reasonable regulations and laws whereby to preserve the peace and order of society and the safety of its members, and to prescribe the mode and manner in which every one may so use and enjoy that which is his own as not to preclude a corresponding use and enjoyment of their own by others.

Inhabitants of Town of Skowhegan v. *Heselton*, 23, 24.

The provision in R. S., Chap. 45, Sec. 30, relating to the necessity of obtaining a license to transport lobsters beyond the limits of the State is a valid and reasonable provision and in accordance with the Constitution of Maine and the Constitution of the United States.

The imposition of a license fee for smacks or vessels engaged in the lobster fisheries on waters within the jurisdiction of the State, and moving in interstate commerce, if reasonable, is not a burden on interstate commerce.

The general power of police is in the States. And neither the power itself, nor the discretion to exercise it as need may require can be bargained away by the State. All that the federal authority can do is to see that the States do not under cover of this power, invade the sphere of national sovereignty, obstruct or impede the exercise of any authority which the Constitution has confided to the nation, or deprive any citizens of rights guaranteed by the federal constitution.

In regard to the transportation of lobsters beyond the limits of the State, the right to legislate is given even if interstate commerce is indirectly involved, until Congress exercises its authority over the subject.

The Fourteenth Amendment does not prohibit legislation special in character. It does not prohibit a State from carrying out a policy that cannot be pronounced purely arbitrary, by taxation or penal laws. If a class is deemed to present a conspicuous example of what the legislature seeks to prevent, the Fourteenth Amendment allows it to be dealt with although otherwise and merely logically not distinguishable from others not embraced in the law.

State of Maine v. *Dodge*, 269.

The Fifth Amendment to the Constitution of the United States does not apply to the courts of the several States.

A statute which authorizes punishment for the commission of crime by fine within the inclusive limitations of one hundred dollars and five hundred dollars, plus costs of prosecution, and imprisonment for not less than two months nor more than six months, with supplementary imprisonment, in the event of omission of payment of the fine and costs, for six months more, neither purports to empower the infliction of the equivalent of sentence to absolute imprisonment for one year nor denominates the crime infamous within the meaning of the Constitution of Maine.

It is competent for the Legislature to invest municipal and other subordinate courts with jurisdiction to try and punish affenders against the statute. Such

statute is not inconsistent with the interdiction of the Fourteenth Article of Amendment to the Constitution of the United States in respect of due process of law and the equal protection of the laws.

LeClair v. *White*, 335.

CONTRACTS.

When a person signs a written contract he is presumed, by the ordinary rules of law, to know its contents, whether read or not.

Watkins Medical Co. v. *Stahl, et al.*, 191.

Where an alderman of the City of Bangor had hired his horses to the city, contrary to R. S., Chap. 4, Sec. 43, and has been paid by the city for the same, in an action by the city to recover what had been so paid to him for said horses it was

Held:

That he could not have maintained an action under this statute for the services rendered.

The payment of the defendant's bill by the city was ultra vires and illegal.

A party dealing with a municipality can reap no advantage from the fact that the contract is completed, as all parties dealing with a municipality must take notice, at their peril of its authority to act.

The money being paid the defendant in violation of the city's legal rights, it can be recovered back in an action for money had and received.

City of Bangor v. *Ridley*, 297.

Where a party agrees to do work for a specified sum under a fraudulent representation as to the nature of the work, he can only recover in an action of indebitatus assumpsit according to the terms of the contract, although, when he discovered the fraud he might have repudiated the contract and sued for deceit.

The duty to pay damages for a tort does not imply a promise to pay them, upon which assumpsit can be maintained.

Where parties have made a contract for themselves, covering the whole subject matter, no promise is implied by law.

Prest v. *Inhabitants of Town of Farmington*, 348, 352.

It is elementary to say, that where one renders beneficial services to another, and the latter knowingly and with approbation accepts and avails himself of these services, the law ordinarily supposes a request and a promise to pay what they are reasonably worth, but the hypothesis is by no means conclusive. If a plaintiff produce evidence ample to prove a case unless answered, and the defendant replies, it then remains to be seen, following the ebb and flow of the testimony, whether that response be sufficient.

Ladd v. *Bean, Ex'r*, 445.

Plaintiff and defendant entered into a contract for the sale of fertilizer to defendant, he giving to plaintiff a lease or contract of his farm and crop for security. Later the defendant gives a mortgage to plaintiff to secure the purchase price of the fertilizer, the mortgage being defeasible and given as collateral security to the lease or contract. A certain part of defendant's crop was delivered to plaintiff. Upon an action brought by plaintiff, it was

Held:

That the two documents, although executed at different times, were parts of the same transaction and that in respect to damages they should be taken and construed together.

The rights and liabilities of the parties were fixed by the lease or contract. It was perfectly competent for them in succeeding time to waive or annul that contract, or to add to or to subtract from it, or to give and take security for its fulfillment or to vary and modify its terms. The two documents should be read together and each construed with reference to the other, to the end that the intent of the parties, what they particularly meant, as they defined and recorded that meaning, shall control.

McIver, et al. v. *Bell, et al.*, 495.

An option is neither a sale nor an agreement to sell; but only a right to buy.

To entitle a broker to his commissions the option must be exercised, unless prevented by the sellers.

Hanscom v. *Blanchard, et al.*, 501.

CONTRIBUTORY NEGLIGENCE.

See *Levesque* v. *Dumont, et al.*, 262.

CORPORATIONS.

Upon the dissolution of a corporation and the appointment of receivers to distribute its funds, the provisions of R. S., Chap. 47, Sec. 77 (R. S., 1916, Chap. 51, Sec. 81), extending the existence of a corporation after the termination of its charter are inapplicable and the corporation is thereafter incapacitated to sue or be sued in a court of law, otherwise than to promote the object confided to the receivers.

Stewart, et als. v. *Stewart Drug Co.*, 84.

When the directors of a business corporation, authorized by its by-laws "from time to time to provide for the management of the affairs of the company at home or abroad in such measure as they see fit, and in particular, from time to time to delegate any of the powers of the Board in the course of the current business of the company to any standing or special committee, or any officer or agent, and to appoint any person to be the agent of the company, with such powers (includ-

ing the power to sub-delegate) and upon such terms as may be thought fit, so far as it may legally do so,"—appoint a general manager of the company, such general manager, although his duties and authority are not expressly defined by vote of the directors, must be held to have been clothed with all the authority which the term implies, and which is ordinarily incident to that position.

A general manager so appointed by the directors of a gas company has authority to purchase pipe and other materials necessary in the operation of the plant, and to arrange payment therefor, although such financial arrangements are made by the general manager through another person not connected with the company.

A general manager may have authority to ratify a contract which is within the scope of his authority to make, when such contract is made by an unauthorized person.

Braman, Dow & Co. v. *Kennebec Gas & Fuel Co., et al.*, 219.

Under R. S., Chap. 51, Sec. 22, a stockholder has an absolute and unlimited right to inspect the corporate records and the list of stockholders at all reasonable times.

The stockholders right to take copies and minutes therefrom is limited to such parts as concern his interests and a list of stockholders does concern his interests.

It will not be presumed that the motive of a stockholder is an improper one, and if the motive or purpose is charged to be otherwise, the burden is upon the officer refusing the request, or the corporation, to establish it.

The character of the remedy sought by application for a writ of mandamus and the discretion to be exercised by the court in issuing it seems not to have been abridged by the statute and a state of facts might be presented where the purpose of the petitioner was so obviously vexatious, improper or unlawful that the court might feel compelled to exercise its discretion and decline to issue the writ.

Knox, Petr., v. *Coburn*, 409.

A party holding bonds as collateral for the security of his debt is, to the extent of his debt, at least, subrogated to such an interest in the property mortgaged to secure the bonds as will enable him to require the trustee, when authorized by the mortgage, to foreclose the mortgage for payment of his debt.

The Peoples' Trust Co. v. *Mount Waldo Granite Works, et al.*, 507.

A public service corporation is not justified in refusing to supply a consumer merely because he refuses to pay for overdue service at some other place, or for a separate or distinct transaction from that for which he is demanding a supply.

Merrill v. *Livermore Falls L. & P. Co.*, 523.

A private individual enjoying no special privileges, who without malice wrongfully asserts and presses by suit or otherwise a claim to the property of another, provided he does not physically interfere with such property or its possession is not, under the common law, guilty of a tort. But a different and stricter

rule should be applied to a corporation armed with the right of eminent domain. Authority in some measure determines accountability. Responsibility is a corollary of power. Privilege and duty grow on the same stem. The defendant was entrusted by the State with the power of taking private property by eminent domain. This power is an attribute of sovereignty. Its possession is a privilege of high import. While nothing in this case shows that it was so used by this defendant, it may be made an instrument of oppression. Its exercise should be sedulously guarded. Atonement should be made for its abuse.

When a defendant filed in the office of the County Commissioners its notice of taking the plaintiff's land, stating therein that "it has taken and does hereby take" such land professedly for public but in fact for private uses, and also filed its petition for determination of damages, it committed an act tortious as to plaintiff notwithstanding it did not by any physical means interfere with the plaintiff's possession.

Sidelinker v. *York Shore Water Co.*, 528, 529.

COUNTY ATTORNEYS

When it appears to the court that such facts and circumstances exist that the public interest requires that the State's Attorney have the aid of some counsellor of the court in the trial of the cause, the court will appoint such persons as may seem to them best fitted under the circumstances to aid in the promotion of justice. The selection and appointment of such persons lies in the discretion of the presiding Judge. The exercise of this power is not the subject of exception unless it infringes some rule of law. The needs and exigencies of the case are for his consideration and cannot be reviewed upon exceptions.

State v. *Bennett*, 113.

COUNTY COMMISSIONERS.

The Commissioners of Cumberland and Androscoggin Counties in joint session relocated an ancient way which lies partly in Pownal, Cumberland County, and partly in Durham, in the County of Androscoggin. The inhabitants of Durham took an appeal from the location and the committee appointed by the Supreme Judicial Court sustained the commissioners.

Held:

The laying out of a way is a judicial act, which is prima facie evidence at least of the doings therein recited though attested by but one of the boards engaged in the proceeding.

R. S., Chap. 24, Sec. 13, requires that a majority of each board must be present at the session and that a majority of those in attendance may decide the matter, but it does not require that all must sign the report.

The joint board is not a permanent board having records of its own, so that its proceedings must be recorded in a County Court. As Cumberland was the originating county the proceedings were properly recorded there and the rights of appeal were governed by and dependent on that record.

Inhabitants of Durham, Applts., 131.

COURTS.

The Supreme Judicial Court of this State, being a court of record, has inherent power over its own docket until a valid final judgment is entered in a given case. Until that time it can amend, enlarge or vacate entries erroneously, improvidently or falsely made. Mistakes may be corrected and false or fraudulent entries rectified and made to conform to the truth. And this can be done at a subsequent term as well as at the term when the erroneous or false entries were made. Until the rendition of a final valid judgment, all actions whether on the docket of the existing or of a former term are regarded as within the jurisdiction and control of the court.

If, however, it appears that the judgment rendered was not valid, but was entered irregularly or improvidently, even then the court can bring the case forward and correct the error.

Myers, et als. v. *Levenseller, et als.*, 82.

When it appears to the court that such facts and circumstances exist that the public interest requires that the State's Attorney have the aid of some counsellor of the court in the trial of the cause, the court will appoint such persons as may seem to them best fitted under the circumstances to aid in the promotion of justice. The selection and appointment of such persons lies in the discretion of the presiding Judge,—The exercise of this power is not the subject of exception unless it infringes some rule of law. The needs and exigencies of the case are for his consideration and cannot be reviewed upon exceptions.

State v. *Bennett*, 113.

The court may set aside a verdict on account of misconduct of jurors.

From time immemorial, court of record have been vested with inherent powers to compel obedience, or remove unwarranted interference with the administration of Justice, and to protect their proceedings against imposition, fraud or any other conduct involving contempt.

The common law, independent of any statute, vests the courts with plenary power over the conduct of its own proceedings.

Walker v. *Bradford*, 147.

Recommitting a report both before and after acceptance, for the purpose of correcting clerical errors and the like in the interest of justice, has been the practice

since the establishment of this court, and from the order to recommit for any such purpose exceptions do not lie.

Waldo County Farmers' Union v. *Hunt*, 217.

It is competent for the Legislature to invest municipal and other subordinate courts with jurisdiction to try and punish offenders against the statute. Such statute is not inconsistent with the interdiction of the Fourteenth Article of Amendment to the Constitution of the United States in respect of due process of law and the equal protection of the laws.

LeClair v. *White*, 335.

The right to establish exceptions is a statutory proceeding. Neither the court below nor the Law Court have any jurisdiction or power beyond the express jurisdiction of the statutes.

There is no statute which provides for the establishment of the truth of exceptions from either of the Superior Courts.

Nissen v. *Flaherty*, 534.

The jury is as much a part of the judicial system, under our constitution and laws, as the presiding Justice or the Law Court. While the court might have a different judgment from the jury in any particular case, yet it is not authorized to substitute its judgment for theirs, when they have exercised a judgment not so inconsistent with the most favorable interpretation which the evidence will bear, as to indicate bias, prejudice or improper influence.

Campbell v. *Peters*, 555.

CRIMINAL LAW.

When two persons conspire together for the common object of robbery, and in pursuance of that object one of them does an act which causes the death of a third party, both are regarded as principals and both may be convicted of murder. The State need neither allege nor prove that the respondent used the weapon with which the killing was done.

State of Maine v. *Priest*, 224.

Indictment for accepting money from a prostitute contrary to the provisions of R. S., Chap. 126, Sec. 16.

Held:

Various offenses are mentioned in Chap. 126, R. S., in any one and all of which Section 20 applies, its clear purpose being to make use of and make admissible reputation of ill repute, in the highest interest of society, to the end that such practices as are here in question, and kindred offenses, shall be stamped out.

Testimony of similar acts was admissible for the purpose of showing intent; and this, with all the other testimony and circumstances in the case, was submitted to the jury, and properly so.

The indictment follows the statute, and at the beginning, and again at the conclusion, uses the words "then and there", which can have but one meaning, and in our criminal proceedings have had but one meaning for a century. As used in the indictment, no doubt can arise in the mind of any person as to the exact meaning of the words being that the money in question was from the earnings of a prostitute while engaged in prostitution.

State of Maine v. *Buckwald*, 344.

DAMAGES.

Where, in an action of slander for stating that the plaintiff forged the defendant's name to a note, no special damages were proved or alleged, and but slight evidence in support of general damages was given, it appearing that no one believed or regarded seriously, the defendant's accusation against the plaintiff, an award of $1475 is so plainly excessive as to indicate that the jury did not exercise a sound discretion free from bias or prejudice.

Sullivan v. *McCafferty*, 1.

Consent by one person to allow another to perform an unlawful act upon such person does not constitute a defense to an action to recover the actual damages which such person thereby received.

Lembo v. *Donnell*, 143.

When an assault is wanton, unprovoked, causeless, with a desire to hurt, to gratify anger or malice, if the jury think the actual damages awarded are not sufficient they are warranted in adding to the actual damages such a sum as smart money or punitive damages which, taken together with the actual damage, will afford a sufficient punishment to the person who has done the wrong.

Brann v. *Leavitt*, 144.

Compensation in damages for the breach of an agreement to convey real estate is not regarded as adequate relief.

Eastman v. *Eastman, et als.*, 276.

The duty to pay damages for a tort does not imply a promise to pay them, upon which assumpsit can be maintained.

Prest v. *Inhabitants of Town of Farmington*, 348.

When a defendant filed in the office of the County Commissioners its notice of taking the plaintiff's land, stating therein that "it has taken and does hereby take" such land professedly for public but in fact for private uses, and also filed its petition for determination of damages, it committed an act tortious as to the plaintiff notwithstanding it did not by any physical means interfere with the plaintiff's possession.

The abandonment before determination of compensation of property properly taken for public purposes does not ordinarily cause liability. Damages suffered by the land owner are in such cases incident to the ownership of property.

It has been held, however, that undue and unreasonable delay or other misconduct in the proceedings will render the corporation liable for damages.

Sidelinker v. *York Shore Water Co.*, 528, 531.

See *Clement* v. *Maine Central Railroad Company*, 45.

See *Williams, Admr.*, v. *Hoyt*, 61.

DAMS.

At common law no person could maintain a dam even upon his own land and thereby flow out an upper riparian owner. This rule has been modified by statute but the chief change is the exemption of the dam from being a nuisance and subject to destruction and giving it the right to flow by paying the damages caused thereby.

Portland Sebago Ice Co. v. *Phinney*, 160.

Flash-boards may become an effective part of a dam.

Carleton, et als. v. *Camden Anchor-Rockland Machine Co.*, 251.

DEEDS.

The cardinal rule for the interpretation of deeds is the expressed intention of the parties, gathered from all parts of the instrument, giving each word its due force, and read in the light of existing conditions and circumstances. It is the intention effectually expressed, not merely surmised. This rule controls all others. Technical rules of construction of deeds may be resorted to as an aid in getting at the intention. And technical rules may be controlling, when nothing to the contrary is shown by the deed. The ancient rigidity of technical rules has given way in modern times to the more sensible and practical rule of actual expressed intention.

The grant of trees or timber, or particular kinds of timber trees, is a grant of the growth standing at the time of the grant. If the grant limit itself by size of tree, age or adaptability for specified uses, then the particular described tree would pass and none other. But where there is no limitation of that character, and the grant is of standing timber, to be taken off in the future, the common understanding is that the grantee may cut timber from the lot until the present growth, suitable for the purpose, shall have been exhausted, or until the right to cut shall have expired by limitation, either express or implied.

This rule is two-fold in its nature, viz; what may be cut under the grant and when the right to cut may expire. The time limit for cutting may be expressed in the deed. When not so expressed the cutting is limited to such as may be done within a reasonable time.

Penley v. *Emmons*, 108.

It is no longer debatable that the intention of the parties control the construction of a deed, if it can be discovered. Nor is it longer questioned that every word in the instrument may be scanned in finding that intention.

Portland Sebago Ice Co. v. *Phinney*, 157.

An "exception" is a part of the thing granted and of a thing in being at the time of the grant. A "reservation" vests in the grantor some new right or interest that did not exist in him before, and operates by way of an implied grant.

Worcester v. *Smith*, 169.

The validity of a deed depends upon the validity of the delivery by the grantor to the grantee.

When a deed has been manually delivered by a grantor to a grantee with the intention that it shall take effect as his deed, it takes effect in exact accordance with the expressed terms of the deed and it cannot be shown by parol evidence that it was to take effect only upon the performance of some condition or the happening of some event not expressed in the deed itself.

A condition may precede delivery, but once delivered by the grantor to the grantee no conditions except those expressed in the deed can postpone the vesting of the title.

DEEDS.

The authorities all agree that a deed cannot be delivered directly to the grantee 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.

Reed v. *Reed*, 281, 287.

Where the plaintiff claims title and possession under a mortgage with full covenants of warranty which has been fully foreclosed, such warranty deed and deraignment of title thereunder afford prima facie evidence of title and seizure and entitle the plaintiff to recover against a mere trespasser, or one who cannot prove better title than the mortgagor, who had no title.

Evidence to the effect that the mortgagor giving such mortgage received from the mortgagee his quitclaim deed of same date as the mortgage, of all the right, title and interest of the grantor in the same property described in the mortgage, falls far short of proving no title in the plaintiff or party holding under the foreclosed mortgage or that his title is inferior to that of the defendant who claims title by adverse possession. Such quitclaim deed conveys, it is true, only the grantee's right, title and interest but it by no means proves that the grantor did not possess a complete and impregnable title. If the fact be otherwise the defendant must proceed further with his proof.

Webber, et als. v. *McAvoy*, 326.

Where a plan is referred to in a deed, the same may be used to ascertain the intention of the parties.

McElwee v. *Mahlman*, 402.

See *Dana* v. *Smith*, 199.

DELIVERY IN ESCROW.

See *Reed* v. *Reed*, 287.

DEMURRER.

See *Tibbetts* v. *Ordway Plaster Co.*, 423.

DEPENDENTS.

That two persons or groups of persons under a strict application of the language of Sec. 8, Chap. 50, R. S., must each be conclusively presumed to be wholly dependent upon a deceased employee will not defeat the plain purpose of the Act, known as the Workmen's Compensation Act, which must receive a liberal construction with a view to carrying out its general purpose.

Under Sec. 8 (a) of Chap. 50, R. S., evidence of whether a wife was being supported by her deceased husband from whom at the time of his injury she was living apart by reason of his continued desertion without her fault, is immaterial. In such case the presumption that she is wholly dependent upon him is conclusive and cannot be controverted by evidence; but if after his desertion she has furnished just cause for his refusing to return, she can no longer be conclusively presumed to be wholly dependent upon him in case of his death. In such case her dependency must be proved.

A woman with whom a deceased employee is living in unlawful union is not a dependent within the meaning of this Act.

Illegitimate children of a deceased employee with whom they were living and by whom they were being supported at the time of his death are not included among those conclusively presumed to be wholly dependent under Sec. 8, (c) of this Act.

A collective body of persons who live in one household under a head or manager who has a legal or moral duty to support them constitutes a family within the meaning of the Act, but they must be violating no law in thus living together.

A father is violating no law in caring for and supporting his illegitimate children, and when he recognizes them as his and supports them in a household of which he is the head, they are members of his family within the meaning of this Act, even though his lawful wife is living apart from him and the mother of such illegitimate children is a member of the same household and living with him in unlawful union. His unlawful union with the mother does not affect his obligations towards the children of such union, nor their rights under this Act.

Harry Scott's Case, 436.

DIVORCE.

See *Kelsea, Petr.*, v. *Cleaves, et al.*, 236.

DUE PROCESS OF LAW.

See *LeClair* v. *White*, 335.

EASEMENTS.

An easement is defined to be a right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a specific purpose, not inconsistent with a general property in the owner, a right which one proprietor has to some profit, benefit, or beneficial use, out of, in, or over the estate of another proprietor.

Easements may be created by (1) express or implied grant; (2) reservation or exception in the deed of conveyance; (3) prescription; (4) statutory proceedings; (5) estoppel.

There can be no implied grant unless the easement be one of strict necessity, mere convenience, however great, being insufficient.

Davis, et al. v. *Briggs, et al.*, 538, 539.

EMINENT DOMAIN.

A private individual enjoying no special privileges, who without malice wrongfully asserts and presses by suit or otherwise a claim to the property of another, provided he does not physically interfere with such property or its possession is not, under the common law, guilty of a tort. But a different and stricter rule should be applied to a corporation armed with the right of eminent domain. Authority in some measure determines accountability. Responsibility is a corollary of power. Privilege and duty grow on the same stem. The defendant was entrusted by the State with the power of taking private property by eminent domain. This power is an attribute of sovereignty. Its possession is a privilege of high import. While nothing in this case shows that it was so used by this defendant, it may be made an instrument of oppression. Its exercise should be sedulously guarded. Atonement should be made for its abuse.

When a defendant filed in the office of the County Commissioners its notice of taking the plaintiff's land, stating therein that "it has taken and does hereby take" such land professedly for public but in fact for private uses, and also filed its petition for determination of damages, it committed an act tortious as to the plaintiff notwithstanding it did not by any physical means interfere with the plaintiff's possession.

Sidelinker v. *York Shore Water Co.*, 528, 529.

The abandonment before determination of compensation of property properly taken for public purposes does not ordinarily cause liability. Damages suffered by the land owner are in such case incident to the ownership of property.

It has been held, however, that undue and unreasonable delay or other misconduct in the proceedings will render the corporation liable for damages.

Sidelinker v. *York Shore Water Co.*, 531.

EQUITABLE ESTOPPEL.

The doctrine of equitable estoppel is founded upon the principles of equity and justice, and is applied so as to conclude a party, who by his acts and admissions intended to influence the conduct of another, when, in good conscience and honest dealings, he ought not to be permitted to gainsay them.

Davis, et al. v. *Briggs, et al.*, 539.

See *Maxwell, Tr.*, v. *Dirigo Mutual Fire Insurance Co*, 431.

EQUITY.

It is well settled that the decree of a single Justice upon matters of fact in an equity hearing will not be reversed unless it clearly appears that the decree is erroneous.

Among the equity powers expressly conferred upon the court is the power to compel the specific performance of written contracts. True, this is a discretionary power; and, generally, it will not be exercised when the party seeking to have it exercised has a full and adequate remedy by an action at law. But an action at law has never been regarded as an adequate remedy for the breach of an agreement to convey real estate; and when such an agreement is founded on an adequate consideration, and is obtained without fraud or oppression, the duty of the court to compel its specific performance is universally acknowledged."

Eastman v. *Eastman, et als.*, 276, 279.

Courts in equity will not pass upon the construction of a will until such time as it can determine or advise as to whom distribution may be made.

Morrill, Ex'r, v. *Roberts, Jr., et als.*, 465.

If the plaintiff in a bill in equity files a replication and afterwards consents that the cause may be reported to the Law Court for decision upon the bill and answer, the replication is waived and the facts stated in the answer are to be taken as true.

Batchelder v. *Bickford*, 468.

See *Stewart, et als.* v. *Stewart Drug Co.*, 84.

EVIDENCE.

It is well settled that the party for whom an appearance was made may prove by parol that it was without his knowledge or authority, and if the fact is established the appearance can in no way legally affect him.

American Sardine Co. v. *Olsen, et al.*, 30.

That evidence of statements and discussions occurring after the date when the respondent was accused and arrested for the offense, to the effect that his reputation for morality had always been good in the community where he lived and carried on business, was properly excluded as being mere hearsay.

State of Maine v. *Howard*, 69.

In a complaint for indecent exposure of the person, evidence of other acts of the respondent, of the same kind as that charged in the complaint, are admissible for the purpose of showing intent.

State v. *Bennett*, 113.

He who charges another with moral turpitude or legal delinquency must prove it.

Presumptions both of law and fact are always in favor of innocence. When one would avoid liability on the ground of violation of law by the plaintiff, he must prove the violation.

Lyons v. *Jordan*, 119.

In proving derivative settlement, the statement of the son in regard to declarations of his father as to the father's birth in defendant town are not admissible, the father not being dead.

Inhabitants of Eagle Lake v. *Inhabitants of Fort Kent*, 134.

Where evidence is admitted for a purpose alleged to be illegal, subject to objection and exceptions, and the court in its instructions to the jury confines the evidence so admitted to a single point for which it was confessedly admissible, the presumption is that the jury regarded the instructions in arriving at its verdict.

The rule as to the admission of evidence of the violation of a statute or ordinance by defendant in actions of tort, as declared in the State, is that such violation is not negligence per se but that the violation of a statute or ordinance prohibiting or requiring a certain course of action is evidence of negligence when the inquiry is whether the doing or the failure to do an act of that character was negligence and that, under all the circumstances of such case, the questions of negligence and casual connection should be submitted to the jury.

Kimball v. *Davis*, 187, 188.

A question put to a broker as to whether he did anything or attempted to do anything to defraud the company at the time the insurance was effected, was properly excluded as being immaterial. There was no claim of fraud in the inception of the policy, but of false and fraudulent overvaluation after the fire occurred.

Archibald v. *Granite State Fire Ins. Co.*, 205.

The legal test of the admissibility of confessions is whether they were extorted by some threat or elicited by some promise; or on the other hand were made from a willingness on the part of the accused to tell the truth and relieve his conscience. The former are involuntary and inadmissible, the latter voluntary and admissible.

The term voluntary, in the legal sense, does not mean that such statements must be made spontaneously, that they must be volunteered. They are equally voluntary if made in response to interrogatories, provided they emanate from the free will of the accused.

State of Maine v. *Priest*, 223.

Witnesses are to be judged not so much by numbers as by the weight of the evidence given by them. And the weight of the evidence depends upon its effect in inducing belief. Simple, natural and reasonable narration by a single witness from personal knowledge of the essentially complete details of a transaction should, and does, stamp conviction on an impartial mind conscientiously seeking truth, to a greater degree than the aggregate testimony of several witnesses, each apparently as reliable and as honest as the single one, but aware only partially of the facts of the case, and whose attestations are equally consistent with the contention of either of the opposite litigants.

Ladd v. *Bean, Exr.*, 445.

To permit the proving of agency by proving the declarations of an agent would be assuming without proof that which is a pre-requisite to the admissibility of the declaration. *Look* v. *Watson & Sons*, 478.

See *State of Maine* v. *Buckwald*, 344.

EXCEPTIONS.

An exception to be valid must raise a question of law.

If it calls in question the interpretation of a written document it must specify in what regard.

A bill of excpetions to be available must show clearly and distinctly that the ruling excepted to was not upon a question in which law and fact are so blended as to render it impossible to tell on which the adverse ruling was based.

American Sardine Co. v. *Olsen, et al.*, 27.

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.

Shapiro v. *Sampson*, 172.

Where exceptions are taken to the order of court directing a verdict, all of the evidence should be presented.

Watkins Medical Co. v. *Stahl, et al.*, 190.

When a nonsuit is ordered or a verdict is directed and exceptions are taken, all of the evidence necessarily becomes a part of the case on exceptions, whether it is mentioned in the bill of exceptions or not. Such a ruling is based upon the entire evidence and will stand, unless it is shown to be erroneous. The burden is on the excepting party to show that it is erroneous and that he is aggrieved, and it cannot be determined to be erroneous without an examination of all the evidence; for it may be that the errors complained of are cured, or the omission supplied, by the evidence omitted in making up the case.

Bouchles v. *Tibbetts*, 192.

Recommitting a report both before and after acceptance, for the purpose of correcting clerical errors and the like in the interest of justice, has been the practice since the establishment of this court, and from the order to recommit for any such purpose exceptions do not lie.

Waldo County Farmers' Union v. *Hunt*, 217.

Where an amendment in a case was an important one and opened a new and wide field for investigation, for which the defendant being taken by surprise was not prepared, sufficient postponement or continuance should have been granted to enable it to secure the testimony needed to meet the new issues. Refusal to grant such continuance was ground for exception.

Charlesworth v. *American Express Co.*, 219.

Exceptions to an order of the Justice presiding at nisi prius directing that a trial for the crime of murder be continued to the next trial term on account of incidents occurring at a view which the presiding Justice considers prejudicial to a fair trial, should not be presented to the Law Court until the determination of the cause at nisi prius; and if prematurely presented, they will be dismissed from the Law Court.

State of Maine v. *Slorah*, 319.

The rule of the Superior Court for Androscoggin County requires that exceptions must be presented to the presiding Justice at the term at which they are taken, or within ten days after the adjournment of the term. *Held:*—where exceptions were not filed until sixty-three days after adjournment of the term, and there being neither a waiver nor agreement to extend time, nor an entry upon the docket of exceptions filed and allowed, the exceptions were filed too late and must be dismissed.

Royal Insurance Co. v. *Nelke*, 366.

Refusal of court to give instructions based upon disputed facts is not subject to exceptions.

Feingold, et als. v. *Supovitz, et al.*, 371.

Exceptions do not lie to the findings of fact by the presiding Justice, and such findings are final, binding, and conclusive if there is any evidence to sustain such findings.

Pembroke, Applt., 396.

The right to establish exceptions is a statutory proceeding. Neither the court below nor the Law Court have any jurisdiction or power beyond the express jurisdiction of the statutes.

There is no statute which provides for the establishment of the truth of exceptions from either of the Superior Courts.

Nissen v. *Flaherty*, 534.

See *State* v. *Bennett*, 113.

EXECUTORS AND ADMINISTRATORS.

It is the right and duty of an administrator to account in the Probate Court, in behalf of his intestate, as executor or administrator, but the accounting is

limited to the acts and doings of the deceased representative in his lifetime and the administrator can proceed no further in the administration of the first intestate and so expressly by R. S., Chap. 68, Sec. 27, with executors.

Libby, et al., Ex'rs, v. *Estate of Simon G. Jerrard,* 303.

The affidavit provided for in R. S., Chap. 87, Sec. 127, is not admissible in evidence in a case where the defendant is administrator or executor.

Haswell v. *Walker, Admr.,* 427.

Where administrations of the estates of the same intestate are granted to different persons in different states they are so far deemed independent of each other that a judgment obtained against one will furnish no right of action against the other, to effect assets received by the latter in virtue of his own administration, for in contemplation of law there is no privity between him and the other administrator. Each administration is sovereign within its own limits.

That one and the same person is administrator in both states does not alter the doctrine. The judgment is against the defendant in his representative capacity, that he shall pay the debt of the intestate out of the funds committed to his care. Such representation does not extend beyond the assets of which the court that appointed him has jurisdiction. Another administrator in another state may be subject to a like judgment upon the same demand. The law and courts of a state can only affect persons and things within their jurisdiction. Consequently, both as to the administrator, and the property confided to him, judgment in another state is a transaction between other parties.

Nash v. *Benani, Admr.,* 491, 492.

See *Merrill, Appll.* v. *Regan, Exrx.,* 182.

FALSE PRETENSES.

See *State of Maine* v. *Kerr,* 254.

FEDERAL EMPLOYERS' LIABILITY ACT.

See *Clement* v. *Maine Central Railroad Company,* 45.

FRAUD.

See *Martin* v. *Green,* 138.

GAMBLING DEVICES.

The chief element of gambling is the chance or uncertainty of the hazard. The chance may be in winning at all, or in the amount to be won or lost.

State v. *Googin,* 106.

See *Grove Manufacturing Co.* v. *Jacobs,* 163.

GENERAL APPEARANCE.

See *Look* v. *Watson & Sons*, 478.

GIFTS CAUSA MORTIS.

The great weight of authority is to the effect that gifts causa mortis clearly proved are valid and operative against all but creditors.

R. S., 1916, Chap. 80, Sec. 14, applies only to properly left by a husband or wife at death and not to personal property which the decedent has parted with during life, either by sale or by gift.

The distinction between testaments and gifts causa mortis is clear. The former require no delivery and take effect at death. The latter require delivery and (subject to revocation) take effect upon delivery.

Lambert v. *Lambert*, 471.

HUSBAND AND WIFE.

See *Kelsea, Petr.*, v. *Cleaves, et al.*, 236.
See *Harry Scott's Case*, 436.
See *Batchelder* v. *Bickford*, 468.
See *Lambert* v. *Lambert*, 471.

IMPLIED CONTRACTS.

See *Ladd* v. *Bean, Ex'r*, 445.

IMPLIED WARRANTIES.

In an action for money had and received to recover the amount paid toward the purchase price of an auto truck, the plaintiff claiming a breach of implied warranty on the part of the defendant in the sale of the truck and a valid rescission on his own part,

Held:

The defendant was a dealer in machines of standard and well known types manufactured by others. Under the written contract he was bound to supply a certain described and defined type of truck well known in the general market.

The contract carried with it no guaranty or warranty or representations of suitableness nor of adaptability to the plaintiff's business. The plaintiff had made his own selection as to type and the responsibility for the wisdom of the choice rested on him, not on the seller.

An instruction that there was an implied warranty on the part of the seller that the truck was suitable for the business and adapted to the purpose for which it was purchased by the plaintiff was reversible error.

Flaherty v. *Maine Motor Carriage Co.*, 376.

INDICTMENT.

A charge in an indictment may be made in the words of the statute, without a particular statement of facts and circumstances, when by using those words, the act in which an offense consists is fully, directly and expressly alleged, without any uncertainty or ambiguity.

An indictment under Sec. 3, Chap. 121, of the Revised Statutes for burning a "building" should, to fix the identity of the offense, describe what was burned.

The memorable and time-honored declaration, that in all criminal proceedings, the accused shall have a right to demand the nature and cause of the accusation, entitled him to insist that the facts alleged to constitute a crime shall be stated in the indictment with that certainty and precision of designation requisite to enable him to meet the exact charge, and to plead the judgment, either of acquittal or conviction, which may be rendered upon it, in bar of a later prosecution for the same offense. He is of right entitled in the beginning to know and in after time to point out, if he shall so desire, without going beyond the written record, the distinct crimination, the description of the offense must be certain, positive and complete.

Where a mere general or generic term is used or the statute does not sufficiently set forth the crime, the use of the statutory language is not sufficient. The rule is, that, in some instances, in addition to the statutory words of general description, it is necessary to set forth such further statement of facts and circumstances as may be essential to identify the particular doing. There must be a description of the crime, that the defendant may know just what it is he is called upon to answer; that the jury may be warranted in its finding, and the court, looking at the record after conviction, may impose the punishment which the law prescribes.

State of Maine v. *Crouse*, 363, 364, 365.

See *State of Maine* v. *Buckwald*, 344.

INSTANTANEOUS DEATH.

In an action under Sec. 9, Chap. 92, R. S. 1916, by the parents for the negligent killing of their son, it is,

Held:

The rights of the beneficiaries vest as of the time of death, and the amount recoverable is not lessened by the fact that the mother died pendente lite.

Funeral expenses are not recoverable, but simply the estimated amount of future pecuniary assistance the deceased would have been to his beneficiaries.
Williams, Admr., v. *Hoyt*, 61.

INSURANCE.

In the absence of express stipulation to the contrary, an agent is not entitled to commissions on renewal premiums paid after the termination of the agency.
Bowles v. *Sawyer*, 49.

Where an insurance policy contains a regular mortgage clause payable to the mortgagee as his interest may appear, the rights of the mortgagee under the policy are not affected by any breach of the conditions of the policy relating to non-occupancy, providing that the breach is not due to any act or default on the part of the mortgagee.
State of Maine v. *McDonald*, 474.

Mistaken and honest overvaluation is not, but intentional and fraudulent overvaluation is fatal to recovery on an insurance policy.

The fact that many of the values were stated by the plaintiff after consultation with and reliance upon her husband does not relieve her from all the responsibility attaching to her figures. The manner in which the proof of loss was made up was a proper matter of consideration by the jury, but she could not blindly adopt his estimates as her own and shirk all responsibility as to their correctness.

The question of fraudulent overvaluation is for the jury to determine.
Archibald v. *Granite State Fire Ins. Co.*, 205.

Where, in accordance with the provisions of a mortgage of real property, the mortgagor insures the buildings thereon for the benefit of the mortgagee, such insurance as to the mortgagee is for protection of the security and not for the payment of the debt. It is collateral to the debt.

After loss the money received from the insurer takes the place of the property destroyed and is still collateral until applied in payment by mutual consent, or by some exercise by the mortgagee of the right to demand payment of the debt, and, upon default of payment, to convert the securities.
Cilley v. *Herrick*, 264.

The medical examiner of an insurance company is not an agent of the company, either under the statute or the commom law.

The knowledge of the agent is constructive knowledge of the company, under the statute, regardless of the source from whom the agent's knowledge may come.

So far as material, false representations to the medical examiner are known to the agent they are known to the company.

On the contrary, any material false representations made to the medical examiner if not known to the agent is not the knowledge of the company.

So far as material false representations made to the medical examiner, coincide with the agent's knowledge, thereof, they are constructively known to the company.

But beyond such coincidence they are not constructively known to the company will not be deemed to be waived, will operate as a fraud, and vitiate the policy.

A false statement as to whether applicant has consulted or been attended or treated by a physician is material to the risk and will defeat recovery especially where it is warranted to be true.

Hughes, Admrx., v. *Metropolitan Life Insurance Co.*, 244, 245, 249.

In an action to recover upon an accident policy which provided that benefits under the policy should not cover any death, disability or loss resulting from "voluntary exposure to danger,"

Held:

To render one guilty of voluntary exposure to danger within the meaning of this policy he must have intentionally done some act which reasonable and ordinary prudence would pronounce dangerous, one which an ordinarily prudent man of common intelligence would know to be dangerous.

The term is not synonymous with lack of due care or contributory negligence. A mere passive negligence is not sufficient. It must ordinarily be active in its nature and implies both an intention to perform the act and a conscious willingness to assume the risk which is obviously connected with it.

In ordinary actions for personal injuries the burden is upon the plaintiff to prove his due care, but in an action upon the contract of insurance it devolves upon the defendant to prove the exemption which it sets up in defense.

Archibald v. *The Order of United Commercial Travelers*, 418, 419.

When the conduct and declarations of the insurer are of such a character as to justify a belief that a waiver was intended, and acting upon this belief the insured is induced to incur trouble and expense and is subjected to delay, to his injury and prejudice, the insurer may be prohibited from claiming a forfeiture for such a breach upon the principles of equitable estoppel.

It cannot be doubted that it is within the power of the secretary who was acting in behalf of and as agent of the company in investigating and adjusting the loss, to waive the breach of condition as to sale if he desired so to do.

Maxwell, Tr., v. *Dirigo Mutual Fire Insurance Co.*, 431.

The rider provision of a renewal policy is prospective only. It does not act backward. It does not relate to and impair the obligation of the second contract.

When the by-laws and policy conflict, if the contract is within the power of the corporation, the policy will prevail over the by-laws and determine the rights and liabilities of the parties. By that instrument the conventional obligations of the company are fixed.

Unless otherwise expressed, a renewal will be construed to be subject to the terms and conditions contained in the original policy. From the moment that the application is accepted by the company, the plaintiff is entitled to insurance protection effective from the expiration of the first policy. Not evidenced by a policy, for the policy had not been made; nor existing validly as an oral contract of insurance, for the undertaking of the contract was not to be performed within one year. But a valid, oral contract in and by which the defendant agreed, for the sufficient consideration that in the usual course of business and from the very nature of the agreement within one year, it would make and deliver to the plaintiff in conformity with their compact in that behalf, a policy of insurance in his favor.

The distinction between a contract to issue a policy of insurance or to renew one already issued, and the policy to be issued or renewed in pursuance of such agreement has always been recognized by the courts and the text writers.

The agreement to issue or renew a policy is one thing. The policy issued or renewed is another and different thing. The contract to renew having been made, the mere want of a policy will not prevent the plaintiff from recovering. Having furnished the agreed consideration for the undertaking of the other, each party is entitled to its promised benefits.

Greenlaw v. *Aroostook County P. M. F. Ins. Co.*, 515.

INTERSTATE COMMERCE.

The accountableness created by the Congress of the United States, on the part of the initial carrier of goods in interstate commerce, does not preclude the right to enforce responsibility against the particular carrier on whose line loss, damage, or injury was occasioned. Indeed, the statute expressly preserves such right. To maintain the action, when the suit is against other than the initial carrier, the evidence must establish the fact not merely that there was loss, damage or injury to the shipment in the course of its transportation in interstate commerce, but that such loss, damage or injury was caused by the carrier named as defendant.

Lewis Poultry Co. v. *N. Y. C. R. R. Co. et al.*, 482.

See *Briggs Hardware Co.* v. *Aroostook Valley R. R. Co.*, 321.

INTOXICATING LIQUORS.

A preceding in rem against an automobile under Chap. 294, of the Public Laws of 1917.

The complaint upon which was issued the warrant by virtue of which the seizure of the car was made alleged that "at said Rumford intoxicating liquors were unlawfully kept, deposited and transported by one John Karakus in a certain. . . . Ford Touring Car owned and driven by said Karakus on the public way in said Rumford;"

Held:

That the complaint cannot be held to charge the offense of keeping and depositing intoxicating liquors, as there is no allegation of the place at which kept and deposited, nor to charge the offense of illegal transportation, the word "knowingly" being wholly omitted, and

That no valid warrant can be issued upon it.

When an offense is created by statute and there is an exception in the enacting clause, the indictment or complaint must negative the exception and so a libel in rem under such statute.

Libels, and monitions, are of a criminal nature and the rules applicable to criminal cases apply.

A legal seizure is essential to jurisdiction of a proceeding in rem by libel for the forfeiture of intoxicating liquors, containing vessels, and, under Chap. 294, Public Laws, 1917 of vehicles engaged in transporting them.

State of Maine v. *Ford Touring Car*, 232.

The reference in Sec. 17 of Chap. 20 of R. S. of 1916 to the United States Pharmacopoeia, Dispensatory and National Formulary is to the editions of those works recognized as authority among apothecaries when Chap. 74 of Public Laws of 1907 became effective.

State of Maine v. *Holland*, 288.

In an action to recover for intoxicating liquors, the defendant undertaking to avoid payment by setting up in defense that the liquors were intended by him for illegal sale, the burden is upon him to sustain his contention by a preponderance of the evidence.

The Morse Co. v. *Barnes*, 569.

See *LeClair* v. *White*, 335.

JOINT TORT-FEASORS.

It is undoubtedly a general rule of law that as between joint tort-feasors in pari delicto, there is no right of contribution, because the law will not lend its aid to one who founds his cause of action upon an immoral or illegal act. It leaves him where it finds him.

It is equally well established that when the parties are not intentional and wilfull wrongdoers but are made wrongdoers by legal intendment then contribution may be enforced. It is only when a person knows or must be presumed to know that his act was unlawful that the law will refuse to aid him in seeking contribution.

The rule denying contribution to joint tort-feasors has no application to torts which are the result of mere negligence in carrying on some lawful transaction.

Hobbs v. *Hurley*, 449.

JUDGMENT.

Where administrations of the estates of the same intestate are granted to different persons in different states they are so far deemed independent of each other that a judgment obtained against one will furnish no right of action against the other, to effect assets received by the latter in virtue of his own administration, for in contemplation of law there is no privity between him and the other administrator. Each administration is sovereign within its own limits.

That one and the same person is administrator in both states does not alter the doctrine. The judgment is against the defendant in his representative capacity, that he shall pay the debt of the intestate out of the funds committed to his care. Such representation does not extend beyond the assets of which the court that appointed him has jurisdiction. Another administrator in another state may be subject to a like judgment upon the same demand. The law and courts of a state can only affect persons and things within their jurisdiction. Consequently, both as to the administrator, and the property confided to him, a judgment in another state is a transaction between other parties.

Nash v. *Benari, Admr.*, 491, 492.

See *Myers, et al.* v. *Levenseller, et als.*, 80.

See *Hobbs* v. *Hurley*, 449.

JURORS.

It is not error to allow a jury to separate during the progress of a trial where the penalty for the offense is not imprisonment for life but for any term of years.

State of Maine v. *Howard*, 69.

The court may set aside a verdict on account of misconduct of jurors.

Walker v. *Bradford*, 147.

The jury is as much a part of the judicial system, under our constitution and laws, as the presiding Justice or the Law Court. While the Court might have a different judgment from the jury in any particular case, yet it is not authorized to substitute its judgment for theirs, when they have exercised a judgment not so inconsistent with the most favorable interpretation which the evidence will bear, as to indicate bias, prejudice or improper influence.

Campbell v. *Peters*, 555.

JUSTICES.

In cases heard by a judge without intervention of jury, his findings of fact are conclusive.

American Sardine Co. v. *Olsen, et al.*, 30.

It is well settled that the decree of a single Justice upon matters of fact in an equity hearing will not be reversed unless it clearly appears that the decree is erroneous.

Eastman v. *Eastman, et als.*, 276.

Exceptions do not lie to the findings of fact by the presiding Justice, and such findings are final, binding, and conclusive if there is any evidence to sustain such findings.

Pembroke, Applt., 396.

LANDLORD AND TENANT.

Right of landlord to recover for rent of fractional part of month.

Shapiro v. *Sampson*, 172.

When the lessee does the acts which prove his intention to abandon and surrender, like vacating the premises and giving up the key, and the lessor, in pursuance of such acts, goes into actual occupation, then, by acts and operation of law, the lease is terminated.

McCann v. *Bass*, 550.

LAST CLEAR CHANCE DOCTRINE.

See *Smith* v. *Somerset Traction Co.*, 407.

LESSOR AND LESSEE.

See *McCann* v. *Bass*, 550.

LICENSEE OR INVITEE.

Where private property abutting on a public way is so surfaced and finished that intelligent and prudent persons would understand they were invited to use the property as a public way, the public are justified in accepting such invitation, and the owner of such private property is bound to take such precaution from time to time as ordinary care and prudence would suggest to be necessary for the safety of those who may have occasion to use said premises for the purposes to which it was apparently approporiated.

Window displays by retail dealers are among the most common and effective methods of advertising, challenging the attention of the public and inviting and inducing closer inspection. The plaintiff was therefore upon the three foot strip as an implied invitee of the defendant, and he owed to her the duty to see that such premises were in a reasonably safe condition.

Lingering upon premises so appropriated while waiting for a car, the plaintiff did not become a trespasser upon the defendant's property or otherwise exceed the bounds of said invitation.

When the thing which has caused the injury is shown to be under the management of the party charged with negligence, and the action is such as in the ordinary course of affairs does not happen if those who have the management use proper care, the accident itself affords reasonable evidence, in the absence of an explanation by the party charged, that it was caused by lack of proper care by the party charged with negligence.

Leighton v. *Dean*, 40, 44.

There is no duty owed to a licensee, save a negative one, not to wantonly injure him or wantonly or maliciously expose him to danger.

In a legal sense, to come under an implied invitation, as distinguished from mere license, the visitor must come for a purpose connected with the business in which the occupant is engaged, or which he permits to be carried on there. There must be some mutuality of interests in the subject to which the visitor's business relates, although the particular thing which is the subject of the visit may not be for the benefit of the occupant.

Kidder v. *Sadler*, 194.

LICENSES.

The permission to conduct an inn is not granted to all who may apply for a license; it is not a right to be exercised by one at will, but a privilege to be exercised when granted by municipal officers. The last named officers may not at will grant such license; their duty is defined by statute, and they may issue licenses to such persons only as are of good moral character. The licensee must possess such character to be entitled to a license. To maintain

such license, he must continue to be of good moral character. If during the term of the license he engaged in the sale of intoxicating liquor in this State, then he violated his license; there was a breach of the bond for which both principal and sureties are liable.

If the Legislature did not intend to include territory beyond the confines of the inn, and the only purpose was to guard the integrity of the license, then the language used was wholly unnecessary, for other provisions of the statute would serve that purpose as effectually.

The words are of broader scope and can mean only that the defendant will sell no liquor anywhere in Maine during the term of his license. The bondsmen agreed to this, and all the parties are bound by the rule that when persons under no disability enter into a contract on a sufficient consideration, an action will lie for its breach. This doctrine is applicable to bonds equally with other contracts.

Goodwin, Treas., v. *Nedjip, et als.*, 339, 340.

LICENSES GRANTED BY STATE.

The provision in R. S., Chap. 45, Sec. 30 relating to the necessity of obtaining a license to transport lobsters beyond the limits of the State is a valid and reasonable provision and in accordance with the Constitution of Maine and the Constitution of the United States.

The imposition of a license fee for smacks or vessels engaged in the lobster fisheries on waters within the jurisdiction of the State, and moving in interstate commerce, if reasonable, is not a burden on interstate commerce.

The general power of police is in the States. And neither the power itself, nor the discretion to exercise it as need may require can be bargained away by the State. All that the federal authority can do is to see that the States do not under cover of this power, invade the sphere of national sovereignty, obstruct or impede the exercise of any authority which the Constitution has confided to the nation, or deprive any citizens of rights guaranteed by the federal constitution.

In regard to the transportation of lobsters beyond the limits of the State, the right to legislate is given even if interstate commerce is indirectly involved, until Congress exercises its authority over the subject.

The Fourteenth Amendment does not prohibit legislation special in character. It does not prohibit a State from carrying out a policy that cannot be pronounced purely arbitrary, by taxation or penal laws. If a class is deemed to present conspicuous example of what the legislature seeks to prevent, the Fourteenth Amendment allows it to be dealt with although otherwise and merely logically not distinguishable from others not embraced in the law.

State of Maine v. *Dodge*, 269.

LIENS.

A permit to cut and haul logs need not be recorded to enable the permittor to retain title to the lumber until the stumpage was paid and the conditions of permit performed.

Webber, et als. v. *Granville Chase Co.*, 150.

LOGS AND LUMBER.

See *Webber, et als.* v. *Granville Chase Co.*, 150.

MALPRACTICE.

Consent by one person to allow another to perform an unlawful act upon such person does not constitute a defense to an action to recover the actual damages which such person thereby received.

Lembo v. *Donnell*, 143.

A physician is bound to exercise ordinary skill and use reasonable care and diligence in his treatment of a case and his best judgment in the application of that skill to the case in hand.

Curran v. *Holt, Jr.*, 369.

See *Rich* v. *King*, 64.

MASTER AND SERVANT.

It is the duty of the master to instruct the inexperienced servant of risks and dangers of the employment which the servant did not know and appreciate, or which he cannot reasonably be held to have known and appreciated; but to cast this responsibility upon the master it must appear that he himself knew or ought to have known of such risks and dangers and also that he knew that the servant was inexperienced and thus excusably ignorant of the risks and dangers and that the servant in the performance of his employment would be reasonably likely to be exposed to those risks and dangers.

The plaintiff is bound to use his senses, and to apply his intelligence and understanding to discern risks and dangers incident to his employment, and to apprehend such risks and dangers as are likely to attend known conditions and circumstances.

Murinelli v. *T. Stuart & Sons Co.*, 87.

In some jurisdictions joint actions against master and servant have been allowed in cases of negligence, but our court has adopted the contrary rule.

Hobbs v. *Hurley*, 453.

MORTGAGES.

In general any party in interest may redeem from a mortgage and ordinarily any one who has an interest, legal or equitable, in the land and would be a loser by foreclosure is entitled to redeem.

If a party is affected by the mortgage, he may redeem; if he is not affected by it there is no occasion for his redeeming and he is not allowed to do so.

Where certain specific property is made liable for the payment of the debt of another and its owner, although not personally liable, must respond or lose it, the latter becomes a surety real for the payment of the debt.

Where, in accordance with the provisions of a mortgage of real property, the mortgagor insures the buildings thereon for the benefit of the mortgagee, such insurance as to the mortgagee is for protection of the security and not for the payment of the debt. It is collateral to the debt.

After loss the money received from the insurer takes the place of the property destroyed and is still collateral until applied in payment by mutual consent, or by some exercise by the mortgagee of the right to demand payment of the debt, and, upon default of payment, to convert the securities.

Cilley v. *Herrick*, 264.

Where property is partitioned or sold, upon which there is an existing mortgage, the part retained by mortgagor stands primarily liable in equity for the payment of the whole debt, while that which has been sold by the mortgagor is chargeable only for any deficiency after the other has been applied.

Thomaston Savings Bank v. *Hurley, et als.*, 211.

It is well settled that if a mortgagee enters into possession of the mortgaged premises after condition broken without taking the steps provided by statute to foreclose the mortgage, it is open to redemption for twenty years. But if the mortgagor and those claiming under him permit the mortgagee to hold possession for twenty years without accounting and without admitting that he holds only as mortgagee, his title becomes absolute and the right of redemption is lost.

It is the adverse character of the possession, and not the mere fact of possession by the mortgagee for twenty years that will operate to convert the mortgage title into an absolute one.

A mortgage was dated and delivered March 16, 1878; the mortgagor and the plaintiff were married in the year 1886; mortgagor died May 3, 1901, leaving the plaintiff as his widow.

Held:

That under R. S., Chap. 80, Sec. 17, the plaintiff was entitled to her right and interest by descent in the mortgaged premises, as against every person except the mortgagee and those claiming under him; and that she had such an interest in the mortgaged premises as would permit her to redeem from the mortgage in the lifetime of her husband.

Batchelder v. *Bickford*, 468, 470.

Where an insurance police contains a regular mortgage clause payable to the mortagee as his interest may appear the rights of the mortgagee under the policy are not affected by any breach of the conditions of the policy relating to non-occupancy, providing that the breach is not due to any act or default on the part of the mortgagee.

State of Maine v. *McDonald*, 474.

A party holding bonds as collateral for the security of his debt is, to the extent of his debt, at least, subrogated to such an interest in the property mortgaged to secure the bonds as will enable him to require the trustee, when authorized by the mortgagee, to foreclose the mortgage for payment of his debt.

If there is personal property described in the trust deed, not forming a part of the realty, such personal property cannot be foreclosed under the mortgage, unless the same is properly recorded, and what articles are so attached to the realty as to become real estate, and what so separated as to retain their character as personal property, must be ascertained.

The Peoples' Trust Co. v. *Mount Waldo Granite Works, et al.*, 507, 508.

See *Delaval Separator Company* v. *Jones, et als.*, 95.

See *Martin* v. *Green*, 138.

See *McIver, et al.* v. *Bell, et al.*, 495.

MOTION FOR CONTINUANCE.

The granting or denying of a motion for continuance is a matter of judicial discretion.

The term judicial discretion means sound discretion exercised according to the well established rules of practice and procedure, a discretion guided by the law so as to work out substantial equity and justice. It is magisterial not personal discretion.

A discretionary ruling is reviewable when some palpable error has been committed or when an apparent injustice has been done.

Where an amendment in a case was an important one and opened a new and wide field for investigation, for which the defendant being taken by surprise was not prepared sufficient postponement or continuance should have been granted to enable it to secure the testimony needed to meet the new issues. Refusal to grant such continuance was ground for exception.

It has been held in many States that if an amendment in pleading is made of a matter of substance and the adverse party is surprised, he is entitled to a continuance.

Charlesworth v. *American Express Co.*, 219, 222.

MOTION IN ARREST OF JUDGMENT.

A motion in arrest of judgment can reach only intrinsic defects, apparent on the face of the record which would render the judgment erroneous, and cannot reach matters of procedure.

It is an invariable rule of criminal pleading that a motion in arrest of judgment can reach only intrinsic defects apparent on the face of the record which would render the judgment erroneous, and the term "record" as used in this connection does not include or mean the evidence in the case, often referred to colloquially as the record, but the court's record of the cause as then made up by the clerk, or the papers filed and minuted on the docket, the full record to be made up later. It comprises the indictment, pleadings, written motions if any, verdict, etc., in the particular case under consideration.

State of Maine v. *Howard*, 71.

See *State of Maine* v. *Crouse*, 363.

MUNICIPAL CORPORATIONS.

Where an alderman of the City of Bangor had hired his horses to the city, contrary to R. S., Chap. 4, Sec. 43, and has been paid by the city for the same, in an action by the city to recover what had been so paid to him for said horses it was

Held:

That he could not have maintained an action under this statute for the services rendered.

The payment of the defendant's bill by the city was ultra vires and illegal.

A party dealing with a municipality can reap no advantage from the fact that the contract is completed, as all parties dealing with a municipality must take notice, at their peril of its authority to act.

The money being paid the defendant in violation of the city's legal rights, it can be recovered back in an action for money had and received.

City of Bangor v. *Ridley*, 297.

A special town committee has no authority to contract after a vote of the town dismissing the committee.

Blaisdell v. *Inhabitants of York*, 379.

Where an attorney has been employed by a special town committee in an action to recover from the town for his services so rendered the burden is upon him to show that the committee had authority to so employ him.

It is the duty of a person contracting with a special committee appointed by a town to ascertain the extent of the power and authority of said committee to bind said town.

Stewart v. *Inhabitants of York*, 385.

See *Marshall* v. *Inhabitants of York*, 390.

NEGLIGENCE.

Assuming that the car steps are in proper condition at the beginning of a specific journey, a carrier should not be held responsible under ordinary circumstances for snow and ice upon the steps accumulated through natural causes during the journey, until it has had reasonably sufficient time and opportunity, consistently with its duty to transport passengers, to remove such accumulation. To require the immediate and continuous removal of all snow from the steps during the journey would usually be impracticable.

A passenger on a railroad train has no right to assume that the effects of a continuous storm of snow, sleet, rain or hail will be immediately and effectually removed from the exposed platforms of the car while making its passage between stations or termini of its route, and it would be an obligation beyond reasonable expectation of performance to require a railroad corporation to do so.

A carrier of passengers for hire is legally responsible for injuries happening to a passenger from such an accumulation of ice upon its car steps as to cause a passenger, using ordinary care, to slip and fall, if sufficient previous opportunity has been had to remove the source of danger. The duty of the carrier in such regard is not performed simply by appointing servants whose duty it is to keep the car steps in a safe condition, nor is it any excuse that the servants neglected their duty, and where a substantial conflict as to the actual performance of such duties by the servants appears from the evidence, such conflict must be determined by the jury.

Davis v. *Waterville, Fairfield & Oakland Ry.*, 32-33.

Where private property abutting on a public way is so surfaced and finished that intelligent and prudent persons would understand they were invited to use the property as a public way, the public are justified in accepting such invitation, and the owner of such private property is bound to take such precaution from time to time as ordinary care and prudence would suggest to be necessary for the safety of those who may have occasion to use said premises for the purposes to which it was apparently appropriated.

Window displays by retail dealers are among the most common and effective methods of advertising, challenging the attention of the public and inviting and inducing closer inspection. The plaintiff was therefore upon the three foot strip as an implied invitee of the defendant, and he owed to her the duty to see that such premises were in a reasonably safe condition.

Lingering upon premises so appropriated while waiting for a car, the plaintiff did not become a trespasser upon the defendant's property or otherwise exceed the bounds of said invitation.

When the thing which has caused the injury is shown to be under the management of the party charged with negligence, and the action is such as in the ordinary course of affairs does not happen if those who have the management use proper care, the accident itself affords reasonable evidence, in the absence of an explanation by the party charged, that it was caused by lack of proper care by the party charged with negligence.

Leighton v. *Dean*, 40, 44.

It is the duty of the master to instruct the inexperienced servant of risks and dangers of the employment which the servant did not know and appreciate, or which he cannot reasonably be held to have known and appreciated; but to cast this responsibility upon the master it must appear that he himself knew or ought to have known of such risks and dangers and also that he knew that the servant was inexperienced and thus excusably ignorant of the risks and dangers and that the servant in the performance of his employment would be reasonably likely to be exposed to those risks and dangers.

The plaintiff is bound to use his senses, and to apply his intelligence and understanding to discern risks and dangers incident to his employment, and to apprehend such risks and dangers as are likely to attend known conditions and circumstances.

Murinelli v. *T. Stuart & Son Co.*, 87.

In two actions of tort, brought the one by the wife, an invited guest in the automobile of the defendant's intestate, and the other by the husband, to recover damages arising from a collision at a grade crossing of a steam railroad when the automobile was struck by a locomotive, it is

Held:

The legal duty resting upon the intestate arose from a gratuitous undertaking on his part, and was assumed without consideration.

The true rule of liability on the part of such voluntary undertaker is that he be required to exercise that degree of care and caution which would be reasonable and proper from the character of the thing undertaken.

The thing undertaken here was the transportation of the guest in the intestate's automobile. The act itself involved some danger because the instrumentality is commonly known to be a machine of tremendous power, high speed and quick action. In a sense the guest may be said to have assumed the risks ordinarily arising from these elements, provided the machine is controlled and managed by a reasonably prudent man who will not, by his own want of due care, increase their danger or subject the guest to a newly created danger. The gratuitous undertaker should be mindful of the life and limb of his guest and should not unreasonably expose her to additional peril.

The governing principle is that whenever a person undertakes an employment which requires care and skill, whether he undertakes it for reward or gratuitously a failure to exert the measure of care and skill appropriate to such employment is culpable negligence, and if damages result therefrom an action will lie.

Avery v. *Thompson*, 120, 125.

Ordinarily there is no reason to anticipate danger from beginning to get ready the places of exit while the train is in the last part of its movement before coming to a full stop. Passengers are not expected to have their fingers in such a position as to be endangered by the opening of the doors at such times.

Murray v. *Cumberland County Power & Light Co.*, 167.

While in actions to recover damages for negligently causing the death of a person or for injury to a person who is deceased at the time of the trial of such action, the person for whose death or injury the action is brought shall be presumed to have been in the exercise of due care at the time of all acts in any way related to his death or injury (R. S., Chap. 87, Sec. 48) it does not follow that the question of contributory negligence must necessarily be submitted to the jury.

Where in such a case there is no substantial conflict in the evidence nor doubt as to the fair and reasonable inferences deducible from it, a question of law is presented for the court.

Levesque v. *Dumont, et al.*, 262.

In an action to recover damages caused to the plaintiff's motor sprinkling truck, driven by his servant, by collision with a car of the defendant, the jury having returned a verdict for the plaintiff, it is

Held:

That the driver's own negligence in turning directly on to the track of the defendant without using reasonable efforts to discover whether a car was approaching precludes recovery. His conduct was not that of a reasonably prudent man concerned for his own safety.

The last clear chance doctrine does not apply. The driver's negligence actively continued from its commencement up to the moment of collision.

Smith v. *Somerset Traction Co.*, 407.

The fact that a car is unregistered in violation of the statute does not constitute negligence per se, and does not preclude a plaintiff from recovering in a common law action of negligence, unless such violation is the direct and proximate cause contributing to the act.

Cobb v. *Cumberland County Power & Light Co.*, 455.

See *Stockman* v. *Boston & Maine Railroad*, 35.

See *Hobbs* v. *Hurley*, 449.

NEITHER PARTY.

The entry of "neither party" means that neither party appears further in the cause. It is made by agreement of the parties and no judgment of the court follows.

Myers, et al. v. *Levenseller, et als.*, 80.

NON-JOINDER AND MIS-JOINDER.

See *Look* v. *Watson & Sons*, 476.

NON-SUIT.

Nonsuit is properly ordered when on unquestioned facts the action cannot be sustained.

Haswell v. *Walker, Admr.*, 427.

OPTION.

An option is neither a sale nor an agreement to sell; but only a right to buy.

To entitle a broker to his commissions the option must be exercised, unless prevented by the sellers. *Hanscom* v. *Blanchard, et al.*, 501.

ORDINANCES.

The Court of Equity has power to restrain parties planning to repair, alter and erect certain frame buildings contrary to Ordinance prohibiting same.

Inhabitants of Town of Skowhegan v. *Heselton*, 17.

PARENT AND CHILD.

If a child leaves his parent's house voluntarily, for the purpose of seeking his fortune in the world, or to avoid the discipline and restraint so necessary for the due regulation of families, he carries no credit and the parent is under no obligation to pay for his support.

The father is entitled to exercise judgment and supervision as to the wants of the child, and the character, cost and necessity of the supplies furnished. The burden is upon the plaintiff to show that there existed a necessity for furnishing the supplies, and that this necessity was occasioned by defendant. It is not to be presumed that the defendant neglected his duty, or was unwilling to perform it.

Dyer v. *Helson*, 203.

PARTNERSHIP.

A defendant who holds himself out as a partner is liable to a plaintiff who believing in and relying upon such partnership enters into a contract involving the giving credit to it. This principle applies although the defendant is not a partner and notwithstanding that such supposed partnership is in fact, but without the plaintiff's knowledge a corporation.

A defendant sued as a partner who files no affidavit (under Rule X) but who challenges the existence of the alleged partnership is precluded from demanding affirmative proof on that issue but not from introducing negative proof. When not seasonably and on oath denied, the existence of an alleged partnership is prima facie but not conclusively presumed.

Look v. *Watson & Sons*, 476.

PAUPERS.

In an action to recover for pauper supplies where the plaintiff claims the residence of the pauper in defendant town, it has the burden of so proving.

A child coming of age takes the settlement of his father in the State of Maine, providing the latter had a legal settlement in this State.

In proving derivative settlement, the statement of the son in regard to declarations of his father as to the father's birth in defendant town are not admissible, the father not being dead.

Where a pauper has once established his residence in a town by the concurrence of intention and personal presence, his personal presence in that town for five successive years is not essential to his acquiring a settlement therein if his intention continues unchanged during that time.

Inhabitants of Eagle Lake v. *Inhabitants of Fort Kent*, 134, 137.

PERMITS.

A permit to cut and haul logs need not be recorded to enable the permittor to retain title to the lumber until the stumpage was paid and the conditions of permit performed.

Webber, et als. v. *Granville Chase Co.*, 150.

PERMITS OR LICENSES.

See *Penley* v. *Emmons*, 108.

PETITION FOR PARTITION.

Where property is partitioned or sold, upon which there is an existing mortgage, the part retained by mortgagor stands primarily liable in equity for the pay-

ment of the whole debt, while that which has been sold by the mortgagor is chargeable only for any deficiency after the other has been applied.

Thomaston Savings Bank v. *Hurley, et als.*, 211.

Petition for partition. On the 22nd day of January, A. D. 1897, the petitioner obtained a decree of divorce upon her petition against the said Edgar O. Stephenson.

The respondents deny the right of partition upon the ground that the petitioner, at the date of her petition, was not seized in fee simple and as tenant in common in or to the premises described in the petition.

Held:

Since the conveyance of the land in question was made before the passage of Chap. 157, Public Laws 1895, abolishing dower, without a release or bar of dower by the wife, that she now takes only such rights as she would have taken had his decease occurred, namely, a right of dower against the grantee or those claiming under him.

Kelsea, Petr., v. *Cleaves, et al.*, 236.

PHYSICIAN AND PATIENT.

Liability of physician or surgeon declaring to patient that the appendix had been removed when the same had not been done.

Rich v. *King*, 64.

PLEA IN ABATEMENT.

See *Look* v. *Watson & Sons*, 477.

PLEADING AND PRACTICE.

Where defendant has filed motion for specifications and the same are filed by plaintiff, setting forth the ground of plaintiff's claim, the plaintiff is restricted to the ground so claimed in his specification.

It is well settled that the specification is practically an amendment to the declaration and the two must be considered together. A specification must particularly state the ground of claim, the gist of the action. It limits the proof and restricts the right of recovery to that claim.

A bill of particulars is an amplification of more particular specification of the matter set forth in the pleading. The declaration, plea, or notice of set-off, may

be so general in its terms that the opposite party will not be fully apprised of the demand which will be set up on the trail, and he is therefore permitted to call on his adversary to give a more detailed and particular statement of the claims on which he intends to rely. When the bill is furnished, it is deemed a part of the declaration, plea, or notice to which it relates, and is construed in the same way as though it had originally been incorporated in it.

Brown v. *Rouillard*, 55, 57.

Where defendant files demurrer to plaintiff's declaration and plaintiff is given leave to amend and no exceptions taken, the ruling of the presiding Justice is final.

Where demurrer is sustained and plaintiff given leave to amend and no special time fixed for filing same, the amended declaration must be filed not later than the middle of the vacation following that same term of court.

Tibbetts v. *Ordway Plaster Co.*, 423.

A defendant sued as a partner who files no affidavit (under Rule X) but who challenges the existence of the alleged partnership is precluded from demanding affirmative proof on that issue, but not from introducing negative proof. When not seasonably and on oath denied, the existence of an alleged partnership is prima facie but not conclusively presumed.

In actions of contract when the situation does not appear upon inspection of the pleadings, non-joinder must be pleaded in abatement but mis-joinder is available under the general issue.

A general appearance waives defects in service and want of jurisdiction over the defendant's person, but does not relieve the plaintiff from the burden of proving the allegations of his writ.

It is well established in the English Law that in assumpsit where too many defendants are joined the plaintiff must fail in his action though he prove an express or implied promise against some of them.

If mis-joinder appears on the pleadings it gives rise to a demurrer; if it appears at the trial, to an adverse verdict.

Look v. *Watson & Sons*, 476, 478, 481.

See *Charlesworth* v. *American Express Co.*, 219.

See *McKinnon* v. *Bangor Railway & Electric Co.*, 239.

See *State of Maine* v. *Crouse*, 363.

See *Haswell* v. *Walker, Admr.*, 427.

POLICE POWER.

See *Inhabitants of Town of Skowhegan* v. *Heselton*, 24.

PRESCRIPTIVE TITLE.

See *Portland Sebago Ice Co.* v. *Phinney*, 153.

PRINCIPAL AND AGENT.

Whether or not a principal is bound by the acts of his agent when dealing with a third person, who does not know the extent of his authority, depends not so much upon the actual authority given or intended to be given by the principal as upon the question, what did such third person, dealing with the agent, believe and have reason to believe as to the agent's authority from the acts of the principal.

Feingold, et als. v. *Supovitz, et al.*, 371.

PROBATE ACCOUNTS.

See *Libby, et al., Applts.*, v. *Estate of Simon G. Jerrard*, 303.

PROBATE APPEAL.

Probate procedure, in this State, should be conducted upon the rules of the broadest equity, whenever the provisions of statute do not conflict with that view. Substantial justice should be awarded by methods conducive to economy and dispatch, and without unnecessary circuity of action or prolixity in procedure.

Merrill, Applt., v. *Regan, Exrx.*, 186.

See *Hall, et al., Applts.*, 100.

PROCEEDING IN COURT.

In its most comprehensive sense the term "proceeding" includes every step taken in a civil action, except pleadings. It is therefore evident that an order purporting to direct an attorney or anyone else to make an entry, which authorizes the court to order a judgment, is, when filed and acted upon, a proceeding in court.

State of Maine v. *Kerr*, 260.

PUBLIC SERVICE CORPORATIONS.

A public service corporation is not justified in refusing to supply a consumer merely because he refuses to pay for overdue service at some other place, or for a separate or distinct transaction from that for which he is demanding a supply.

Merrill v. *Livermore Falls L. & P. Co.*, 523.

QUANTUM MERUIT.

Quantum meruit is based upon an implied contract, whereby it is held, when one party knowingly receives the services of another party, and the conditions, circumstances and relations are such that, in equity and good conscience he ought to pay for such services, then, although no express contract exists, the law intervenes and implies a contract, that the party receiving the benefit of such services shall be held to pay what they are reasonably worth.

City of Bangor v. *Ridley*, 301.

REAL ACTION.

See *Gile* v. *Boardman*, 52.

RECEIPTORS.

The giving of a receipt in the alternative dissolves an attachment as regards third parties, whether bona fide purchasers or creditors, making subsequent attachments, but as between the attaching creditor, the receiptors and the debtor, the liability of the attaching officer remains in force until dissolved by operation of law and the liability of the receiptors depends upon the existence of the liability of the officer and ceases with it.

Stewart, et als. v. *Stewart Drug Co.*, 84.

RECEIVERS.

See *Stewart, et als.* v. *Stewart Drug Co.*, 84.

REFEREES.

Recommitting a report both before and after acceptance, for the purpose of correcting clerical errors and the like in the interest of justice, has been the practice since the establishment of this court, and from the order to recommit for any such purpose exceptions do not lie.

Waldo County Farmers' Union v. *Hunt*, 217.

REGISTRATION OF AUTOMOBILES.

See *Cobb* v. *Cumberland County Power & Light Co.*, 455.

RES ADJUDICATA.

See *Merrill, Applt.*, v. *Regan, Exrx.*, 182.

RESERVATIONS AND EXCEPTIONS.

An "exception" is a part of the thing granted and of a thing in being at the time of the grant. A "reservation" vests in the grantor some new right or interest that did not exist in him before, and operates by way of an implied grant.

The distinction between an "exception" and a "reservation" is frequently obscure and uncertain, and has not always been observed, and the two expressions have to a great extent been indiscriminately employed. Moreover, a reservation is often construed as an exception in order that the obvious intention of the parties may be subserved.

A reasonable construction should be given to a reservation or exception according to the intention of the parties, ascertained from the entire instrument.

Worcester v. *Smith*, 168, 169.

RIGHT OF STOCKHOLDER TO INSPECT CORPORATE RECORDS.

See *Knox, Petr.*, v. *Coburn*, 409.

RULE OF COURT.

A rule of court has the force of a statute.

Tibbetts v. *Ordway Plaster Co.*, 423.

RULES OF DESCENT.

Under Rule 6, Chap. 80, Sec. 1, R. S., 1916, it is held that an estate shall descend to the next of kin and must be distributed per capita and not per stirpes and that nephews and nieces, being next of kin, would inherit rather than grand-nephews and grandnieces.

Hall, et al., Applts., 100.

RULE AGAINST PERPETUITIES.

It should be borne in mind that the rule against perpetuities is not, like a rule of construction, a test more or less artificial, to determine intention. Its object is to defeat intention. Therefore every provision in a will is to be construed as if

the rule did not exist, and then to the provision so construed the rule is to be applied. In so construing the provision in question the intention of the testatrix is to be gathered from the entire will and not from the residuary clause standing alone.

The rule concerns itself only with the vesting, the commencement of estates, and not at all with the termination. It makes no difference when such a vested estate or interest limited terminates.

Moreover, when the gift of a legacy is absolute, and the time of payment only is postponed, the time not being of the substance of the gift is held to postpone the payment, but not the vesting of the legacy.

Strout v. *Strout, et als.*, 359.

SALES.

The fact that the seller was induced to sell by fraud of the buyer made the sale not void but voidable. There was a de facto contract of sale by which the vendor at the time intended to convey and did convey the property to the vendee on his own responsibility.

Upon discovery of the fraud the vendor could have rescinded the contract and have recovered the property from the fraudulent vendee or from a purchaser from the vendee having knowledge of the infirmity.

An innocent purchaser of goods for a valuable consideration, even from a vendee who has obtained them by fraud, obtains a good title as against the original vendor. He has the superior equity. The defendant therefore cannot successfully set up the fraudulent sale in defense to this action.

Martin v. *Green*, 138.

In an action for money had and received to recover the amount paid toward the purchase price of an auto truck, the plaintiff claiming a breach of implied warranty on the part of the defendant in the sale of the truck and a valid rescission on his own part,

Held:

The defendant was a dealer in machines of standard and well known types manufactured by others. Under the written contract he was bound to supply a certain described and defined type of truck well known in the general market.

The contract carried with it no guaranty or warranty or representations of suitableness nor of adaptability to the plaintiff's business. The plaintiff had made his own selection as to type and the responsibility for the wisdom of the choice rested on him, not on the seller.

An instruction that there was an implied warranty on the part of the seller that the truck was suitable for the business and adapted to the purpose for which it was purchased by the plaintiff was reversible error.

Flaherty v. *Maine Motor Carriage Co.*, 376.

SEARCH AND SEIZURE.

See *State of Maine* v. *Ford Touring Car*, 232.

SELECTMEN.

In a hearing before Selectmen brought under R. S., Chap. 4, Sec. 16, it is,

Held:

The selectmen do not sit as municipal officers, but for the time being as a judicial tribunal, and they should hear the evidence and pass upon the facts, deliberately, without bias or prejudice and with no preconceived opinion or judgment.

The proceedings must be according to the common law, which is the "law of the land." This necessitates the specification of charges, reasonable notice, impartial hearing, separate adjudication on each charge and adjudication on the order of removal.

A written appointment signed by two of three members of a Board of Selectmen is sufficient.

State of Maine v. *McLellan*, 73, 74.

SENTENCE.

A statute which authorizes punishment for the commission of crime by fine within the inclusive limitations of one hundred dollars and five hundred dollars, plus costs of prosecution, and imprisonment for not less than two months nor more than six months, with supplementary imprisonment, in the event of omission of payment of the fine and costs, for six months more, neither purports to empower the infliction of the equivalent of sentence to absolute imprisonment for one year nor denominates the crime infamous within the meaning of the Constitution of Maine.

LeClair v. *White*, 335.

SLANDER AND LIBEL.

Where the defamatory words spoken impute the commission of a crime, and they are not justified by proof of their truth, or that they were spoken on a privileged occasion, the law in such case presumes that they were spoken maliciously. The malice so presumed is called malice in law, and is of itself sufficient to support that action. In such case the slanderous words are said to be actionable per se.

General damage, as applied to actions for libel and slander, as distinguished from special damage, means that damage which the law will presume must naturally,

proximately and necessarily result to the plaintiff from the utterance of the slander, such as injury to the feelings and injury to the reputation of the plaintiff.

In an action of slander where the slanderous words accuse the plaintiff of the commission of a crime, he is entitled to recover such general damage as resulted to him from the slander, without special proof thereof, and irrespective of whether the defendant had an honest belief in the truth of the slanderous statements or not.

In an action of slander for accusing the plaintiff of the commission of a crime, a requested instruction which might be understood by the jury to mean that if the defendant had an honest belief in the truth of his slanderous statements concerning the plaintiff, then the plaintiff could recover only such damage as had been actually proved, should not be given, for that would be an idea of the law of the case wholly erroneous.

The phrase "honest belief" as used in a requested instruction without addition or qualification, is not an adequate definition of a standard by which it is to be determined if the speaker of false and slanderous words, accusing another of a crime, was or was not actuated by malice in so doing.

Where, in an action of slander, it appears that the defendant falsely stated that the plaintiff had forged his name to a note, and the defendant sets up in defense that he made the statement in good faith and with an honest belief in its truth, mere belief on the part of the defendant in the truth of his false and slanderous statement is not alone sufficient, but it should be made to appear that his belief in the truth of the charge was based upon reasonable grounds for such a belief after the exercise of such means to verify its truth as would be taken by a man of ordinary prudence under like circumstances, and before making such an accusation.

Where in an action of slander the defendant seeks in mitigation of damages to establish an adequate retraction it should appear that it was fully, fairly and promptly made.

Where in an action of slander it appeared that the alleged retraction claimed by the defendant in mitigation of damages was a statement in a letter from him to the plaintiff written long after the suit was brought, and only four days before the case was in order for trial, and the court instructed the jury that a retraction to be of avail in mitigation of damages must be made within a reasonable time after the slander, or within a reasonable time after the defendant could have ascertained that his statement was not true, and left it to the jury to determine whether the retraction claimed was made within a reasonable time, such instruction and ruling were proper and unexceptionable.

Sullivan v. *McCafferty*, 1.

An action for slander in which the plaintiff complained that the defendant accused him of burning his buildings to defraud his insurers. In response to

an order of court the plaintiff filed the following specifications: "The words 'you burned your buildings' is the language claimed to have been uttered by the defendant, relied upon as being actionable."

Held:

The specification amended the declaration, stated the ground of plaintiff's claim and restricted his right of recovery to that claim.

When words complained of are harmless in themselves, or of doubtful import, a declaration for slander must contain averments sufficiently full and complete of such facts and circumstances as together with the uttered words justify the hearers in giving to the language a slanderous interpretation with at least a reasonable certainty.

Omission of such averments will not be aided by innuendos and those cannot add to, or extend, the sense or effect of the words set forth, or refer to anything not properly alleged in the declaration.

If the libel or words did not acknowledge, or per se convey the meaning the plaintiff would wish to assign to them, are ambiguous and equivocal, and require explanation by reference to some extrinsic matter to show that they are actionable, it must be expressly shown that such matter existed and that the slander resulted therefrom. When what is complained of in the declaration as a libel does not, upon the face of it, apply to the plaintiff and impute a libel there must be an inducement stating such facts as will support an innuendo and show the libellous application of the statement to the plaintiff.

When the slander is prima facie actionable, as calling a person directly a thief or charging him with having been guilty of perjury, a declaration stating the defendant's malicious intention of the slander concerning the plaintiff is sufficient without any preparatory inducement.

Where the words themselves are such as can only be understood in a criminal sense no inducements of any extrinsic matter is requisite, but if the charge is not necessarily slanderous the plaintiff must by way of introduction or inducement state that some fact has taken place to which the defendant alluded and to which the innuendo must afterwards refer.

A defendant is responsible only for the meaning which the words used by him, reasonably interpreted, convey to the understanding of the persons in whose presence they were uttered.

Brown v. *Rouillard*, 55, 58, 59, 60.

No action lies for a communication imputing want of integrity or other ground of unfitness to a public official or employee, who is subject to removal by the board or officer to whom the communication is addressed, provided such communication is made in good faith and without malice.

Actual malice is not to be inferred from falsity alone.

Sweeney v. *Higgins*, 415.

SPECIFIC PERFORMANCE.

Among the equity powers expressly conferred upon the court is the power to compel the specific performance of written contracts. True, this is a discretionary power; and, generally, it will not be exercised when the party seeking to have it exercised has a full and adequate remedy by an action at law. But an action at law has never been regarded as an adequate remedy for the breach of an agreement to convey real estate; and when such an agreement is founded on an adequate consideration, and is obtained without fraud or oppression, the duty of the court to compel its specific performance is universally acknowledged."

Eastman v. *Eastman*, 279.

SPECIFICATIONS.

See *Brown* v. *Rouillard*, 56.

STATUTES.

The rule as to the admission of evidence of the violation of a statute or ordinance by defendant in actions of tort, as declared in the State, is that such violation is not negligence per se but that the violation of a statute or ordinance prohibiting or requiring a certain course of action is evidence of negligence when the inquiry is whether the doing or the failure to do an act of that character was negligence and that, under all the circumstances of such case, the questions of negligence and causal connection should be submitted to the jury.

Kimball v. *Davis*, 188.

It is a general rule that penal statutes are to be construed strictly and not to be extended beyond their obvious import.

Cobb v. *Cumberland County Power & Light Co.*, 455.

See *Tibbetts* v. *Ordway Plaster Co.*, 423.

STOCK DIVIDENDS.

Under all ordinary circumstances stock dividends belong to capital and go to the remainderman, while cash or money dividends are the property of the life tenant.

Thatcher, et als. v. *Thatcher, et als.*, 331.

In ascertaining the rights of life tenants and remaindermen as to the disposition of dividends declared from the earnings of corporations upon stock held as part of the corpus of a testamentary trust estate, the intention of the testator so far as

manifested by him must of course control, but when he has given no special direction upon the question as to what shall be considered principal and what income, he must be presumed to have had in view the lawful power of the corporation over the use and apportionment of its earnings, and to have intended that the determination of that question should depend upon the regular action of the corporation with regard to all its shares.

Harris v. *Moses, et als.*, 391.

SUPERIOR COURTS.

There is no statute which provides for the establishment of the truth of exceptions from either of the Superior Courts.

Nissen v. *Flaherty*, 534.

TROVER.

To maintain an action for the conversion of logs, plaintiffs must establish that they had either actual or constructive possession of the premises. If they did not have the title, they must show actual possession, the gist of the action being the invasion of the plaintiff's possession.

Webber, et als. v. *McAvoy*, 326.

See *Penley* v. *Emmons*, 108.

TRUST DEEDS.

A party holding bonds as collateral for the security of his debt is, to the extent of his debt, at least, subrogated to such an interest in the property mortgaged to secure the bonds as will enable him to require the trustee, when authorized by the mortgagee, to foreclose the mortgage for payment of his debt.

If there is personal property described in the trust deed, not forming a part of the realty, such personal property cannot be foreclosed under the mortgage, unless the same is properly recorded and what articles are so attached to the realty as to become real estate, and what so separated as to retain their character as personal property, must be ascertained.

The Peoples' Trust Co. v. *Mount Waldo Granite Works, et al.*, 507.

TRUSTS.

See *Strout* v. *Strout, et als.*, 357.

ULTRA VIRES.

See *City of Bangor* v. *Ridley*, 297.

VERDICT.

A jury verdict is not to be set aside because of a slight but comparatively harmless error in the admission or rejection of evidence.

State of Maine v. *Priest*, 224.

WAIVER.

When the conduct and declarations of the insurer are of such a character as to justify a belief that a waiver was intended, and acting upon this belief the insured is induced to incur trouble and expense and is subjected to delay, to his injury and prejudice, the insurer may be prohibited from claiming a forfeiture for such a breach upon the principles of equitable estoppel.

It cannot be doubted that it is within the power of the secretary who was acting in behalf of and as agent of the company in investigating and adjusting the loss to waive the breach of condition as to sale if he desired so to do.

A waiver implies knowledge of the material facts and of one's rights, and a willingness to refrain from enforcing those rights. It is a voluntary surrender of known rights.

Maxwell, Tr., v. *Dirigo Mutual Fire Insurance Co.*, 431, 433.

WARRANTS.

Sec. 8, of Chap. 134, R. S., provides that "warrants issued by trial justices shall be made returnable before any justice in the county, and such warrants may be returned before any municipal or police court in the same county and the same proceedings had thereon as if said warrants had originally issued from said municipal court or police court; and the justice, for issuing one not so returnable shall be imprisoned for six months and pay the costs of prosecution." These words plainly relate to the form of the warrant, and the duty of the Justice, and not to the duty or liability of the officer.

The common law presupposed that the warrant would be executed before it was returned, and does not in terms require an immediate return unless the officer has actually done some act or accomplished some substantial object to be reported back to a court as "his doing thereon."

Zanoni v. *Cyr, et al.*, 399.

WATER RIGHTS.

A prescriptive title to flowage cannot be acquired without proof of actual damage.

It is well settled law in this State, that a use or occupancy of water rights for twenty years, which does no appreciable injury to the possession, or rights of the owner, does not ripen into a prescriptive title. Prescription not presumed unless damage is sustained.

To establish a prescriptive right to flowage, there must be proof of yearly damage continued for twenty years. There must be a preceptible amount of injury throughout the period necessary to gain such right.

Portland Sebago Ice Co. v. *Phinney*, 153, 159.

See *Carleton, et als.* v. *Camden Anchor-Rockland Machine Co.*, 251.

See *Bass & Co.* v. *Wilton Woolen Co.*, 314.

See *Davis, et al.* v. *Briggs, et al.*, 536.

WAYS.

The Commissioners of Cumberland and Androscoggin Counties in joint session relocated an ancient way which lies partly in Pownal, Cumberland County, and partly in Durham, in the County of Androscoggin. The inhabitants of Durham took an appeal from the location and the committee appointed by the Supreme Judicial Court sustained the commissioners.

Held:

The laying out of a way is a judicial act, which is prima facie evidence at least of the doings therein recited though attested by but one of the boards engaged in the proceeding.

Revised Statutes, Chap. 24, Sec. 13, requires that a majority of each board must be present at the session and that a majority of those in attendance may decide the matter, but it does not require that all must sign the report.

The joint board is not a permanent board having records of its own, so that its proceedings must be recorded in a County Court. As Cumberland was the originating county the proceedings were properly recorded there and the rights of appeal were governed by and dependent on that record.

Inhabitants of Durham, Applts., 131.

In actions to recover damages for injuries on account of defective ways, it is *held*,— that the main object of the notice which is provided for under R. S., Chap. 24, Sec. 92, is that a town may have an early opportunity of investigating the cause of an injury and the condition of the person injured before changes may occur essentially affecting such proof of the facts as may be desirable for the town to possess; and a minor purpose of such notice would be perhaps that the town should have a favorable chance to settle the claim before being sued for it should they see fit to do so.

That while in actions brought for injury to person on account of defective ways the notice must specify the nature of the bodily injuries, yet the statute does not require such specification where claim is made for damage to personal property.

Creedon v. *Inhabitants of Town of Kittery*, 541.

WILLS.

The intention of the testatrix as expressed by her through the language which she employed to express her will is to control. The words of her will are to have their usual, ordinary and popular signification, technical words excepted, unless there is something in the context or subject matter to indicate that she intended a different use of the terms employed, and her intention is to be gathered from the words of the particular devise and bequest, considered in connection with the whole will and its manifest scope and purpose, and in the light of the circumstances surrounding the testatrix and known to her when the will was made.

A devise or bequest to heirs designates not only the persons who are to take, but also the manner and proportions in which they are to take, and the law presumes in such case that the testator intended that they would take as heirs would take by the rules of descent, that is per stirpes.

Tucker v. *Nugent, et als.*, 10.

Where the executrix of her husband's will is directed thereby to give by will in charity a sum not exceeding three-fourths part of what may remain of his estate at her decease and she makes the appointment by a will executed less than four months and confirmed less than forty days before her decease, and her executors find among the papers in her possession at her decease, a note given to her by her husband many years before, the balance due upon which practically equals one-half of what must have remained of her husband's estate at her decease to warrant her devise of the sums given in the exercise of the power in charity, it is held that her wills clearly indicate that she did not consider the note an existing claim against her husband's estate and did not intend to enforce it as such.

Where a testator gives to his widow a life estate in certain property with power of disposal and remainder over, whatever remains at the decease of the widow, upon due and proper accounting by her executors or administrators, should be paid or delivered to the administrator de bonis non with the will annexed of the first testator.

It is the right and duty of an administrator to account in the Probate Court, in behalf of his intestate, as executor or administrator, but the accounting is limited to the acts and doings of the deceased representative in his lifetime and the administrator can proceed no further in the administration of the first intestate and so expressly by R. S., Chap. 68, Sec. 27, with executors.

Libby, et al., Ex'rs, v. *Estate of Simon G. Jerrard*, 303.

Under all ordinary circumstances stock dividends belong to capital and go to the remainderman, while cash or money dividends are the property of the life tenant.

Thatcher, et als. v. *Thatcher, et als.*, 331.

The will of Viola Phipps, late of Brunswick, contains the following residuary clause: "I give and bequeath to Mildred Strout to hold in trust all the rest and

residue of my personal property, and I wish it to be distributed to the children of Leon B. Strout and herself or their descendents at such times as she sees fit for their best benefit."

At the death of the testatrix three children of Leon B. Strout and Mildred Strout were living.

Upon consideration of the entire will, it is

Held:

That the testatrix intended that the three children should share equally in the legacy so bequeathed; that the shares of the children were fixed beyond the power of the trustee to change; that the time of payment only was postponed; that the trustee took the legal estate; that the three children took the beneficial or equitable estate; that no other interests were bequeathed; that all interests, legal or equitable, vested at the death of the testatrix; and that the residuary clause does not violate the rule against perpetuities.

The words "or their descendants" when used in a will are construed to include only lineal heirs in the direct descending line; by the use of these words, the testatrix intended to provide, independently of the statute, R. S., Chap. 79, Sec. 10, that if a child died in her lifetime leaving lineal descendants, such descendants should take the share of the deceased parent.

The plaintiff, having instituted this action to wrest the trust estate from the possession of the trustee and to divert the fund to his personal benefit, is not entitled to have his expenses, costs and counsel fees paid from the trust fund.

Strout v. *Strout, et als.*, 357.

In ascertaining the rights of life tenants and remaindermen as to the disposition of dividends declared from the earnings of corporations upon stock held as part of the corpus of a testamentary trust estate, the intention of the testator so far as manifested by him must of course control, but when he has given no special direction upon the question as to what shall be considered principal and what income, he must be presumed to have had in view the lawful power of the corporation over the use and apportionment of its earnings, and to have intended that the determination of that question should depend upon the regular action of the corporation with regard to all its shares.

Harris v. *Moses, et als.*, 391.

Courts in equity will not pass upon the construction of a will until such time as it can determine or advise as to whom distribution may be made.

Morrill, Ex'r, v. *Roberts, Jr., et als.*, 465.

WITNESSES.

Witnesses are to be judged not so much by numbers as by the weight of the evidence given by them. And the weight of the evidence depends upon its effect in inducing belief. Simple, natural and reasonable narration by a single

witness from personal knowledge of the essentially complete details of a transaction should, and does, stamp conviction on an impartial mind conscientiously seeking truth, to a greater degree than the aggregate testimony of several witnesses, each apparently as reliable and as honest as the single one, but aware only partially of the facts of the case, and whose attestations are equally consistent with the contention of either of the opposite litigants.

Ladd v. *Bean, Ex'r*, 445.

WORDS AND PHRASES.

"Abandonment"—*McCann* v. *Bass* 550
"Act and Operation of Law"—*McCann* v. *Bass* 551
"Building"—*State of Maine* v. *Crouse* 365
"Divided Equally Between"—*Tucker* v. *Nugent* 10
"Equitable Estoppel"—*Maxwell* v. *Dirigo Mutual Fire Ins. Co.* 433
"General Manager"—*Braman Dow & Co.* v. *Kennebec Gas & Fuel Co.* 291
"Options"—*Hanscom* v. *Blanchard* 501
"Proceedings Filed or Entered in Court"—*State of Maine* v. *Kerr* 260
"Share and Share Alike"—*Tucker* v. *Nugent* 10
"Surrender of Lease by Acts and Operation of Law"—*McCann* v. *Bass* 551
"Then and There"—*State of Maine* v. *Buckwald* 344
"Tort-feasors"—*Hobbs* v. *Hurley* 449
"Until"—*Bass & Co.* v. *Wilton Woolen Co.* 314
"Voluntary Exposure to Danger"—*Archibald* v. *Order of United Commercial Travelers* 418

WORKMEN'S COMPENSATION ACT.

Under the provision of the Workmen's Compensation Act, R. S., Chap. 50, Sec. 20, declaring that "want of notice shall not be a bar to proceedings under this act, if it be shown that the employer or his agent had knowledge of the injury," the agents acquiring such knowledge are not limited, in case of corporations, to agents upon whom, by virtue of the preceding section, written notice of the injury may be served.

It being provided by section thirty-four of the Workmen's Compensation Act (R. S., Chap. 50, Sec. 34) that there shall be no appeal from a decree entered in equity, in accordance with an order or decision of the Industrial Accident Commission, from questions of fact found by the commission or its chairman, the only question presented upon appeal as to such questions is whether or not there was any evidence to support the finding.

Bertha B. Simmons' Case, 175.

The Workmen's Compensation Act, providing that during the first two weeks after the injury the employer shall furnish reasonable medical and hospital services, etc. (R. S., Chap. 50, Sec. 10), the Industrial Accident Commission exceeds its power in making a rule that such services shall be furnished during the two weeks succeeding the date of incapacity arising from the injury.

The power of the Commission to make rules is limited to such as are not inconsistent with the Workmen's Compensation Act (R. S., Chap. 50, Sec. 29).

Where, upon an appeal, a modification of the decree in equity made in accordance with an order or decision of the commission or its chairman is found necessary and neither such order or decision nor the evidence reported present sufficient facts to enable either the Law Court or the sitting Justice to determine the extent of the modification to be made, the case will be remanded to the Commission for its determination.

Corinne McKenna's Case, 179.

That two persons or groups of persons under a strict application of the language of Sec. 8, Chap. 50, R. S., must each be conclusively presumed to be wholly dependent upon a deceased employee will not defeat the plain purpose of the Act, known as the Workmen's Compensation Act, which must receive a liberal construction with a view to carrying out its general purpose.

Under Sec. 8 (a) of Chap. 50, R. S., evidence of whether a wife was being supported by her deceased husband, from whom at the time of his injury she was living apart by reason of his continued desertion without her fault, is immaterial. In such case the presumption that she is wholly dependent upon him is conclusive and cannot be controverted by evidence; but if after his desertion she has furnished just cause for his refusing to return, she can no longer be conclusively presumed to be wholly dependent upon him in case of his death. In such case her dependency must be proved.

A woman with whom a deceased employee is living in unlawful union is not a dependent within the meaning of this Act.

Illegitimate children of a deceased employee with whom they were living and by whom they were being supported at the time of his death are not included among those conclusively presumed to be wholly dependent under Sec. 8 (c) of this Act.

A collective body of persons who live in one household under a head or manager who has a legal or moral duty to support them constitutes a family within the meaning of the Act, but they must be violating no law in thus living together.

A father is violating no law in caring for and supporting his illegitimate children, and when he recognizes them as his and supports them in a household of which he is the head, they are members of his family within the meaning of this Act, even though his lawful wife is living apart from him and the mother of such

illegitimate children is a member of the same household and living with him in unlawful union. His unlawful union with the mother does not affect his obligations towards the children of such union, nor their rights under this Act.
Harry Scott's Case, 436.

WRIT OF ENTRY.

See *Gile* v. *Boardman*, 52.

APPENDIX

STATUTES AND CONSTITUTIONS CITED, EXPOUNDED, ETC.

CONSTITUTION OF UNITED STATES.

Article I, Section 8, Clause 3 485
Article IV, Section 1 494

CONSTITUTION OF MAINE.

Article I, Section 6 365
Article I, Section 7 337

STATUTES OF UNITED STATES.

Federal Employers' Liability Act of 1908 45
The Carmack Amendment 486
The U. S. Food and Drug Act of June 30, 1906, Chap. 3915, Sec. 7 (Comp. St. 1916, Sec. 8723) 290
The Interstate Commerce Act of February 4, 1887 486
34 Stats. at Large, Chapter 3591, Section 1 324
U. S. Bankruptcy Act, Section 47A 99
U. S. Bankruptcy Act, Section 60 99

STATUTES OF CONNECTICUT.

Public Acts of Connecticut, 1907, Chapter 22 461

LAWS OF MASSACHUSETTS.

1783, Chapter 24, Section 10 311

SPECIAL LAWS OF MAINE.

1909, Chapter 247 17

STATUTES OF MAINE.

1821, Chapter LI, Section 19 311
1839, Chapter 398 97
1842, Chapter 9 485
1854, Chapter 93 485
1856, Chapter 211 424
1856, Chapter 266 428
1857, Chapter 55, Section 3 425
1859, Chapter 73 423
1874, Chapter 181, Section 5 97
1874, Chapter 215 543
1891, Chapter 11 97
1891, Chapter 111 98
1893, Chapter 174 535
1895, Chapter 32 151
1895, Chapter 157 236
1903, Chapter 160 472
1905, Chapter 85 85
1907, Chapter 74, Section 3 288
1909, Chapter 260 472
1911, Chapter 119, Section 11 290
1913, Chapter 137 429
1915, Chapter 118 426
1917, Chapter 291 336
1917, Chapter 291, Section 2 234
1917, Chapter 294 ..... 232, 460

REVISED STATUTES OF MAINE.

1871, Chapter 82, Section 19 425
1871, Chapter 111, Section 5 152
1877, Chapter 204, Section 5 289
1883, Chapter 77, Section 51 535
1883, Chapter 82, Section 23 425
1883, Chapter 111, Section 5 151
1883, Chapter 118, Section 17 72
1903, Chapter 30, Section 18 289
1903, Chapter 47, Section 77 84
1903, Chapter 78, Section 14 54
1903, Chapter 82, Section 35 425
1903, Chapter 89, Section 9-10 262
1903, Chapter 119, Section 16 72
1916, Chapter 1, Section 6, Paragraph III 75
1916, Chapter 4, Section 16 74

1916, Chapter 4, Section 43 297
1916, Chapter 4, Sections 93, 94 22
1916, Chapter 20, Section 17 288
1916, Chapter 23, Section 21-24 188
1916, Chapter 24, Sections 13, 14, 15 133
1916, Chapter 24, Section 92 541
1916, Chapter 26, Sections 2-6 460
1916, Chapter 26, Sections 23, 28 118
1916, Chapter 26, Sections 24, 28 455
1916, Chapter 29, Section 1, Paragraphs II and VI 136
1916, Chapter 30 22
1916, Chapter 31, Section 2 340
1916, Chapter 36, Section 12 290
1916, Chapter 45, Section 30 269
1916, Chapter 50 436
1916, Chapter 50, Sections 1-48 175
1916, Chapter 50, Sections 10, 29 179
1916, Chapter 51, Section 22 409
1916, Chapter 51, Sections 81, 82-87 85
1916, Chapter 51, Section 88 87
1916, Chapter 53, Sections 35, 36 516
1916, Chapter 53, Section 119 246
1916, Chapter 57, Section 67 420
1916, Chapter 65, Section 9 236
1916, Chapter 68, Section 25 311
1916, Chapter 68, Section 27 303
1916, Chapter 68, Section 66 186
1916, Chapter 77, Section 6, Clause 3 279
1916, Chapter 78, Section 16 548
1916, Chapter 79, Section 10 361
1916 Chapter 80, Section 1 100
1916, Chapter 80, Section 3 442
1916, Chapter 80, Section 14 471
1916, Chapter 80, Section 17 470
1916, Chapter 80, Section 18 236
1916, Chapter 81, Section 14 54
1916, Chapter 82, Section 6, Paragraph XLV 25
1916, Chapter 82, Section 6, Sub.-div. X 465
1916, Chapter 82, Section 55 70
1916, Chapter 82, Section 56 534
1916, Chapter 84, Section 18 114
1916, Chapter 87, Section 14 481
1916, Chapter 87, Sections 17, 18 211
1916, Chapter 87, Section 36 ..... 423, 425
1916, Chapter 87, Section 48 262
1916, Chapter 87, Section 117 446

1916, Chapter 87, Section 127 427
1916, Chapter 92, Section 9 61
1916, Chapter 92, Sections 9-10 262
1916, Chapter 93, Section 28 213
1916, Chapter 96 98
1916, Chapter 96, Section 1 143
1916, Chapter 96, Section 2 512
1916, Chapter 102 442
1916, Chapter 111 97
1916, Chapter 114 98
1916, Chapter 114, Section 1 519
1916, Chapter 114, Section 8 150
1916, Chapter 120, Section 16 69
1916, Chapter 121, Section 3 363
1916, Chapter 121, Section 8 365
1916, Chapter 123, Section 1 259
1916, Chapter 126, Section 16, 20 344
1916, Chapter 127, Section 20 234
1916, Chapter 127, Section 27 235
1916, Chapter 127, Sections 27, 40 336
1916, Chapter 128, Section 1 254
1916, Chapter 128, Section 22 475
1916, Chapter 130, Section 18 ..... 102, 163
1916, Chapter 133, Section 11 336
1916, Chapter 134, Section 8 399
1916, Chapter 134, Section 14 400
1916, Chapter 136, Section 28 226
1916, Chapter 137, Section 3 336

ERRATA.

Brown v. *Rouillard*, page 55, line 3 from top of page, strike out "defendant" and substitute therefor "plaintiff."

McCann v. *Bass*, page 551, line 5 from bottom of page, strike out "complimentary" and substitute therefor "complementary."

Webber v. *Granville Chase Co.*, page 152, line 2 from top of page, strike out "11" and substitute therefor "111."