MAINE REPORTS

118

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

JANUARY 7, 1919—MARCH 1, 1920

TERENCE B. TOWLE
FREEMAN D. DEARTH*
REPORTERS

PORTLAND, MAINE
WILLIAM W. ROBERTS

*Freeman D. Dearth appointed December 20, 1919

JUSTICES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS

HON. LESLIE C. CORNISH, CHIEF JUSTICE
HON. ALBERT M. SPEAR
HON. GEORGE M. HANSON
HON. WARREN C. PHILBROOK
HON. CHARLES J. DUNN
HON. JOHN A. MORRILL
HON. SCOTT WILSON
HON. LUERE B. DEASY

Justices of the Superior Courts

HON. HENRY W. OAKES,	ANDROSCOGGIN COUNTY
HON. LAUREN M. SANBORN,	CUMBERLAND COUNTY
HON. FRED EMERY BEANE,	KENNEBEC COUNTY
HON. BERTRAM L. SMITH,	PENOBSCOT COUNTY

ATTORNEY GENERAL

GUY H. STURGIS

REPORTER OF DECISIONS

TERENCE B. TOWLE

ASSIGNMENT OF JUSTICES

FOR THE YEAR 1919

LAW TERMS

BANGOR TERM, First Tuesday of June.

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

PORTLAND TERM, Fourth Tuesday of June.

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

AUGUSTA TERM, Second Tuesday of December.

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

TABLE OF CASES REPORTED

A

A. O. U. W. *v.* Martin, et al. 409
Arnold *v.* City of Augusta 399
Arsenault, et al., Conant *v.* 281
Augusta, City of, Arnold *v.* 399
Austin, Barry, et als. *v.* . . 51
Austin, Barry, et als. *v.* . 51

B

Barry, et als. *v.* Austin . . 51
Bassett *v.* Breen . . . 279
Beaudry, et al., Berman, Ex'r. *v.* 248
Beaumont, Sabine *v.* . . . 490
Bellevieu, Roy *v.* 495
Benjamin Shaw & Co. *v.* Moody, et als. 489
Berman, Ex'r. *v.* Beaudry, et al. 248
Blaisdell, State of Maine *v.* 13
Bluehill, Inh. of, Inh. of Mt. Desert *v.* 293
Bordeleau, State of Maine *v.* 424
Borneman, et als. *v.* Milliken, et als. 168
Bradbury *v.* Ins. Co. of Pennsylvania . . . 191
Bragdon *v.* Kellogg . . 42
Breen, Bassett *v.* 279
Bridges, State *v.* 487
Brown, State of Maine *v.* . 164
Bryer, Pet. *v.* Wyman . . 378
Burpee, et als. *v.* Burpee, et als. 1
Burr *v.* Merrill, et al. . . 488

C

Call, Gould, Ex'r. *v.* . . 478
Caribou W. L. & P. Co., Nadeau *v.* 325
Carpenter *v.* Hadley, Admr. 437
Carter, Chute *v.* 502
Chadwick, State of Maine *v.* 233
Chapman, Furbish *v.* . . 449
——— *v.* N. Y. C. R. R. Co. 481
Chasse *v.* Boucier . . . 62
Chesnel, et al., Berman, Ex'r. *v.* 248
Chickering, Admr. *v.* Lincoln County Power Co. . . 414
Chute *v.* Carter . . . 502
City of South Portland, Harris, Applt. *v.* . . . 356
——— — Augusta, Arnold *v.* 399
Clarence B. Merchant's Case 96
Clark, Weed *v.* 466
Clifford, Jr., Petr. *v.* Verrill 101
———, Farnham *v.* . . 145
Colby, et als. *v.* Richards, et al. 288
Cole *v.* Pendleton . . . 486
Conant *v.* Arsenault, et al. 281

Corey Co., Pet'r. *v.* Cummings Construction Co. . . 34
Cotting, Applt. *v.* Tilton . 91
Crane, Elms *v.* 18
——, —— — 261
Creamer, et als., Reed, Ex'r *v.* 317
Cumberland County P. & L. Co., Lowe *v.* 493
Cummings Construction Co., Corey Co. *v.* 34
————, Sproul *v.* . . . 129

D

Damarest, State *v.* 86
Davis *v.* U. S. Bobbin & Shuttle Co. 285
Debe, Repetti *v.* 498
Derry, State of Maine *v.* . 431
Dolan & Furnival Co., Claimant, Intoxicating Liquors & Vessels, State *v.* . . . 198
Drummond *v.* Trickey . . 296
Dunbar & Co., Fiske *v.* . 342
Dyer *v.* Mudgett . . . 267

E

Elms *v.* Crane 18
—— *v.* —— 261
Elward, Kalloch *v.* 346
Epstein, Ginsberg *v.* . . . 487
Erskine, Hopkins *v.* . . . 276
Est. of Madison M. J. L. Leavitt, Nichols, Applt. *v.* 464

F

Farnham *v.* Clifford . . 145
Farrell *v.* Farrell, et al. . . 441
Fish's Case 489
Fiske *v.* Dunbar & Co. . . 342
Flaherty *v.* Maine Motor Carriage Co. 471
Furbish *v.* Chapman . . 449

G

Gammons *v.* King . . . 76
Gastonguay, State of Maine *v.* 31
Ginsberg *v.* Epstein . . 487
Golden Cross, United Order of, Wallace *v.* . . . 184
Googins, Pro Ami, *v.* Skillings, et al. 299
Gordon v. Hutchins, et al. 6
——— *v.* Keene, Admr. . 269
Gould,, Lambert, Pet'r *v.* . 101
——, Ex'r. *v.* Call . . 478
Graham, Payne *v.* 251
Grand Lodge of A. O. U. W. of Maine *v.* Martin, et al. 409
Gray, Sylvester *v.* 74
——, Ricker *v.* 492
Greeley *v.* Greeley, Ex'r. . 491
Guilford Water Co., In re . 367

H

Hadley, Admr., Carpenter *v.* 437
Hahnel, State of Maine *v.* . 452
Hamm, Thompson, Treas. *v.* 501
Harris, Applt. *v.* City of South Portland . . . 356

Hawkins, Michaud, Pro Ami *v.* 492
Hayden *v.* M. C. R. R. Co. 442
Helen B. Mailman's Case . 172
Henry, State of Maine *v.* . 495
Higgins *v.* Smith . . . 312
Hodgman, Admrx. *v.* Sandy R. & R. L. R. R. . . . 218
Holden *v.* Page . . . 242
Hooper's Sons *v.* Sterling-Cox Shoe Co., et al. . . 404
Hopkins *v.* Erskine . . 276
Hutchins, et al., Gordon *v.* 6

I

In re McKellar, Applt. . . 64
In re Will of Robert C. Foster 67
— — Rawley, Applt. . . 109
— — Thompson, Applt. . 114
— — Guilford Water Co. . 367
— — Searsport Water Co. 382
— — Lincoln Water Co. . 382
— —Island Falls Water Co. 397
Ingraham, Applt. . . . 67
Inh. of Sorrento, Nash *v.* . 224
— — Mt. Desert *v.* Inh. of Bluehill 293
— — Bluehill, Inh. of Mt. Desert *v.* 293
— — Norway Village Corp., Merrow *v.* 352
Inh. of Van Buren, Van Buren Light & Power Co. *v.* 458
— — York, Perkins *v.* . 488
Ins. Co. of Pennsylvania, Bradbury *v.* 191
Intoxicating Liquors & Vessels, Dolan & Furnival Co. Claimant, State *v.* . 198
Irving, Kelsey, et al. *v.* . 307
Island Falls Water Co., In re 397

J

Johnson, et al. *v.* Palmer, et als. 226
——— *v.* Weare . . . 502

K

Kalloch *v.* Elward . . . 346
Kautz *v.* Sheridan, et al. . 28
Keene, Admr., Gordon *v.* . 269
Kellogg, Bragdon *v.* . . 42
Kelsey, et al. *v.* Irving . . 307
Kendall, et al., Gordon *v.* 6
Kennebec Lumber Co., Viles *v.* 148
King, Gammons *v.* . . . 76

L

Lambert, Petr. *v.* Gould . 101
LaRose, State of Maine *v.* . 502
Lawler *v.* Spellman, et als. 484
Leavitt, Est. of M. J. L., Nichols, Applt. *v.* . . 464
Lemaire, Pet'r. *v.* Reade . 101
Lewin, et al., Starkey *v.* . 87
Libby, et al., Williams, In Eq. *v.* 80
Lincoln Water Co., In re. 382
———County Power Co., Chickering, Admr. *v.* . . 414

Llewellyn W. Fish's Case . 489
Look *v.* Watson . . . 339
Lowe *v.* Cumberland County P. & L. Co. 493
Lumber Co., Kennebec, Viles *v.* 148

M

Mailman's Case . . . 172
M. C. R. R. Co., Hayden *v.* 442
Maine Motor Carriage Co., Flaherty *v.* 471
Marston, Pro Ami, *v.* N. E. Ridlon Co. 499
Martin, et al., Grand Lodge of A. O. U. W. 409
McKellar, Applt. . . . 64
McLoon & Co., Olson *v.* . 480
Menard, et als., O'Leary, et als. *v.* 25
Merchant's Case . . . 96
Merrill, et al., Burr *v.* . . 488
Merrow *v.* Inh, of Norway Village Corp. . . . 352
Michaud, Pro Ami, *v.* Hawkins 492
Milliken, et als., Borneman, et als. *v.* 168
Moody *v.* Moody . . . 454
——, et als., Shaw & Co. *v.* 489
Morse, et als., Oliver *v.* . 479
Mt. Desert, Inh. of, *v.* Inh. of Bluehill 293
Mudgett, Dyer *v.* . . . 267
Mulkern, State of Maine *v.* 477
Murphy, et al., State of Maine *v.* 477

N

Nadeau *v.* Caribou W. L. & P. Co. 325
Nash *v.* Inh. of Sorrento . 224
N. Y. C. R. R. Co., Chapman *v.* 481
Nichols, Nickels *v.* . . . 21
Nichols, Applt. *v.* Est. of Madison M. J. L. Leavitt 464
Nickels *v.* Nichols, Ex'r . 21
Norway Village Corp., Inh. of, Merrow *v.* . . . 352

O

O'Hare, et al., State of Maine *v.* 477
O'Leary, et als. *v.* Menard, et als. 25
Oliver *v.* Morse, et als. . 479
Olson *v.* McLoon & Co. . 480
O'Toole, State of Maine *v.* 314

P

Page, Holden *v.* . . . 242
Palmer, et als., Johnson, et al. *v.* 226
Patch, Randall *v.* . . . 303
Patten, Est. of Herbert E., Tyler *v.* 501
Payne, Pet'r. *v.* Graham . 251
Pelletier, State of Maine *v.* 257
Pendleton, Cole *v.* . . . 486
Penney, et al., Grand Lodge of A. O. U. W. *v.* . . 409
Perkins *v.* Inh. of York . . 488

Power & Light Co., Cumberland County, Lowe *v.* 493
Prince, et als., Stanley *v.* . 360

R

Randall *v.* Patch . . . 303
Rawley, Applt. . . . 109
Reade, Lemaire, Pet'r *v.* . 101
Reed, Ex'r. *v.* Creamer, et als. 317
——— *v.* Reed 321
———, The M. Steinert & Sons Co. *v.* 403
Repetti *v.* Debe . . . 498
Richards, et al., Colby, et als. *v.* 288
Ricker *v.* Gray . . . 492
Ridlon Co., Marston *v.* . . 499
Roberts *v.* Small . . . 500
Roy *v.* Bellevieu . . . 495
Russell, Pet'r. *v.* Stevens . 101

S

Sabine *v.* Beaumont . . 490
Sandy River & Rangeley Lakes R. R., Hodgman, Admrx. *v.* 218
Searsport Water Co., In re 382
Shaw & Co. *v.* Moody, et als. 489
Sheridan, et al., Kautz *v.* . 28
Skillings, et al., Googins, Pro Ami., *v.* 299
Slorah, State of Maine *v.* . 203
Small, Roberts *v.* . . . 500
Smith, Higgins *v.* . . . 312
———, et als. *v.* Walker, et als. 473
Sorrento, Inh. of, Nash *v.* 224
Soucier, Chasse *v.* 62
South Portland, City of, Harris, Applt. *v.* 356
Spellman, et als., Lawler *v.* 484
Sproul *v.* Cummings. . . 129
Stanley *v.* Prince, et als. . 360
Starkey *v.* Lewin, et als. . 87
State of Maine *v.* Blaisdell 13
——— — ——— *v.* Gastonguay 31
——— — ——— *v.* Damarest 86
——— — ——— *v.* Brown . 164
——— — ——— *v.* Intoxicating Liquors and Vessels . 198
——— — ——— *v.* Slorah . 203
——— — ——— *v.* Chadwick 233
——— — ——— *v.* Stephens 237
——— — ——— *v.* Pelletier . 257
——— — ——— *v.* O'Toole . 314
——— — ——— *v.* Townsend 380
——— — ——— *v.* Bordeleau 424
——— — ——— *v.* Derry . 431
——— — ——— *v.* Hahnel . 452
——— — ——— *v.* O'Hare, et al. 477
——— — ——— *v.* Mulkern 477
——— — ——— *v.* Bridges . 487
——— — ——— *v.* Henry . 495
——— — ——— *v.* LaRose . 502
Steinert & Sons Co., The M., *v.* Reed 403
Stephens, State of Maine *v.* 237
Sterling-Cox Shoe Co., et al., Hoopers Sons *v.* . . 404
Stevens, Russell, Pet'r. *v.* . 101
Stobie *v.* Sullivan . . . 483
Sullivan *v.* Stobie . . . 483
Sylvester *v.* Gray . . . 74

T

The M. Steinert & Sons Co. *v.* Reed 403
Thompson, Applt. 114
————, Treas. *v.* Hamm 501
Tilenius, et als., Waterhouse *v.* 239
Tilton, Cotting, Applt. *v.* . 91
Townsend, State *v.* . . . 380
Trickey, Drummond *v.* . 296
Tyler *v.* Est. of Herbert L. Patten 501

U

United Order of the Golden Cross, Wallace *v.* . . . 184
U. S. Bobbin & Shuttle Co., Davis *v.* 285

V

Van Buren Light & Power Co. *v.* Inh. of Van Buren 458
Verrill, Clifford, Pet'r *v.* . 101
Viles *v.* Kennebec Lumber Co. 148

W

Walbridge *v.* Walbridge, et al. 337
Waldron, et al., Kautz *v.* . 28
Walker, et als., Smith, et als. *v.* 473
Wallace *v.* United Order of the Golden Cross . . 184
Waterhouse *v.* Tilenius, et als. 239
Watson, Look *v.* 339
Weare, Johnson *v.* 502
Weed *v.* Clark 466
Westman's Case . . . 133
Williams, In Eq. *v.* Libby, et al. 80
Wyman, Bryer, Pet. *v.* . 378

Y

York, Inh. of, Perkins *v.* . 488

TABLE OF CASES CITED

BY THE COURT

Abbott *v.* United Order of Pilgrim Fathers, 190 Mass., 67, 413
Adams v. Moore, 7 Maine, 86, 11
——— *v.* Clapp, 87 Maine, 316, 245
Adomites *v.* Royal Furniture Co., 196 Mich., 498, 100
Albaugh-Dover Co. *v.* Ind. Board (Ill.), 115 N. E., 834, 177
Amendment to Schedule of Fees, 110 Maine, 544, 323
18 A. & E. Ency., 2 Ed., 1018, 1093, 265
American Bible Society *v.* Wells, 68 Maine, 572, 278
A. O. U. W. *v.* Connor, 116 Maine, 229, 413
Andrews *v.* State, 174 Ala., 11, 210
Ann. Cas., 1914 C., 163, 137
Arlington Bd. of Survey *v.* Bay St. Ry., 224 Mass., 463, 471, 391
Arthur E. Guth Co. *v.* Adams, 114 Maine, 390, 404
Asbury Ins. Co. *v.* Warren, 66 Maine, 529, 177
Atlanta K. & N. Rwy. *v.* Southern Rwy. Co., 131 Fed., 657, 660, 20
Atlantic Coast Line R. R. Co. *v.* Goldsboro, 232 U. S., 548, 371
——— ——— ——— — — — v. Bd. of Pub. Util. Comrs., 92 N. J. L., 168, 395
Attorney General *v.* Newell, 85 Maine, 273, 276, 105
——— ——— *v.* Lindsay, 178 Mich., 542, 145 N. W., 98, 254
Atwood *v.* Lucas, 53 Maine, 508, 310

Backus *v.* Cheney, 80 Maine, 17, 117
Bacon *v.* Hooker, 173 Mass., 554; 54 N. E., 253, 298
Bailey *v.* Worcester, 103 Maine, 170, 178, 61, 302
Baker *v.* Waldron, 92 Maine, 17, 38
——— *v.* Copeland, 140 Mass., 342, 349
Bangor *v.* Hampden, 41 Maine, 484, 295
Bank *v.* Portland, 82 Maine, 99, 110, 232
——— *v.* Bugbee, 19 Maine, 29, 240
Barber *v.* Merriam, 11 Allen, 322, 192
Barnsdall *v.* Waltemeyer, 142 Fed. Rep., 415, 448
Barry *v.* Austin, 118 Maine, 51; 105 At., 806, 319, 476
Bartlett *v.* Bangor, 67 Maine, 460, 359
———, Applt., 82 Maine, 210, 466
Bean *v.* Ayers, 69 Maine, 482, 488, 277
Beatty *v.* Randall, 5 Allen, 441, 11
Beers *v.* Haughton, 9 Pet., 329, 350
Beggs *v.* State, 55 Ala., 108, 110, 238
Belcher *v.* Estes, 99 Maine, 314, 315, 211
Belfast *v.* Water Co., 115 Maine, 234, 373
Bell *v.* Hayes Ionia Co. (Mich.), 158 N. W., 179, 178
Benedict *v.* Davis, 2 McLean, 347, 341
Benner *v.* Payson, 110 Maine, 204, 207, 106
Bennett Trust Co. *v.* Singstacken (Or.), 113 Pac., 863, 254
——— *v.* Davis, 90 Maine. 105, 305
Benton *v.* State, 30 Ark., 328, 213
——— *v.* N. C. Service Corp., 81 S. E., 448, 422
Benwood *v.* West Va. Public Service Com., 75 W. Va., 127, 389
Bergstrom *v.* Ind. Comm. (Ill.), 121 N. E., 195, 178
Berry *v.* Stevens, 69 Maine, 290, 468
Beshiers *v.* Allen (Okl.), 148 Pa., 141, 264
Biddeford *v.* Yates, 104 Maine, 506, 461
Bigelow on Estoppel, 6th. Ed., Part 1, Chap. 1, 10
Bigham *v.* Clubb, 42 Texas Cir., App., 312, 95 S. W., 675, 98
Bigner *v.* Hodges, 82 Miss., 215, 33 So., 980, 264
Binel, etc. Co. *v.* Loper (Ind.), 117 N. E., 527, 181
Bish. New Crim. Law, Vol. 1, Sec. 951 d, 207
1 ——— ——— ———, Secs. 1014, 1015, 1016, 208
——— ——— ———, Vol 1, Secs. 1031, 1033, 209
—— Stat. Crimes, Sec. 586, 238

—— New Crim. Proc., Secs. 424-432, 443, 434, 435
——— ——— ———, Sec. 77, 435
Bither *v.* Packard, 115 Maine, 306, 315, 9
Bixler *v.* Wright, 116 Maine, 113, 135, 8
Black on Interpretation of Laws, 136, 137, 395
3 Blackstone, pages 296, 377, 10
3 ——— Com., 296, 447
Blaisdell *v.* York, 115 Maine, 351, 463
Blouin *v.* Phaneuf, 81 Maine, 180, 250
Blythe *v.* State, 47 Ohio St., 234, 213
Board of Survey of Arlington *v.* Bay St. Ry., 224 Mass., 463, 469, 395
Boardman *v.* Creighton, 95 Maine, 159, 417
Boatmen's Bank *v.* Fritzler, 221 Fed., 145, 333
Borden *v.* Mercer, 163 Mass., 7, 38
Borders *v.* B. & M. R. R., 115 Maine, 210, 51
Borgnis *v.* Falk Co. (Wis.), 133 N. W., 209, 175
Borough of No. Wildwood *v.* Bd. of Pub. Util. Com., 88 N. J. L., 81, 391
Boston Furnace Co. *v.* Dimock, 158 Mass., 552, 38
B. & M. R. R. Co. *v.* County Commrs., 79 Maine, 386, 371
Bowman *v.* Moore (Cal.), 25 Pac., 409, 412
Boyd on Workman's Compensation, 1123, 177
Boynton *v.* Dyer, 18 Pick., 4, 111
Bradbury on Workman's Compensation, 2nd. Ed., 800, 117
——— *v.* Cony, 62 Maine, 223, 211
Bradford *v.* Clark, 90 Maine, 298, 365
Bradley *v.* Warren, 104 Maine, 423-427, 54
——— *v.* Heath, 12 Pick., 163, 165, 365
Bradstreet *v.* Bradstreet, 64 Maine,
Bradstreet *v.* Bradstreet, 64 Maine, 204, 93, 116
Bragdon *v.* Hatch, 77 Maine, 433, 313
Bragdon *v.* Kellogg, 118 Maine, 42, 76, 484, 493
Bragg *v.* White, 66 Maine, 157, 354
Brann *v.* Vassalboro, 50 Maine, 64, 147
Bridge *v.* Sumner, 1 Pick,. 370, 10
Briggs, *v.* Ice Co., 112 Maine, 344, 347, 268
——— *v.* Chase, 105 Maine, 317, 408
Brill *v.* Ohio Humane Society, 4 Ohio C. C., 358, 305
Brink *v.* Freoff, 40 Mich., 610; 44 Mich., 69; 6 N. W., 94, 298
Brown *v.* Getchell, 11 Mass., 11, 348
Brown's Case, 228 Mass., 38, 178
Bryant *v.* Fissell, 84 N. J. Law, 72; 86 Atl. Rep., 458, 140
Burbank *v.* Sweeney, 161 Mass., 490, 476
Burge *v.* Rockwell (Iowa), 94 N. W., 1103, 461
Burkett *v.* Harper, 79 N. Y., 273, 38
Burlington *v.* Dennison, 42 N. J. L., 167, 461
Burpee *v.* Burpee, 109 Maine, 383, 111
Burr *v.* Stevens, 90 Maine, 500, 503, 268
Butcher's Union Co. *v.* Cresent City Co., 111 U. S., 746, 371
Caldwell *v.* Smith, 77 Ala., 157, 165, 11
——— *v.* State, 17 Conn., 467, 316
Camp *v.* Wabash R. Co. (Mo.), 68 S. W., 98, 461
Campbell *v.* Golden Cycle Mining Co., 141 Fed. Rep., 610, 616, 11
Campmeeting Ass. *v.* Andrews, 104 Maine, 349, 359
Cancemi *v.* Pelple, 18 N. Y., 128, 215
Cape Elizabeth *v.* Lombard, 70 Maine, 399, 310
Carroll *v.* State, 5 Neb., 31, 213
Carter *v.* Hume-Bennett Lumber Co., 2 Cal., 1 A. C. Dec., 42, 144
——— *v.* Clark, 92 Maine, 228, 246
Carvill *v.* Carvill, 73 Maine, 136, 117
Case *v.* Hoffman, 100 Wis., 314, 170
Cedar Rapids Gas Co. *v.* Cedar Rapids, 223 U. S., 655, 374
Central Trust Co. *v.* Bodwell Water Power Co., 181 Fed. Rep., 735, 40
Chalmers *v.* Littlefield, 103 Maine, 271-281, 232
Chamberlain *v.* Bressey, 5 Maine, 164, 170, 4
4 Chamberlayne on Ev., Sec. 2831 et seq., 426
4 ——— ——— ———., Sec. 2858, 429
Champion *v.* Noyes, 2 Mass., 481, 350
Chaney *v.* Smallwood, 1 Gill., 367, 278
Chapman *v.* Battle, 124 Ga., 574, 52 S. E., 812, 264
Charles *v.* Dana, 14 Maine, 387, 462
Charlesworth *v.* Am. Exp. Co., 117 Maine, 219, 221, 63, 487

Chase *v.* Ladd, 153 Mass., 126, 61
Chase *v.* Allen, 82 Maine, 234, 245
—— *v.* Fish, 16 Maine, 132, 348
Chasse *v.* Soucier, 105 Atl. 853, 487
Chew Heong *v.* U. S., 112 U. S., 559, 440
Chicago, Burlington & Quincy R. Co. *v.* Nebraska, 170 U. S., 57, 371
————, M. & St. P. Ry. Co. *v.* Minnesota, 134 U. S., 418, 456, 372
Chitty on Contracts, Sec. 442, 88
——— — Pleading, Vol. 2, page 437, 240
1 —— Pl., Sec. 308, 16th. Amer. Ed., 392-4, 278
1 —— on Pleadings, Sec. 397, 417
Chute *v.* State, 19 Minn., 230, 213
Cilley *v.* Bartlett, 19 N. H., 312, 211
Citizens Gas Co. *v.* Whitney, 232 Pa., 592, 81 Atl., 804, 333
City of Roanoke *v.* Eliot (Va.), 96 S. E., 821, 255
—— Club *v.* Howes, 92 Maine, 214, 311
—— of Englewood *v.* Denver & South Platte Ry. Co., 248 U. S., 294, 372
——— — New York *v.* Foster, 133 N. Y. S., 152, 393
——— — Logansport *v.* Humphrey, 84 Indiana, 467, 401
Clark *v.* Stetson, 112 Maine, 276, 9
—— *v.* Woap, 159 App. Div., N. Y., 437, 50
Cleveland *v.* Cleveland City Ry. Co., 194 U. S., 517, 386
Clifton Forge *v.* Virginia Western Power Co., P. U. R. 1918, F. 791, 803, 386
Coan *v.* Auburn Water Comrs., 109 Maine, 312, 311
Cobb *v.* Dyer, 69 Maine, 494, 82
Coke, Litt., 277, 209
Coke's Litt., page 352, 10
Colbath Seed Case., 112 Maine, 277, 89
Colcord *v.* Fletcher, 50 Maine, 398, 284
Collier on Bankruptcy, page 1178, 302
Collingwood Sew. Co. *v.* Collingswood, (N. J.), P. U. R., 1918, C. 261, 268, 388
Collins *v.* Stott, 76 Fed., 613, 20
Colomb *v.* Street Railway Co., 100 Maine, 418, 420, 419
Columbus Ry. P. & Lt. Co. *v.* Columbus, 249 U. S., P. U. R., 1919, D. 239, 390
Commonwealth *v.* Patterson, 138 Mass., 500, 33
———— *v.* McArty, 11 Gray, 456, 33
———— Edison Co. *v.* Industrial Board (Ill.), 115 N. E., 158, 178
———— *v.* Drake, 124 Mass., 21, 207
———— *v.* Donovan, 99 Mass., 425, 207
———— *v.* Zec, 105 At. Rep. (Penn.), 279, 281, 207
———— *v.* McCauley, 105 Mass., 69, 208
———— *v.* Purchase, 2 Pick., 520, 209
———— *v.* Roby, 12 Pick., 496, 209
———— *v.* Fells, 9 Leigh (Va.), 613, 210
———— *v.* McCormick, 130 Mass., 61, 211
———— *v.* Van Horn, 188 Pa. St., 143, 213
———— *v.* Knapp, 9 Pick., 496, 515, 213
———— *v.* Webster, 5 Cush., 295, 298, 213
———— *v.* McCarthy, 163 Mass., 458, 213
———— *v.* Chancem, 174 Mass., 245, 214
———— *v.* Bradley, 2 Cush., 553, 238
———— *v.* Geo. W. Thompson, 116 Mass., 346, 381
———— *v.* Gagne, 153 Mass., 205, 316
———— *v.* Roberts, 108 Mass., 296, 302, 427
———— *v.* Brewer, 164 Mass., 577, 582, 429
———— *v.* Bishop, 165 Mass., 148, 152, 429
———— *v.* Tucker, 189 Mass., 457, 475, 430
———— *v.* Poisson, 157 Mass., 510, 433
———— *v.* Symonds, 2 Mass., 163, 434
———— *v.* Holmes, 119 Mass., 195, 434
———— *v.* Tuck (Mass.), 20 Pick., 361, 435
Comstock *v.* Eastwood, 108 Mo., 41, 50, 11

Contra, Hopkins *v.* Northwestern Life Asso. Co., (U. S. Dist. Ct.), 94 Fed., 729, 189
Cooley on Torts, page 666, 45
Cooley's Cons. Lim., page 339 (6th. Ed.), 208
——— —— ——., pages 399, 400, (6th. Ed.), 209
Copeland *v.* Barron, 72 Maine, 206, 57
Corey *v.* Independent Ice Co., 106 Maine, 494, 463
Corinna *v.* Exeter, 13 Maine, 321, 295
Cornell *v.* State (Wis.), 80 N. W., 745, 435
Coronado Beach Co. *v.* Pillsbury, 158 Pac., 212, 143
Corpus Juris, Vol. 9, pages 244, 245, 170
7 ——— ——, 1163, note 83, 238
Cowan *v.* Bucksport, 98 Maine, 308, 311
Cowen & Hill's Notes, No. 453, ——— — —— ——, page 611, note 457, 429
Cox *v.* Burbridge, 106 Eng. Com. Law Rep., 430, 268
Crary *v.* Dye, 208 U. S., 515, 521, 11
Craven *v.* Turner, 82 Maine, 383, 19
Crosby *v.* Railroad Co., 113 Maine, 270, 419
Cross *v.* Beane, 81 Maine, 525, 83
Crowningshield *v.* Crowningshield, 68 Mass., 528, 111
C. & O. Canal Corp. *v.* Hutchings, 59 Maine, 206, 334
Cunningham *v.* N. W. Imp. Co., (Mont.), 119 Pac., 554, 175
——— *v.* Frankfort, 104 Maine, 208, 214
Cutler *v.* Grover, 15 Maine, 159, 64
20 Cyc., p. 165 c., 88
38 ——, 2026, 131
19 ——, 1430, 194
12 ——, 898, 207
25 ——, 506, 265
25 ——, 536, 365
25 ——, 536, 265
29 ——, 567, 417
12 ——, 762, 435

Dahnke *v.* People (Ill.), 48 N. E., 140, 461
Daly *v.* Children's Home, 113 Maine, 528, 246
Dana *v.* Gill, 20 Am. Dec., 255, 447
Danville *v.* Danville Water Co., 178 Ill., 299, 389
Davis *v.* Smith, 79 Maine, 358, 10
——— *v.* Wakelee, 156 U. S., 680, 689, 11
——— *v.* Smith (Pa.), 105 At., 559, 178
——— *v.* Starett, 97 Maine, 575, 263, 366
——— *v.* Harkness, 6 Ill., 173, 278
Dawson *v.* Dawson Tel. Co., 137 Ga., 62, 395
De Klyn *v.* Gould, 165 N. Y., 282, 80 Am. St. Rep., 719, 38
Dean *v.* Dean (Wis.), 156 N. W., 136 K
Dean *v.* Emerson, 102 Mass., 482, 178
——— *v.* Dean (Wis.), 156 N. W., 136, 413
Deering *v.* Adams, 37 Maine, 264, 230
Deibeikes *v.* Link-Belt Co. (Ill.), 104 N. E., 211, 175
Delaney *v.* Delaney (Ill.), N. E., 966, 412
Dempsey *v.* People, 47 Ill., 323, 215
Denny *v.* Metcalf, 28 Maine, 389, 287
Denver Con. El. Co. *v.* Walters (Colo.), 89 Pac., 815, 421
Deposit Co., Applt., in re Pope, 103 Maine, 382, 440
Derinza's Case, 229 Mass., 444, 176
Derrick *v.* Taylor, 171 Mass., 444, 442
Detroit *v.* Detroit Citizens' St. Ry. Co., 184 U. S., 368, 382, 372
Diaz's Case, 217 Mass., 36, 178
Dickinson *v.* Farwell, 71 N. H., 213, 349
Dirken *v.* G. N. P. Co., 110 Maine, 374, 388, 387
Dix *v.* Somerset Coal Co., 217 Mass., 146, 268
Doherty *v.* Grady, 105 Maine, 36, 42, 23
Donnell *v.* Railroad Co., 73 Maine, 567, 29
Donnelly *v.* State, 26 N. J. L., 463, 429
Dooley *v.* Sullivan, 218 Mass., 597, 336
Dorman *v.* Bates Mfg. Co., 82 Maine, 438, 449, 359
Dorr *v.* Tremont Savings Bank, 128 Mass., 359, 111
Doughten *v.* Hickman, 6 B. W. C. C., 77, 180
Dresser *v.* Kronberg, 108 Maine, 423, 84
Drew *v.* Kenfer, 30 N. Y. S., 733, 88
——— *v.* W. U. Tel. Co., 111 Maine, 346, 462

Driscoll *v.* Gatcomb, 112 Maine, 289, 290, 216
Drtina *v.* Charles Tea Co. (Ill.), 118 N. E., 69, 178
Dugan *v.* Thomas, 79 Maine, 223, 284
Dugan *v.* Railway Co., 193 Mass., 431, 333
Dunn *v.* Packing Co., 113 Maine, 159, 164
——— *v.* Motor Co., 92 Maine, 165, 168, 169, 462
Dunning *v.* Staples, 82 Maine, 432, 486
Dunsmore *v.* Pratt, 116 Maine, 22, 79
Duren *v.* Getchell, 55 Maine, 241-9, 284
Dyer *v.* Belfast, 88 Maine, 140, 440

Eacott, Applt., 113 Maine, 156, 94
Eames *v.* Whittaker, 123 Mass., 344, 264
Eatman *v.* Eatman (Tex.), 135 S. W., 165, 412
Eaton *v.* Manter, 114 Maine, 259, 319
Elias *v.* Territory, 9 Ariz., 1, 213
Emerson *v.* St. Ry., 116 Maine, 63, 463
Enfield *v.* Buswell, 62 Maine, 128, 78
England *v.* Adams, 157 Mass., 451; 20 Cyc., 430, 30
Englewood *v.* S. Platte Ry. Co., 248 U. S., 294, 390, 398
Erie Railroad Co. *v.* Jacobus, 221 Fed. Rep., 335, 137
Erskine *v.* Savage, 96 Maine, 57, 310
Espy *v.* Crossman, 2 Cal., 1, A. C. Dec., 328, 144
Estey *v.* Whitney, 112 Maine, 131, 9
Evers *v.* Davis, 86 N. J. Law, 196; 90 At., 677, 225
Fahey *v.* Shafer, 98 Wash., 517, 167 Pac., 1118, 264
Farmer *v.* Portland, 63 Maine, 47, 306
Farmer's National Bank *v.* Deering, 91 U. S., 29, 225
Farrar, et al. *v.* Merrill, 1 Maine, 17, 131
Farwell *v.* Rockland, 62 Maine, 301, 462
Faubel *v.* Eckhart (Wis.), 138 N. W., 615, 412
Federal Rubber Co. *v.* Havolic, 156 N. W., 143, 143
Fenton *v.* Thomley (1903), A. C., 443; 19 T. L. R., 684, 141
Fertilizing Co. *v.* Hyde Park, 97 U. S., 659, 387
Fidelity & Casualty Co. *v.* Hubbard, 117 Fed., 949, 20
Field *v.* Gellerson, 80 Maine, 270 169
——— *v.* Milwaukee, 161 Wis., 393, 154 N. W., 698, 225
Fisher *v.* Insurance Co., 95 Maine, 485, 192
——— *v.* Ins. Co., 95 Maine, 486, 284
Fitch *v.* Amer. Popular Life Ins. Co., 59 N. Y., 557; 17 Am. Rep., 372, 383, 189
Fitzgerald *v.* Clark & Son, (1908), 2 K. B., 796, 142
Fitzgibbons Case (Mass.), 119 N. E., 1020, 178
Flanagan *v.* McLane, 87 Conn., 220, 87 Atl., 727, 264
Fleet *v.* Johnson & Sons, 6 B. W. C. C., 60, 182
Fogg, Applt., 105 Maine, 480, 250
——— Co. *v.* Bartlett, 106 Maine, 122, 124, 350
Folger *v.* Mitchell, 3 Pick., 396, 4
Folsom *v.* Skolfield, 53 Maine, 171, 88
Ford *v.* Ford, 143 Mass., 577, 457
Foster *v.* State, 70 Miss., 755, 213
Fournier *v.* Mfg. Co., 108 Maine, 357, 76
Francis *v.* Sayles, 101 Mass., 435, 38
Frankfort Ins. Co. *v.* Pillsbury (Cal.), 159 Pac., 150, 178
Freeport Water Co. *v.* Freeport, 180 U. S., 587, 372
Frye *v.* Miley (W. Va.), 46 S. E., 135, 30
Furbish *v.* Ponsardin, 66 Maine, 430, 64, 487
Gaffney *v.* Goodwillie (Mich.), 169 N. W., 849, 180
Gage *v.* Eddy, 179 Ill., 492, 131
Garcelon *v.* Tibbetts, 84 Maine, 148, 450
Gather *v.* State (Tex.), 81 S. W., 717, 433
Gavin *v.* Vance, 33 Fed., 84, 19
Georgie Railroad Co. *v.* Smith, 128 U. S., 174, 372
Gerding *v.* Walter, 29 Mo., 426, 470
Giddings *v.* Gillingham, 108 Maine, 512, 231
Gillis *v.* Cobe, 177 Mass., 584, 153
Gilman *v.* Gilman, 53 Maine, 188, 111
Ginsberg *v.* Burroughs (Mich.), 170 N. W., 15, 178
Gleason *v.* Brewer, 50 Maine, 22, 76
——— *v.* Smith, 180 Mass., 6, 419
Golder *v.* Chandler, 87 Maine, 69, 250

Goldey *v.* Morning News Co., 156 U. S., 518, 20
Goodwin *v.* Toucy, 71 Conn., 262, 41 Atl., 806, 305
Gordon *v.* Pierce, 11 Maine, 213, 217, 11
Gosser *v.* Ohio Valley Water Co. (Pa.), 90 Atl., 540, 177
Gould *v.* Boston Excelsior Co., 91 Maine, 214, 220, 279
Gower, Applt., 113 Maine, 156, 94
Grammici *v.* Zinn, 219 N. Y., 322, 100
Grand Lodge, A. O. U. W. *v.* Edwards, 111 Maine, 359, 187, 411
——— ——— — — — — *v.* Conner, 116 Maine, 224, 187, 411
——— ——— *v.* Connelly, 58 N. J., Eq., 183, 411
Granite State Bank *v.* Otis, 53 Maine, 133, 134, ... 11
Great Western Company *v.* State, 181 Ind., 28, 102 N. E., 849, 225
Green Bay Canal Co. *v.* Hewitt, 62 Wis., 316, 327, 11
——— *v.* Horn, 112 N. Y. S., 993, 247
Greenleaf on Evidence, Vol. 1, Sec. 162, (6th. Ed), 213
2 ——— ———, Sec. 292, 241
——— ——— *v.* Hamilton, 94 Maine, 118-121, 344
1 ——— ——— on Ev., Sec. 158, 426
1 ——— ——— ———., Sec. 160, 429
——— ——— ———., Vol. 2, Sec. 112, 470
Greenwood *v.* Greenwood, 113 Maine, 226, 338
Gregory *v.* Boston Safe Deposit & Trust Co., 88 Fed., 3, 20
Griffin *v.* United El. Li. Co., 164 Mass., 492, 420
Gruenwald *v.* Neu, 215 Ill., 132, 61
Guest *v.* State, 96 Miss., 871, 52 So., 211, 428

Hale *v.* Hobson, 167 Mass., 397, 231
Hallowell Bank *v.* Marston, 85 Maine, 488, 349
Hamilton *v.* McQuillan, 82 Maine, 204, 23, 250
Hank *v.* B. & A. R. R., 147 Mass., 495, 214
Hanson *v.* News Publishing Co., 97 Maine, 99, 103, 38
Hanson *v.* Hodges, 109 Ark., 479, 160 S. W. 392, 254
——— *v.* Butler, 48 Maine, 81, 287
Hardesty *v.* State (Neb.). 146 N. W., 1007, 433
Hardware Co. *v.* Goodwin, 68 W. Va., 462, 90
Harkinson *v.* Vantine, 152 N. Y., 20, 40
Harris *v.* Seal, 23 Maine, 435, 64
Harrison *v.* Remington Paper Co., 140 Fed., 400, 463
Hartford *v.* McGillicuddy, 103 Maine, 229, 450
Hartig *v.* Seattle (Wash.), 102 Pac., 410, 461
Haseltine *v.* Shepard, 99 Maine, 495, 60
Haskell *v.* Friend, 196 Mass., 198, 200, 10
Hatch *v.* Caine, 86 Maine, 282, 57
Hathaway *v.* Sherman, 61 Maine, 466, 250
Haward *v.* Rowsell & Matthews, 7 Butterworth's Compensation Cases, 552 (Eng. Cases), 181
Hawkins *v.* Bleakley, 243 U. S. 210, 61 L Ed., 678, 175
Hayward *v.* Leonard, 7 Pick., 181, 152
——— *v.* Westleigh Colliery Co., 8 B. W. C. C., 278, 182
Head *v.* Selleck, 110 Fed., 786, 20
Heald *v.* Thing, 45 Maine, 394, 192
Hearne *v.* Hearne, 55 Maine, 445, 470
Heath *v.* Jaquith, 68 Maine, 433, 469
Heath's Garage Lim. *v.* Hodges, 2 Law Rep. K. B. (1916), 370, 268
Heffron *v.* Gallupe, 55 Maine, 563, 211
Heileman Brewing Co. *v.* Shaw, 161 Wis., 631, 140, 183
Heintz *v.* Lepage, 100 Maine, 542, 202
Heller *v.* Ilwasco Mill & Lumber Co., 178 Fed., 111, 20
Hibbard *v.* Newman, 101 Maine, 410, 287
Hight *v.* York Manf. Co., 116 Maine, 81, 139
——— *v.* Quinn, 86 Maine, 493, 331
Hill *v.* Winsor, 118 Mass., 251, 45
——— *v.* Libby, 110 Maine, 150, 147
——— *v.* More, 40 Maine, 515, 284
Hills *v.* Blair, 182 Mich., 22-28, 148 N. W., 243, 181
Hobbs *v.* Parker, 31 Maine, 143, 152, 11
Hodges *v.* Swastika Oil Co. (Texas), 185 S. W., 369, 331
Holcomb *v.* Parker, 106 Maine, 17, 19, 54
Holcome *v.* People, 49 Ill. App., 73, 200

Holden *v.* Shattuck, 34 Vt., 336, 342, 268
——— *v.* Modern Brotherhood (Iowa), 132 N. W., 332, 412
——— *v.* Westervelt, 67 Maine, 449, 462
Hollenbeck *v.* Ristine, 105 Iowa, 488, 75 N. W., 355, 264
Hollis *v.* Hollis, 84 Maine, 96, 313
Holly *v.* Young, 66 Maine, 520, 408
Holmes *v.* Smith, 49 Maine, 242, 283
Homans *v.* Foster, 232 Mass., 4, 476
Home Tel. & Tel. Co. *v.* Los Angeles, 211 U. S., 265, 371, 386
Homer *v.* Brown, 16 Howard (21 U. S., 182), 354, 365, 10
Hooper *v.* Leavitt, 109 Maine, 77, 247
Hopkins *v.* Keazer, 89 Maine, 347-353, 54, 319
——— *v.* Fowler, 39 Maine, 568, 570, 91
——— *v.* Northwestern Life Assur. Co. (C. C. A.), 99 Fed., 200, 189
Hopt *v.* Utah, 110 U. S., 574, 215
Howe *v.* Ward, 4 Maine, 195, 29
——— *v.* Bradley, 19 Maine, 31, 35, 278
Howell Elec. Co. *v.* Howell (Mich.), 92 N. W., 941, 462
Howey *v.* N. E. Navigation Co., 83 Conn., 278, 76 Atl., 469, 333
Hudson Co. W. Co. *v.* McCarter, 209 U. S., 349, 394
Hudson *v.* Hudson (Fla.), 138 A. St. Rep., 146, 456
Hunter *v.* Colfax Consol. Coal Co. (Iowa), 154 N. W., 1037, 157 N. W., 145, 175
Huntzinger *v.* Jones, 60 Pa. St., 170, 470
Hurley *v.* O'Sullivan, 137 Mass., 89, 69
Hussey *v.* Allen, 59 Maine, 269, 211
Hutchins *v.* Ford, 82 Maine, 378, 177

Illinois Central R. R. Co. *v.* Behrens, 223 U. S., 473; 58 Led., 1051, 137
In re Cilley, 58 Fed., 977, 113
— — Myers (Ind.,) 116 N. E., 314, 179
— — Menefee (Or.), 97 Pac., 1014, 254
— — Guilford Water Co., 118 Maine, 367, 385, 398
— — Lincoln Water Co., 118 Maine, 382, 398
Indiana Pennsylvania Co. *v.* Leonard, 160 Ind., 16, 21, 20
Irvin *v.* State (Fla.), 41 So., 785, 435
Interstate Co. *v.* Szot (Ind.), 115 N. E., 599, 178
Interurban R. & T. Co. *v.* Public Utility Co., 98 Ohio St., 287, 395
Intoxicating Liquor Cases, 25 Kansas, 751, 200
Jamison *v.* Brady, 6 Serg. & R., 466, 60
Jellison *v.* Goodwin, 43 Maine, 288, 265
Jenks *v.* Stump (Col.), 93 Pac., 17, 305
Jewell *v.* Gagne, 82 Maine, 430, 469
Jewett *v.* Weston, 11 Maine, 348, 150
Johnson *v.* Josephs, 75 Maine. 547, 110
——— Com., 86 Ken., 122, 238
Jones *v.* Shiro, 116 Maine, 512, 8
——— on Liens, Secs., 1275, 1276, 38
——— *v.* Bacon, 68 Maine, 34, 58
——— *v.* Owners of Ship Alice and Eliza (1910), 3 B. W. C. C., 495, 144

Kadderly *v.* City of Portland, 44 Oregon, 120, 74 Pac., 721, 254
Kelleher *v.* Fong, 108 Maine, 181, 408
Kelley *v.* Jones, 110 Maine, 360, 364, 359
Kennebec Water Dis. *v.* Waterville, 97 Maine, 185, 201, 387
Kent *v.* Dunham, 106 Mass., 586, 23
Kilbourn *v.* State, 9 Conn., 560, 435
King *v.* Ward, 74 Maine, 349, 351, 91
—— *v.* State, 58 Miss., 739, 200
—— *v.* Viscoloid Company, 219 Mass., 420, 225, 334
—— *v.* Hayes, 80 Maine, 206, 305
Kinney *v.* Cadillac Motor Co., 199 Mich., 435, 165 N. W., 651, 176
Kinsley *v.* Davis, 74 Maine, 498, 82
Knight *v.* Trim, 89 Maine, 469, 283
Knowles *v.* Toothaker, 58 Maine, 172, 171
Knox *v.* Waldoboro, 5 Maine, 185, 10
Knox *v.* Coburn, 117 Maine, 409, 379
—— *v.* Lee, 12 Wall., 457, 550, 391
Knoxville Water Co. *v.* Knoxville, 189 U. S., 434, 372
——— *v.* Knoxville Water Co., 212 U. S., 1, 374
Koehn *v.* Pub. Ser. Com., 176 N. Y. S., 147, 395
Kramath *v.* Albany, 127 N. Y., 580, 461

Lackmann *v.* Kearney, 142 Cal., 112, 11
Lahey *v.* Lahey, 174 N. Y., 152, 411
Lamont *v.* Hotel Asso., 30 Fed., 817, 412
Lancey *v.* White, 68 Maine, 28, 439
Land Company *v.* Powers' Heirs (Ky.), 144 S. W., 2, 247
Lander *v.* Arno, 65 Maine, 28, 311
Larke *v.* John Hancock etc. Ins. Co., 90 Conn., 303, 142
——— *v.* Ins. Co. (Conn.), 97 At., 320, 178
Larrabee *v.* Sewall, 66 Maine, 381, 45
Lasley *v.* Kniskern (Mich.), 115 N. W., 971, 247
Laughlin *v.* Norcross, 97 Maine, 33, 189
Lea *v.* Lea, 8 Allen, 418, 457
Leask *v.* Hoagland, 205 N. Y., 171, 470
Lee *v.* Gorham, 165 Mass., 130; 42 N. E., 556, 298
Leiper *v.* Balt. Phila. R. R. Co., 262 Pa. St., 328, 395
Lefars *v.* Ind. Comm. (Ill.), 121 N. E., 182, 178
Leighton *v.* Nash, 111 Maine, 525, 95, 271
LeMaire *v.* Crockett, 116 Maine, 267, 254
Lesieur *v.* Rumford, 113 Maine, 323, 462
Levy & Company *v.* Davis, 115 Va., 814, 80 S. E., 791, 225
Lewis Sutherland Statutory Construction, 2nd. Ed., Vol. 2, page 1283, 440
Libby *v.* English, 110 Maine, 449, 459, 106
——— *v.* Cushman, 29 Maine, 429, 404
License Cases, 5 How., 583, 371
Lindsay *v.* State (Fla.), 64 So., 501, 433
Linnens *v.* Sidney, 70 Maine, 114, 295
Linsteadt *v.* Lumber Co., (Mich.), 157 N. W., 64, 178
Lloyd *v.* Calhoun, 78 Wash., 438, 139 Pac., 231, 51
Lockhard *v.* Memphis & L. R. R. Co., 38 Ged., 274, 19
Loesch *v.* Koehler (Ind.), 144 Ind., 278, 41 N. E., 326, 305
Lombard *v.* Paper Co., 101 Maine, 114-119, 344
———, Applt., 88 Maine, 587, 440
Look *v.* Watson & Sons, 117 Maine, 476, 339
Loomis *v.* Green, 7 Maine, 386, 391, 10
Lord *v.* Chadbourne, 42 Maine, 429, 443, 10, 170
Loring *v.* Hayes, 86 Maine, 351, 58
Los Angeles *v.* Los Angeles Water Co., 177 U. S., 558, 389
Louisville & Nashville R. R. Co. *v.* Layton, 243 U. S. Rep., 617, 221
——— *v.* Mottley, 219 U. S., 467, 482, 391
Lovejoy *v.* Foxcroft, 91 Maine, 370, 462
Lovelady *v.* Berrie, 2 B. W. C. C., 62, 182
Luhrs *v.* Luhrs, 123 N. Y., 367, 412
Lunge *v.* Abbott, 114 Maine, 177, 182, 275
Lyons *v.* Jordan, 117 Maine, 117, 341

Machiasport *v.* Small, 77 Maine, 109, 111, 241
Mahoney *v.* New South Building Loan Ass'n, 70 Fed., 513, 20
116 Maine, 76, 169
Maine Water Co. *v.* Crane, 99 Maine, 473, 485, 469
Manigault *v.* Springs, 199 U. S., 473, 372
Manhattan Life Ins. Co. *v.* Broughton, 109 U. S., 121, 124, 125, 10
Manitowoc *v.* Manitowoc N. & T. Co., 145 Wis., 13, 30, 393
Mansfield *v.* Shelton, 67 Conn., 390, 61
Marrett *v.* Brackett, 60 Maine, 524, 274
Marsh *v.* American Legion of Honor, 149 Mass., 512, 515, 189, 412
——— Bros. & Co. *v.* Bellefleur, 108 Maine, 354, 448
Marshall *v.* Owners of Ship Wild Rose, 3 B. W. C. C., 514, 141
Martin *v.* Kearney County, 87 N. W., 351, 401
Martins, Admr. *v.* B. & O. R. R., 151 U. S., 673, 684, 19
Marvin Sage Co. *v.* Ward, 46 N. J. L., 19, 23, 418
Mason *v.* State, 1 Ga. App., 535, 200
Masonic Mut. Ben. Soc. *v.* Burkhart, 110 Ind., 189; 10 N. E., 79, 190
Massar *v.* Brown, 29 Pa. St., 128, 470
Mathews *v.* Fisk, 64 Maine, 101, 297

McCague *v.* City of Omaha, 78 N. W., 463, 401
McCarty *v.* Railroad Co., 112 Maine, 1, 76
McCarthy's Case (Mass.), 120 N. E., 852, 178
McCaughn *v.* Young (Miss.), 37 S., 839, 247
McCormick *v.* Sawyer, 108 Maine, 405, 153
McCrary on Elections, 4th. Ed., Sec. 569, 570, 105
McDaniels *v.* McDaniels, 40 Vt., 363, 364, 211
McDuffie *v.* Lynchburg, etc. Co. (Ala.), 59 So., 567, 30
McFern *v.* Gardiner, 121 Mo. App., 1, S. W. A., 72, 50
McGuire *v.* Gallagher, 99 Maine, 334, 336, 60
McKeen *v.* Ives, 35 Fed., 801, 19
McKenney *v.* Alvord, 73 Maine, 221, 117
McMahon *v.* Lynn & Boston R. R. 191 Mass., 295, 214
——— *v.* Harrison, 6 N. Y., 443, 317
McManus *v.* Peerless Casualty Co., 114 Maine, 98, 189
McMinn *v.* Telephone Co., 113 Maine, 519, 418
McNally *v.* Burleigh, 91 Maine, 22, 264
McNicol's Case, 215 Mass., 497, 142
McQueen's Appeal, 104 Pa. St., 595, 11
Merrill *v.* Hayden, 86 Maine, 133, 68
——— *v.* Merrill, 65 Maine, 79, 445
Meyers *v.* Michigan Central R. R. Co. (Mich.), 165 N. W., 703, 183
Miami County *v.* City of Dayton (Ohio), 110 N. E., 728, 254
Miles *v.* Schmidt, 168 Mass., 339, 284
Miller *v.* Moses, 56 Maine, 128, 140, 241
——— *v.* Horton, 152 Mass., 544, 305
Milliken *v.* Morey, 85 Maine, 342, 111
——— *v.* Southgate, 26 Maine, 427, 278
Milwaukee Western Fuel Co. *v.* Industrial Commission of Wisconsin, 150 N. W., 998, 140
——— Electric &c. Co. *v.* Railroad Com., 238 U. S., 174, 372
——— El. R. & Light Co. *v.* R. R. Com., 153 Wis., 592, 395
Minneapolis *v.* Minneapolis St. Ry. Co., 215 U. S, 417, 390
Minnesota Rate Cases, 230 U. S., 352, 371
Mitchell, et al. *v.* Starbuck, et al., 10 Mass., 5, 19, 4
——— *v.* Morse, 77 Maine, 423, 56
——— *v.* Glamorgan Coal Co., 9 B. W. C. C., 16, 182
——— *v.* Com., 106 Ky., 602, 200
——— *v.* State, 42 Ohio St., 383, 396, 208
Mitchinson *v.* Day Bros. (1913), 6 B. W. C. C., 191, 143
Montenegro-Riehm Co. *v.* Beuris, L. R A. 1916, C-557, 298
Moody *v.* State (Okl.), 164 Pac., 676, 433
Moore, Applt., 113 Maine, 195, 302
——— *v.* Phillips, 94 Maine, 421, 466
Morgan *v.* Bliss, 2 Mass., 111, 10
Moreland *v.* Georgia, 51 Ga., 192, 207
Morrill *v.* Morrill, 116 Maine, 154, 57
Morris *v.* State Mut. Life Asso. Co., 183 Pa., 563, 189
Morrison *v.* Commercial Towboat Co., 227 Mass., 237, 137
Morrow *v.* Frankish (Del. Sup.), 89 Atl., 740, 470
Morse *v.* Dole, 73 Maine, 351, 354, 39
——— *v.* Williams, 62 Maine, 446, 247
——— *v.* Sherman, 106 Mass., 430, 310
——— *v.* Moore, 83 Maine, 473-483, 345
Moses *v.* Richards, 8 B. & C., 421, 351
Mosher *v.* Jewett, 63 Maine, 84, 446
Mowry *v.* Insurance Co., 106 Maine, 309, 192
Mullen *v.* Wilkes-Barre Has & Electric Co., 229 Pa. St., 54, 420
Munn *v.* Illinois, 94 U. S., 113, 371
Munroe *v.* Clark, 107 Maine, 134, 38
Murray *v.* Waite, 113 Maine, 485, 492, 106
Mutual Accident Assoc. *v.* Barry, 131 U. S., 100, 33 L. Ed., 60, 141
——— Aid So. *v.* Lupold, 101 Pa. St., 118, 413

Najjar *v.* Najjar, 227 Mass., 450, 458
National Life Ins. Co. *v.* Haley, 78 Maine, 268, 819
Nat'l. Bank *v.* St. Clair, 93 Maine, 38, 462
Nay *v.* Curley, 113 N. Y., 575, 470
Neal *v.* Randall, 98 Maine, 69, 44

Neal *v.* State, 32 Neb., 120, 131, 213
Nelson *v.* Butterfield, 21 Maine, 234, 131
——— *v.* New York, 63 N. Y., 544, 462
Nevich *v.* Delaware L. & W. R. Co. (N. J.), 100 Atl., 234, 177
N. Y. C. & H. R. R. Co. *v.* Carr, 238, U. S., 260; 59 L. Ed., 1298, 137
New Orleans Gas Light Co. *v.* Louisiana Light &c. Co., 115 U. S., 650, 371
—— ——— Water Works *v.* Rivers, 115 U. S., 674, 387
Newbit *v.* Statuck, 3 Maine, 318, 213
Nichols *v.* Fearson, 7 Pet., 103, 109; 8 Law Ed., 623, 625, 469
Nicholson *v.* Railroad Co., 100 Maine, 342-6, 285
Nolan *v.* State, 55 Ga., 521, 210
Norcross Bros. *v.* Vose, 199 Mass., 81, 214
Northern Pacific Ry. *v.* North Dakota, 236 U. S., 585, 374
Northwestern Fuel Co. *v.* Industrial Commission, 161 Wis., 450, Ann. Cas. 1918 A. 533, 100
Norton *v.* Clark, 85 Maine, 357, 40
Noyes *v.* Shepherd, 30 Maine, 178, 179, 91
O'Brien *v.* Bd. of P. U. Com., 92 N. J. L., 44. 395
O'Brion *v.* Mahoney, 179 Mass., 200, 203, 5
Ochs *v.* People, 124 Ill., 399, 207
O'Donnell *v.* Clinton, 145 Mass., 461, 463, 457
Oklahoma City *v.* Shields, 22 Okl., 265, 100 Pac., 559, 254
Olds, et als. *v.* City Trust Safe Deposit & Surety Co., 114 Fed., 975, 20
Oliveros *v.* State, 120 Ga., 237, 212
Olsen *v.* Hale, 2 Cal., 1 A. C. Dec. 607, 141
Onizi *v.* Studebaker Corp. (Mich.), 163 N. W., 23, 178
Opinion of Justices, 103 Maine, 506, 306
Otis *v.* Dodd, 90 N. Y., 236, 38

Packard *v.* New Limerick, 34 Maine, 266, 402
Packer *v.* Olds Motor Works, 195 Mich., 497, 162 N. W., 80, 100
Page *v.* Alexander, 84 Maine, 83, 84, 91
Palmer *v.* Est. of Palmer, 106 Maine, 25, 32
Palmer's Appeal, 110 Maine, 441, 94
Pantall *v.* R. & P. Coal & Iron Co., 204 Pa., 158, 53 Atl., 751, 333
Papinaw *v.* Railway Co., 189 Mich., 441, 155 N. W., 545, 179
Park *v.* Miller, 27 N. J. L., 338, 470
Patrick *v.* Cowles, 45 N. H., 553, 112
Patten *v.* Cilley, 46 Fed., 892, 112
Pawhuska *v.* Pawhuska Oil & Gas Co., (Okl.), P. U. R. 1917, F. 226, 395
Peak *v.* State, 50 N. J. L., 222, 426
Pease *v.* Bamford, 96 Maine, 23, 364
Pendergrass *v.* York Manufacturing Co., 76 Maine, 509, 513, 10
Pennock *v.* Douglas County, 39 Neb., 293, 401
People, ex rel., Judson *v.* Thatcher, 55 N. Y. 525, 14 Am. Rep., 312, 105
——— — ——, Smith, et al. *v.* Pease, 27 N. Y., 45, 106
——— *v.* Fitzgerald, 137 Cal., 546, 550, 551, 208
——— *v.* Hawkins, 127 Cal., 372, 208
——— *v.* Warden, 202 N. Y., 138, 151, 208
——— *v.* Goodwin, 18 Johns, 187, 211
——— *v.* Thorn, 156 N. Y., 286, 298, 212
——— *v.* Auerback, 176 Mich., 23, 46, 213
——— *v.* Burch, 68 Cal., 619, 623, 213
——— *v.* Mathews, 139 Cal., 527, 213
——— *v.* Gullo, 149 N. Y., 106, 214
——— *v.* Fishman, 119 N. Y. S., 89, 215
——— *v.* Scates, 3 Scam., 351, 216
——— *v.* Apfelbaum (Ill.), 18, 95 N. E., 995, 305
———, ex rel. *v.* N. Y. Pub. Ser. Com., 225 N. Y., 216, 395
——— *v.* White, 251 Ill., 67, 75, 428
——— *v.* Smith, 104 N. Y., 491, 58 Am. Rep., 543, 429
——— *v.* Hoffman (Mich.), 105 N. W., 857, 433
——— *v.* McKay (Cal.), 55 Pac., 594, 433
——— *v.* Wright, 9 Wendell, N. Y., 193, 434
Peoria Cordage Co. *v.* Ind. Board (Ill.), 119 N. E., 996, 177
Perry *v.* Central Coal & Coke Co., 138 F., 769, 131

——— *v.* Lime Co., 94 Maine, 325-334, 408
Pertect *v.* People, 70 Ill., 171, 215
Pettingill *v.* Pettingill, 60 Maine, 411, 466
Pfannebecker *v.* Pfannebecker (Iowa), 119 Am. Sr. Rep., 618, 456
1 Phillips on Ev., 2d. Am. Ed., 235, 426
Pigeon's Case, 216 Mass., 55, 176
Pierce *v.* Savage, 45 Maine, 90, 230
——— *v.* Rodliff, 95 Maine, 346, 364
Piscataquis County *v.* Kingsbury, 73 Maine, 326, 84
Polinsky *v.* People, 73 N. Y., 72, 434
Pollock *v.* Eastern Railroad Co., 124 Mass., 158, 225
Poluskiewicz *v.* Philadelphia Co. (Pa.), 101 At., 638, 178
Pomeroy Equity, Vol. 11, Sec. 810, 11
Pond *v.* Pond Est., 79 Vt., 352, 11
Poole *v.* Canning, L. R., 2 P. C., 241, 351
Pooler *v.* U. S., 127 Fed., 515, 435
Pope *v.* Medill, 12 N. Y. S., 306, 88
——— *v.* Heywood Bros. & Wakefield Co., 221 Mass., 143, 336
Potter *v.* Titcomb, 16 Maine, 423, 425, 11
Powers *v.* Railway Co., 169 U. S., 98, 20
——— *v.* Moore, 79 Maine, 216, 166
Preble *v.* Reed, 17 Maine, 169, 64
Prince *v.* Skillin, 71 Maine, 361, 366, 107
Proprietors of Kennebec Purchase *v.* Laboree, 2 Maine, 275, 440
Pullen *v.* Glidden, 68 Maine, 564, 265
Puritan *v.* Wolfe (Imd.), 120 N. E., 417, 180

Quimby *v.* Public Service Corp., 223 N. Y., 244, 395
Rackliff *v.* Greenbush, 93 Maine, 99, 225
Railroad Commission Cases, 116 U. S., 307, 325, 372
Railway *v.* Brow, 164 U. S., 271, 20
——— *v.* Pierce, 88 Maine, 86-93, 232
Ramsdall *v.* Ramsdell, 21 Maine, 288, 57
Rankin *v.* Gaslon County (N. C.), 92 S. E., 719, 461
Rawlins *v.* State, 52 S. E., 8, 433
Raymond *v.* County Commissioners, 63 Maine, 110, 311
——— Lumber Co. *v.* Raymond Lt. & W. Co., 92 Wash., 330, 395
Re Senate Resolutions, 54 Col., 269, 130 Pac., 336, 254
Reck *v.* Whittesberger (Mich.), 148 N. W., 249, 176
Reed *v.* Reed, 115 Maine, 441, 110
—— *v.* ——, 117 Maine, 579, 324
—— *v.* Creamer, 118 Maine, 317, 475
Reid *v.* Julian, 2 Bart., 822, 106
Reuting *v.* Titusville (Penn.), 34 At., 918, 461
Reynolds *v.* N. Y. Central &c. R. R., 58 N. Y., 248, 419
Rice *v.* Culver, 172 N. Y., 60, 65, 38
Richards *v.* Morrison, 101 Maine, 424, 57
——— *v.* Allen, 17 Maine, 296-299, 298
Ricker Classical Institute *v.* Mapleton, 101 Maine, 553, 225
Rideout Co. *v.* Pillsbury, 159 Pac. Rep., 435, 140
Ritter *v.* Ins. Co., 169 U. S., 139; 42 Law Ed., 693, 188
Robbins *v.* Gas Engine Co., 157 N. W., 437, 140
——— Cordage Co. *v.* Brewer, 48 Maine, 481, 485, 278
——— *v.* Railway Co., 100 Maine, 496, 337
Roberts *v.* Richards, 84 Maine, 10, 247
Robinson *v.* Van Auken, 190 Mass., 166, 264
——— *v.* Railroad Co., 79 Mich., 323, 327, 268
——— *v.* Trofitter, 106 Maine, Maine, 51, 446
Rodermund *v.* State (Wis.), 168 N. W., 390, 433
Rodgers *v.* U. S., 185 U. S. S. C., 46 2nd. L., 819, 461
Rogers *v.* Street Railway, 100 Maine, 86, 93, 11
——— *v.* Libby, 35 Maine, 202, 311
——— Park Water Co. *v.* Fergus, 180 U. S., 624, 372
Roper *v.* Greenwood (1900), 83 L. T., 471, 141
Royal *v.* Power Co., 114 Maine, 220, 469
9 Ruling Case Law, 194, 447
Rusk *v.* Thompson (Missouri), 156 S. W., 64, 305
Russell *v.* Sloan, 33 Vermont, 659, 200
2 ——— on Crimes, 5th. Am. Ed., 761, 429

——— *v.* Almot, 116 N. Y. S., 1080, 470
Sag Harbor *v.* Long Island Gas Corp., P. U. R., 1919 E. 163, 395
Sahr *v.* Schoole, 35 N. Y. S., 97, 305
Salt Lake City, et al. *v.* Utah L. & T. Co., (Utah), P. U. R., 1918, F., 377, 395
Sampson *v.* Randall, 72 Maine, 109, 319
Sanborn *v.* Black, 67 N. H., 538, 412
Sanderson's Case, 224 Mass., 558, 138, 175
Sandpoint W. & L. Co. *v.* Sandpoint, 31 Idaho, 498, 395
Sanford *v.* Hampden Paint &c. Co., 179 Mass., 10, 14, 440
Savings Bank *v.* Lancey, 93 Maine, 422, 313
Savoy *v.* McLeod, 111 Maine, 234, 47
Sayles *v.* Foley (R. I.), 96 At., 340, 175
Scannel *v.* Hub Brewing Co., 178 Mass., 288, 38
Schanning *v.* Standard Co. (Mich.), 169 N. W., 879, 178
Schmidt *v.* Milwaukee, 149 Wis., 367; 135 N. W., 883, 225
Schouler on Executors, Section 72, 112
Scroggins *v.* State, 32 Ark., 205, 214, 238
Seavy *v.* Preble, 64 Maine, 121, 306
Seiler *v.* Economic Life Association, 105 Iowa, 87, 189
Sexton *v.* Newark Co. (N. J.), 86 At., 451, 175
Seymour *v.* Maddox, 16 Q. B., 326, 418
Shanks *v.* D. L. & W. R. R., 239 U. S., 556; 60 L. Ed., 436, 137
Shaw *v.* Young, 87 Maine, 271, 40
Shepherd *v.* Camden, 82 Maine, 535, 214
——— *v.* M. C. R. R. Co., 112 Maine, 350, 311
Sherman *v.* Ballou, 8 Cow., 304, 278
——— *v.* Hall, 89 Maine, 411, 468
Shipman *v.* Protected Home Circle, 174 N. Y., 398, 405, 188
Short *v.* State (Ga.), S. E., 12, 433
Shular *v.* State, 105 Ind., 289, 208
Shuman *v.* A. O. U. W. (Iowa), N. W., 331, 411
Silver *v.* Worcester, 72 Maine, 322, 329, 469
Simcoke *v.* Grand Lodge (Iowa), 51 N. W., 9, 412
Simmon's Case (117 Maine), 103 Atl., 68, 178
Simmons *v.* United States, 142 U. S., 148, 154, 211
Simon *v.* Ellison (Va.), 22 S. E., 860, 30
Skene *v.* Graham, 114 Maine, 229, 50
Skowhegan Bank *v.* Farrar, 46 Maine, 293, 287
——— *v.* Heselton, 117 Maine, 17, 371
Small *v.* Thompson, 92 Maine, 539, 57
Smith *v.* Sawyer, 108 Maine, 485, 131, 245
——— *v.* Booth Brothers, 112 Maine, 308, 245
——— *v.* State Board (Iowa), 117 N. W., 117, 305
——— *v.* Ford, 82 Conn., 653, 74 Atl., 910, 333
——— *v.* Jones, 76 Maine, 138, 348
——— *v.* Lawrence, 98 Maine, 94, 450
Solvuca *v.* Ryan & Reilly Co., 129 Md., 235, 98 Atl., 675, 330
Soper *v.* Lawrence, 98 Maine, 283, 440
Sorge *v.* Aldebaran Co., 3 N. Y. St. Dep. Rep., 390, 144
Southard *v.* Railroad, 112 Maine, 227, 147
Southwick *v.* Southwick, 97 Mass., 327, 456
Spaulding *v.* Barnes, 4 Gray, 330, 11 Corpus Juris, 593 (h.) 596, 597, 297
Sponatski's Case, 220 Mass., 526, 138, 177
Spotsville *v.* Western States Portland Cement Co., 94 Kan., 258, 146 Pac., 356, 330
Spring *v.* Hulet, 104 Mass., 592, 275
Sproul *v.* Randell, 108 Maine, 350, 93
Stafford *v.* Morse, 97 Maine, 222, 313
Stanislaus County *v.* San Joaquin Co., 192 U. S., 201, 372
State *v.* Cumberland Club, 112 Maine, 196, 15, 32
—— *v.* Kaufman, 98 Maine, 546, 16
—— *v.* Mitchell, 35 S. E , 845, 16
—— *v.* Stanley, 84 Maine, 561, 33
—— *v.* McIntosh 98 Maine, 400, 33
—— *v.* Kapicsky, 105 Maine, 130, 33
—— *v.* M. C. R. R. Co., 76 Maine, 357, 76

—— v. Houlehan, 109 Maine, 285, 91
—— v. Kupferle, 44 Missouri, 154; 100 Am. Dec. 271, 107
—— v. Hill, 48 Maine, 241, 166
—— v. Perry, 115 Maine, 204, 166
—— v. Thompson, 85 Maine, 194, 169
—— v. Verrill, 54 Maine, 581, 583, 170
—— v. Creamer (Ohio), 97 N. E., 602, 175
—— v. Costa, 78 Vermont, 195, 200
—— of Vermont v. Eddio Barr, 84 Vermont, 38; 77 Atlantic, 914; L. R. A., 48 N. S., 302, 200
—— v. Frederickson, 101 Maine, 37, 200
—— v. Miller, 92 Kansas, 994 (1917), 202
—— v. Oakes, 95 Maine, 369, 204
—— v. Steen, 115 Mo., 474, 207
—— v. Marshall, 115 Mo., 383, 207
—— v. Sasse, 72 Wis., 4, 208, 213
—— v. Suber, 89 S. C., 100, 103, 208, 213
—— v. Hansford, 76 Kan., 678, 682, 208
—— v. Richardson, 47 S. C., 18, 208
—— v. Elden, 41 Maine, 165, 170, 209
—— v. Richardson, 47 S. C., 166, 172; 12 Cyc., 269, 270, 209
—— v. Wiseman, 68 N. C., 203, 206, 210
—— v. Hansford, 76 Kan., 678, 211
—— v. Hascall, 6 N. H., 352, 211
—— v. Adams, 20 Kan., 311, 213
—— v. Mortensen, 26 Utah, 312, 213
—— v. Ah Lee, 8 Or., 214, 217, 213
—— v. Hartley, 22 Nev., 342, 213
—— v. Sasse, 68 Wis., 530, 213
—— v. Bertin, 24 La. Ann., 46, 213
—— v. Congdon, 14 R. I., 458, 463, 213
—— v. Buzzell, 59 N. H., 65, 70, 213
—— v. Hascall, 6 N. H., 352, 216
—— v. Western & A. R. Co., 136 Ga., 619; 71 S. E., 1055, 225
—— v. Brewer, 102 Maine, 293, 234
—— v. Artshall, 110 N. C., 538, 238
—— v. Ray, 151 N. C., 710, 238
—— v. Stewart, 194 Mo., 345, 238
—— v. Sweetser, 53 Maine, 438, 238
—— v. Meath, 84 Wash., 302, 147 Pac., 11, 254
—— v. Whisman (S. D.), 154 N. W., 711, 254
—— v. Knight, 43 Maine, 122, 305
—— v. Starkey, 112 Maine, 12, 306
—— v. Robb, 100 Maine, 186, 306
—— v. Plunkett, 64 Maine, 538, 315
—— v. Neagle, 65 Maine, 468, 315
—— v. Raymond, 24 Conn., 204, 315
—— v. Mead, 46 Conn., 22. 316
—— v. Welch, 64 N. H., 525, 316
—— v. Mayo, 106 Maine, 62, 66, 387
——, ex rel. v. Billings Gas Co., 55 Mont., 102. 112, 394
——, — ——, City of Sedalia v. Pub. Ser. Com., 275 Mo., 201, 395
—— v. Castel, 11 N. E. (Indiana), 219, 401
—— v. Monich, 74 N. J. L., 522, 527, 430
—— v. Leavitt, 87 Maine, 72, 431
—— v. Furgerson (Mo.), 53 S. W., 427, 433
—— v. Hough (S. C.), 81 S. E., 187, 433
—— v. Miller (Wash.), 138 Pac., 896, 433
—— v. Smith, 61 Maine, 386, 434
—— v. Nelson, 8 N. H., 163, 434
—— v. Dolan, 69 Maine, 576, 435
—— v. Palmer, 35 Maine, 13, 435
—— v. Berry, 112 Maine, 501, 435
—— v. Manley (Vt.), 74 At., 231, 435
—— v. Hicks (Mo.), 155 S. W., 482, 435
—— v. Calhoun (W. Va.), 69 S. E., 1098, 435
—— v. Wilson (N. C.), 28 S. E., 416, 435
—— v. Armstrong (Mo.), 16 S. W., 609, 435
—— v. Gardner, 58 Ohio St., 599, 456
—— v. Valentine (Tex.), 198 S. W., 1009, 461
Stearns v. Railroad Co., 46 Maine, 95, 225
——— v. Washburn, 7 Gray, 188, 310
Stebbins v. Lothrop, 4 Pick., 42, 112
Steers v. Dunnewald, 85 N. J. Law., 449, 140
Stephenson v. Ins. Co., 54 Maine, 55, 284
Stevens v. King, 84 Maine, 291, 83
Stevens v. Fassett, 27 Maine, 266, 272, 209
——— v. Owen, 25 Maine, 100, 245
Stewart v. State, 13 Ark., 720, 207
——— v. Gilbert, 115 Maine, 262, 339
——— v. Stewart, 78 Maine, 548, 456

Stilphen, Applt., 110 Maine, 461 911
Stinson *v.* Rouse, 52 Maine, 261, 230
Stone *v.* Curtis, 115 Maine, 63, 338
——— *v.* Mississippi, 101 U. S., 814, 371
Story's Eq. Jur. Sec., 511, 278
Strout *v.* Lewis, 104 Maine, 65, 67, 8
Stuart *v.* Walker, 72 Maine, 145, 56
Sturtevant *v.* Randall, 53 Maine, 153, 311
Supreme Lodge, N. E. O. P. *v.* Sylvester, 116 Maine, 1, 27
——— Conclave *v.* Cappella, 41 Fed., 1, 412
Sutherland on State Construction, 2nd. Ed., 465, 36 Cyc., 1094, 451
Sweeney *v.* Higgins, 117 Maine, 415, 365
Sweeten *v.* Pacific Power & Light Co., 88 Wash., 679, 153 Pac., 1054, 421
Sweetser *v.* McKenney, 65 Maine, 225, 408
Taber *v.* Douglass, 101 Maine, 363, 93
Tarbox *v.* Fisher, 50 Maine, 237, 111
Tasker *v.* Farmingdale, 85 Maine, 523, 194
Temple *v.* McComb City El. Lt. & Pa. Co. (Miss.), 42 So., 874, 11 L. R. A. (N. S.), 449, 421
Tenn. Coal etc. *v.* Waller, 37 Fed., 545, 19
Texas No. R. R. Co. *v.* Miller, 220 U. S., 408, 389
Thatcher *v.* Jones, 31 Maine, 534, 91
Thayer *v.* Kitchener, 200 Mass., 382, 225
Thompson, Applt., 114 Maine, 338, 22
———, ———., 116 Maine, 473, 22,126
——— *v.* United States, 155 U. S., 271, 210
——— *v.* Smith, 79 Maine, 160, 234
——— *v.* Logan (Ala.), 51 So., 985, 247
——— *v.* Sun Pub. Co., 91 Maine, 207, 263
——— *v.* Robinson, 89 Maine, 46, 302
——— *v.* Flater, 197 Mo. App., 247,, 421
——— *v.* Tilton El. Lt. Co., 77 N. H., 92, 88 Atl., 216, 422
Thorndike *v.* Hinckley, 155 Mass., 263, 278
Tibbetts *v.* Tibbetts, 113 Maine, 203, 5
Tilton *v.* Hunter, 24 Maine, 33, 244
Titcomb *v.* Powers, 108 Maine, 347, 470
Trafton *v.* Pitts, 73 Maine, 409, 214
Train *v.* Boston Disinfecting Company, 144 Mass., 523, 225
Traverse City *v.* Mich. R. R. Co., P. U. R., 1918, F. 752, 759, 761, 399
Treat *v.* Orono, 26 Maine, 217, 491
Tremblay *v.* Etna Life Ins. Co., 97 Maine, 547, 553, 189
Trodden *v.* McLennard, 4 B. W. C. C., 190, 180
True *v.* Plumley, 36 Maine, 478, 265
Tully *v.* Fitchburg, 134 Mass., 499, 214
Union Pacific R. R. Co. *v.* Huxol, 245 U. S. Rep., 535, 221
——— Dry Goods Co. *v.* Georgia Public Service Corp., 248 U. S., 372, 371
——— P. Ry. Co. *v.* McDonald, 152 U. S., 262, 38 Law Ed., 434, 419
United States *v.* Parker, 120 U. S., 89, 93, 10
——— ——— *v.* Clasey, 175 U. S., 509, 131
——— ——— *v.* Wilson, 69 Fed., 144, 200
——— ——— *v.* Perez, 9 Wheat, 579, 210
——— ——— *v.* Morris, 1 Curtis, C. C., 23, 211
Van Buren L. & P. Co. *v.* Inh. of Town of Van Buren, 116 Maine, 119, 463
Veazie *v.* Mayo, 45 Maine, 560, 371
Vicksburg *v.* Vicksburg Waterworks Co., 206 U. S., 496, 508, 372
Virginia-Western P. Co. *v.* Com. ex rel. Clifton Forge, P. U. R. 1919, E. 766, 396
Von Ette's Case, 223 Mass., 56, 138, 175
Voorhees *v.* Smith (N. J.), 92 At., 280, 180
Vumbaca *v.* West, 107 Maine, 130, 133, 279
Wakefield *v.* Boston & Maine R. R., 63 Maine, 385, 214

Walker *v.* Sanborn, 8 Maine, 288, 64
——— *v.* Moors, 125 Mass., 352, 88
——— *v.* Chase, 53 Maine, 260, 311
Walla Walla *v.* Walla Walla Water Co., 172 U. S., 1, 15, 387
Washburn *v.* Phelps, 24 Vt., 506, 350
——— *v.* Allen, 77 Maine, 344, 442
Waterman *v.* Merrow, 94 Maine, 237, 11
——— *v.* Dockray, 56 Maine, 54, 240
Way *v.* Greer, 196 Mass., 237, 333
Weed *v.* Crocker, 13 Gray, 219, 408
Western, etc. Co. *v.* Pillsbury (Cal.), 159 Pac., 423, 183
Westinghouse *v.* R. R. Co., 106 Maine, 349, 404
Weston *v.* Palmer, 51 Maine, 73, 351
Wetherby *v.* Twin State Co. (Vt.), 75 At., 8, 418
Wharton Crim. Proc., Secs., 335-344, 434
——— ——— ———, 10th. Ed. Sec. 304, 435
White *v.* Harvey, 85 Maine, 212, 344
——— *v.* Blake, 22 Wend., 162, 350
White *v.* Harvey, 85 Maine, 212, 344
——— *v.* Blake, 22 Wend., 162, 350
——— *v.* Manter, 109 Maine, 408, 379
——— *v.* People (Colo.), 45 Pac., 540, 435
Whitehouse *v.* Bolster, 95 Maine, 460, 29
Whiting *v.* Burger, 78 Maine, 296, 311
——— *v.* Whiting, 114, Maine, 382, 338
Whitley *v.* State, 114 Ark., 243, 213
Whitney *v.* Farrar, 51 Maine, 418, 404
Whittemore *v.* Russell, 80 Maine, 297, 68
2 Wigmore on Ev., Sec. 1438, et. seq., 426
2 ——— ——— ———., Sec. 1451, 429
Wildasen *v.* Long (W. Va.), 82 S. E., 205, 30
Wilkinson *v.* State (Miss.), 27 So., 639, 435
Willard *v.* Whitney, 49 Maine, 235, 10
Willey *v.* Nichols, 59 Maine, 253-4, 354
Williams College *v.* Mallett, 12 Maine, 398, 4
——— *v.* Coombs, 88 Maine, 184, 5
——— *v.* Dearborn, 101 Maine, 506, 60
——— *v.* Robinson, 42 Vt., 658, 111
Willoughby *v.* Atkinson Co., 93 Maine, 185, 408
Wilson *v.* Winchester & P. R. Co., et al., 82 Fed., 15, 20
——— *v.* Fosket, 6 Met., 400, 70
Winchester *v.* Everett, 80 Maine, 535, 541, 351
Winfield *v.* Public Service Com. (Ind.), 118 N. E., 531. 374
——— *v.* ——— Ser. Com. (Ind.), P. U. R., 1918, B. 747, 389
Winsor *v.* Queen, 1 L. R. Q. B. C. 1865, page 394, 209
Winterport *v.* Water Co., 94 Maine, 215, 458
Wisheallis *v.* Hammond (Mich.), 166 N. W., 995, 181
Withee *v.* Rowe, 45 Maine, 585, 127
Withington *v.* Bradley, 111 Maine, 384, 379
Woodburn *v.* Pub. Ser. Com., 82 Or., 114, 120, 387
Woods *v.* Cooke, 61 Maine, 215-218, 298
Worcester *v.* Worcester St. Ry., 196 U. S., 539, 391
Wyman *v.* Porter, 108 Maine, 110, 313

Yates *v.* Jones National Bank, 206 U. S., 158, 225
Yeatman *v.* Public Service Com., 126 Md., 513, 389
York *v.* Mathis, 103 Maine, 73, 40
—— *v.* Wyman, 115 Maine, 353, 355, 211
—— *v.* Stewart, et als., 103 Maine, 474, 241
Young *v.* Chandler, 104 Maine, 184, 78
——— *v.* Duncan, 218 Mass., 346, 175
——— *v.* Insurance Co., 101 Maine, 294, 191

CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE

ISABELLE F. BURPEE, et als. *vs.* EDGAR A. BURPEE, et als.

Knox. Opinion January 7, 1919.

Petition for partition. Rights of parties to form a corporation to take over the management and control of real estate after bill in equity has been filed requesting partition. Right of Court to grant relief where, on account of the several interests and the nature and condition of the property, it cannot be equitably divided.

After the filing of a bill in equity, for the sale of certain real estate held in common and the division of the proceeds, alleging that the premises are not susceptible of division and separate occupancy, a part of the defendants owning a majority interest, before answer, organized a corporation under sections 15 to 28 of Chap. 62 of the R. S., and assumed by major vote to divide the common property, assigning to themselves a part, and to the minority owners a certain other part of the common property. These proceedings were taken against the protest of the minority owners.

Held:

That the plaintiffs' right to partition was not affected by the action of the defendants in forming or attempting to form a so-called corporation of proprietors and by the division made by such corporation.

A finding of the sitting Justice that "because of the nature and condition of the property and the number and variety of the fractional interests, the premises are not susceptible of physical division and separate occupancy," is sufficient to sustain a decree appointing a receiver of the common property and ordering sale thereof.

Bill in equity asking for the partition of certain real estate in the City of Rockland, Knox County, State of Maine. The cause was

heard upon bill, answer, replication and evidence, and from the findings of the sitting Justice an appeal was taken. Judgment in accordance with opinion.

Case stated in opinion.

Will C. Atkins, and George W. Heselton, for plaintiffs.

A. S. Littlefield, for defendants.

SITTING: HANSON, PHILBROOK, DUNN, MORRILL, WILSON, DEASY, JJ.

MORRILL, J. Six of the defendants in this proceeding, representing a three-quarters interest in the common property, appeal from a decree of the sitting Justice ordering a sale of the property owned in common by the parties to this bill. Two grounds of appeal are relied upon.

1. After the bill was filed and before answering, the defendants who are now appellants undertook, against the protest of the plaintiffs and two defendants, to organize a corporation under R. S., 1916, Chap. 62, Secs. 15 to 28. Pursuant to a warrant issued by a Justice of the Peace, the defendants met on the twenty-first day of October, 1916, and organized a corporation. John A. Burpee and Annie T. Tyler, two of the defendants, who are now acting in harmony with the plaintiffs, were present but apparently took no part in the proceedings except to present the protests of the dissenting owners representing the one-quarter interest.

At the meeting for organization under an article in the call, "To divide or dispose of said property if a majority shall so vote, and determine what division or disposition thereof shall be made," the owners of the three quarters interest voted to divide the property and assigned to themselves a certain portion of the common property, and to the protesting owners a certain other portion. By virtue of these proceedings the majority now contend that the common property has been legally divided and that they are not now owners of any real estate as tenants in common with the plaintiffs and other defendants. This contention cannot be sustained.

The statute in question is of colonial and provincial origin; as first enacted in this State it is found in laws of 1821, Chap. 43, in substantially its present form. In the course of the several revisions of the statutes, the sections of the law of 1821 were re-arranged by

division and consolidation, and the phraseology from time to time was somewhat changed. In the revision of 1841 the words "wharves or other real estate," which are found in the first sentence of the act of 1821, were omitted, although the word "wharves" was retained in section eight where authority was given to the proprietors to "pass votes as to the management, improvement, division and disposition of said lands and wharves." In the revision of 1903 the word "wharves" was restored to section one. In section one of the revision of 1903 the words, "desire a meeting of the proprietors for the purpose of forming a corporation, or for any other purpose" were inserted after the words "in common," in the second line; and in section three the words "organize into a corporation, if not already so organized," were inserted after the word "may" in the second line. These changes were not intended to enlarge the scope of the law, but to "make clearer the corporate character of the organization of such proprietors." See note to Commissioner's Report on the revision of 1903, page 558. We may add that section one, in the particulars above noted, is expressed in substantially the same language as the corresponding statute of Massachusetts, Revised Laws, Chap. 123.

In all the changes of phraseology made in this statute since 1821, any intention of the Legislature to enlarge the scope of the law or to add to the class of owners within its provisions is not apparent, and we find no such intention.

The title of Chap. 43 of the laws of 1821 is, "An Act for the better managing Lands, Wharves and other real estate, lying in common;" in that chapter the owners are referred to as "Proprietors," and the land as "held and improved as a proprietary;" see Secs. 7 and 9. It is a matter of history that in the early days of the New England settlements grants of land were made to certain proprietors as grantees in fee, to hold as tenants in common. It was early found that the proprietors, in many cases, were too numerous and dispersed to manage their lands as individuals. Acts are found prescribing the mode in which their meetings shall be called, empowering them to choose officers, pass orders relative to the management, division and disposal of their common lands, and to assess and collect taxes from their members; "in short, communicating to them all the incidents of a corporation aggregate, without giving them that name." See Chap. 6 of Angell & Ames on Corporations, 9th ed., which treats of these proprietary corporations, their organization and powers, and gives a

list of the different colonial and provincial laws relating to them. The text of these laws will be found in "The Charters and General Laws of the Colony and Province of Massachusetts Bay," Boston, 1814.

By these provincial statutes, when an organization was perfected by virtue of a warrant issued on the application of the requisite number of proprietors the seisin which the individuals had of their respective shares in common, became transferred to the proprietary, and thereupon the proprietors could exercise any powers conferred upon them by law, and at a legal meeting could manage, divide and dispose of their property by major vote. The law of 1821, Chap. 43, and the revisions thereof, contain nearly the same provisions as the provincial statutes. As long as a man remains a member or proprietor, his common interest is subject to that control which the law has given to a majority in interest. But he may withdraw from the company, and by process of partition have his share assigned to him to hold in severalty. *Chamberlain* v. *Bussey*, 5 Maine, 164, 170; *Mitchell et al.* v. *Starbuck et al.*, 10 Mass., 5, 19; *Folger* v. *Mitchell*, 3 Pick., 396. But the proprietary are under no obligation to suspend their proceedings, in order to give opportunity to an individual member for the exercise of the right to begin proceedings at law for partition. *Williams College* v. *Mallett*, 12 Maine, 398.

The seisin of the plaintiffs is however to be alleged as it stood at the commencement of the action. *Williams College* v. *Mallett*, supra, page 402. In *Folger* v. *Mitchell*, 3 Pick., 396, it was objected that one or more of the partitions by the proprietors was made in 1821 while a former petition for partition, which had been discontinued, was pending, and it was urged that the pendency of that suit superseded the doings of the proprietors; the court said, page 402, "No doubt that would have been true, had the petitioner proceeded to final judgment." We therefore hold that the ruling of the sitting Justice, that the plaintiffs' right to partition was not affected by the action of the defendants in forming or attempting to form a so-called corporation of proprietors and by the division made by such corporation, is correct.

We do not find it necessary to decide and do not decide that the statute invoked applies to the case before us, or that the proceedings supposed to have been taken thereunder were in accordance with its provisions. Assuming these propositions in favor of the appellants we hold that this court having acquired jurisdiction by the filing of

the bill and service of process, cannot be deprived of that jurisdiction by proceedings afterwards taken by part of the defendants under the statute here relied upon.

2. It is contended that the findings of fact of the sitting Justice are insufficient as a basis for an order of sale. The right of the plaintiffs to enjoy their interests in the property in severalty is conceded. R. S., Chap. 93, Secs. 2, 13; *Tibbetts* v. *Tibbetts*, 113 Maine, 203; *O'Brion* v. *Mahoney*, 179 Mass., 200, 203. The plaintiffs allege, "That owing to the construction of the buildings on said land and the small fractional interests individually owned by the said plaintiffs and defendants, the premises are not susceptible of division and separate occupancy, and the sale of the whole of said real estate would be much more beneficial and less injurious to all persons interested therein." The sitting Justice found that "because of the nature and condition of the property and the number and variety of the fractional interests, the premises are not susceptible of physical division and separate occupancy" and that the property does not admit of such a division as would fully protect the rights of all parties.

We are of the opinion that the allegations of the bill and the findings of the sitting Justice clearly bring the cause within the principles laid down in *Williams* v. *Coombs*, 88 Maine, 184. An examination of the evidence, without however the advantage of a view and examination of the premises as was taken by the sitting Justice, satisfies us that the finding was fully sustained by the evidence.

Appeal dismissed. Decree of sitting Justice affirmed with additional costs.

OLGA M. GORDON

vs.

W. D. HUTCHINS and W. B. KENDALL.

Kennebec. Opinion January 14, 1919.

Fraudulent representations. Waiver of same. Pleadings in former case where non-suit has been granted being res adjudicata in another suit between same parties. Rule as to equitable estoppel.

Where in a previous action of deceit between the same parties on the ground of fraudulent representation as the inducement of a contract of sale, both a waiver of the alleged fraud and a rescission of the contract were pleaded by the defendants as special matters of defense in a brief statement under the general issue, and an entry of non-suit was made with the consent of the plaintiff,

Held:

(1) That in a later action of assumpsit to recover the money paid on account of said contract of sale alleging rescission of the contract by reason of the same fraudulent representations as were set forth in the action of deceit, it was error to rule that the defendant by reason of his plea of rescission in the action of deceit was estopped in the later action from denying rescission and relying on a waiver of the alleged fraud.

(2) That an entry of non-suit determines no rights between the parties to an action.

(3) That to create an estoppel *in pais*, known as an equitable estoppel, all the elements must be present including ignorance of the true facts on the part of the one claiming the estoppel.

(4) That to estop one from taking a position inconsistent with that taken in his pleadings in a former action, the position taken in the first action must have been successfully maintained, and in the event of the dismissal of the former action without any binding judgment, as by an entry of non-suit, and the other party not being misled by the former plea into taking any position to his prejudice through ignorance of the real facts, the fact that a certain position was taken in the prior action, though admissible as evidence against the pleader, does not estop him from taking a position inconsistent with his former plea in a later action concerning the same subject matter between the same parties.

Action on the case to recover damages for alleged fraud and misrepresentation in regard to a certain farm sold to plaintiff by defendants. Defendant filed plea of general issue, also brief statement. Verdict for plaintiff in the sum of $1331.24. Defendant filed motion for new trial; also exceptions to certain rulings of presiding Justice. Judgment in accordance with opinion.

Case stated in opinion.

George W. Heselton, for plaintiff.

Williamsom, Burleigh & McLean, for defendants.

SITTING: CORNISH, C. J., HANSON, DUNN, MORRILL, WILSON, DEASY, JJ.

WILSON, J. In the spring of 1912 the plaintiff negotiated for the purchase of a farm of the defendants, and on the first day of June, 1912, received from the defendants a bond bearing date of May 8, 1912, to deliver to the plaintiff a deed of the premises upon the payment of the purchase price in accordance with the conditions of the bond. The plaintiff entered into the occupancy of the premises on or about the fifteenth day of May, 1912, and continued to occupy and carry on the farm until at least December 3rd, 1914, when her counsel notified the defendants by letter that she rescinded her agreement to purchase on the ground of fraud.

Following a surrendering up, or abandonment of the premises, the plaintiff brought an action of deceit alleging fraudulent representations by the defendants of substantially the same tenor as those set forth in the case at bar. To this action of deceit the defendants pleaded the general issue, and a brief statement of special matters of defense among which were:

(1) That the defendants had rescinded the contract, and surrendered up the premises, which had been sold by the defendants.

(2) That the alleged fraud had been waived by the plaintiff by reason of her continuing under the contract and requesting and receiving an extension of time for payment, after discovery of the alleged fraud, that the plaintiff had committed waste on the premises and had finally abandoned them.

At the October term, 1916, with the consent of the plaintiff's counsel an entry of non-suit was made, whereupon the plaintiff then brought the present action of assumpsit, under which she now claims that the

contract of purchase was rescinded by reason of substantially the same fraudulent representations as were set forth in her prior action of deceit.

To this action the defendants have pleaded the general issue with a brief statement of special matters of defense among which were the following: (1) that the fraud, if any, had been waived after discovery; (2) that the contract was never legally rescinded; (3) that the plaintiff by bringing her previous action of deceit had elected her remedy and was estopped from bringing the present action. The jury at *nisi prius* found that the plaintiff was entitled to recover of the defendants the sum of $1331.24. The case comes before this court on motion of the defendants for a new trial on the usual grounds and on exceptions by the defendants.

The plaintiff in her declaration has made at least nine distinct allegations of fraudulent representations as inducements for her entering into the agreement to purchase. The defendants, however, point out that her husband acting as her agent visited the farm for the purpose of inspecting it prior to the purchasing; that she occupied the premises for two seasons without a word in a considerable volume of correspondence as to any claim of fraud, although the alleged shortcomings were frequently urged as excuses for failure to meet her payments on the purchase price and interest; and that it was not till the spring of 1914, and the defendants insisted on payments being made, that the first claim of fraud appears in the correspondence.

It is urged by counsel for the plaintiff that she was kept quiet by oral promises of adjustment. This is denied by the defendants, and there is at least no direct evidence of it in the case; and the letters of the plaintiff's husband and agent contain no suggestion of an intent to avoid her contract until the spring of 1914, though it may appear that the fruits of their labor fell somewhat short of their anticipations.

The scope of an opinion does not permit an analysis of all the evidence. Without deciding whether the evidence that the fraudulent representations were made as alleged was "clear and convincing" as is required under the decisions of this court, *Strout* v. *Lewis*, 104 Maine, 65, 67; *Bixler* v. *Wright*, 116 Maine, 133, 135; *Jones* v. *Shiro*, 116 Maine, 512, we feel that after two years of occupation and cultivation of this farm, with the opportunity for acquiring knowledge of the falsity of the representations, if any such were made, as to the amount of hay and apples produced on the premises the year prior to

the purchase, with her expressed intent from time to time of carrying out the contract, her payments on account of the purchase price and interest, with requests for extension of time of making payments, the defendants' waivers of time of payments, there was evidence of a waiver by the plaintiff of any misrepresentations as to the property, to which the jury, under the rulings of the court, did not give proper weight.

Again, granting the claim of the plaintiff that, notwithstanding the place cut only eight tons English hay in 1912, and seven tons in 1913, and the many other respects in which she now claims it fell short of the representations, her suspicions as to its failure to produce twenty-five tons of English hay and fifty to sixty dollars worth of apples in 1911 were not aroused till the middle of the haying season of 1914, when inquiries were made of the neighbors, the jury should have been allowed to pass upon the question of whether the evidence disclosed sufficient grounds for delay in rescinding the contract till December, 1914; *Estey* v. *Whitney*, 112 Maine, 131; *Clark* v. *Stetson*, 113 Maine, 276; *Bither* v. *Packard*, 115 Maine, 306, 315.

The jury, however, were precluded from considering this phase of the case by the ruling of the court that owing to the defendants setting up as a defense under their brief statement in the former suit that the contract had been rescinded, they were now estopped in this action from denying it, and that it must be treated as a rescinded contract. By this ruling the jury were, in effect, also precluded from considering whether or not there had been a waiver by the plaintiff of any misrepresentations which they found to have been made. The inference being, that if there was a rescission, there could have been no waiver of the fraud. We think there was error in this ruling. If the question of waiver and rescission had been submitted to the jury under proper instructions they might have reached a different conclusion.

The ruling of the court upon the effect of the defendants' plea of rescission in the former case appears to have been based upon the assumption that the issue of whether or not there was a legal rescission of the contract was then decided, that the entry of non-suit was in the nature of a judgment based upon that finding, and that the question of rescission between these parties is now *res judicata*. Neither the evidence before this court, nor the legal effect of the entry of non-suit, seems to warrant that assumption. From the printed case it appears that it was a voluntary non-suit consented to by the plaintiff's counsel,

upon the suggestion of the court that she had misconceived her remedy, no doubt to save her own right to bring a new action and avoid an estoppel by election of her remedy. We do not mean to imply, however, that the result would have been different if the non-suit had been ordered by the court against the objection of the plaintiff.

Estoppels are of three kinds: by record, by deed, and *in pais*. The record of a court creates two estoppels,—one, as a memorial, or record, of the proceedings, which all the world is estopped from denying; and two, as a record of the fact enrolled or issue decided or in other words, of a judgment of the court, which only estops the parties and their privies to the action, except in the case of judgments *in rem*. Bigelow on Estoppel, 6th ed., Part I, Chap. 1. That the former action between these parties was disposed of by a non-suit all the world is estopped to deny. Bigelow on Estoppel, 6th ed., page 36; *Willard* v. *Whitney*, 49 Maine, 235; *Davis* v. *Smith*, 79 Maine, 358. It seems equally well settled, that no issue between the parties thereby became *res judicata*. 3 Blackstone, pages 296, 377; *Knox* v. *Waldoboro*, 5 Maine, 185; *Loomis* v. *Green*, 7 Maine, 386, 391; *Lord* v. *Chadbourne*, 42 Maine, 429, 443; *Pendergrass* v. *York Manufacturing Co.*, 76 Maine, 509, 513; *Morgan* v. *Bliss*, 2 Mass., 111; *Bridge* v. *Sumner*, 1 Pick., 370; *Haskell* v. *Friend*, 196 Mass., 198, 200; *Homer* v. *Brown*, 16 Howard (21 U. S., 182) 354, 365; *Manhattan Life Insurance Co.* v. *Broughton*, 109 U. S., 121, 124, 125; *United States* v. *Parker*, 120 U. S., 89, 93. We think, therefore, neither party, is estopped by the record from taking any of the positions assumed by their respective pleadings in this case.

Does the setting up by the defendants of a rescission of the contract as one of their defenses under their brief statement in the former action of deceit constitute an estoppel *in pais*? Estoppels *in pais* while not unknown to the common law, Coke's Litt., page 352, were apparently limited in their application. Their wide and general recognition in modern practice has grown out of the application of equitable principles and their adoption by courts of law. None of the facts in this case are among those recognized at common law as creating an estoppel *in pais*, Coke's Litt., *supra*. To constitute an estoppel *in pais* or an equitable estoppel as it is sometimes termed in modern practice, all the elements must be present, among which is ignorance of the true facts on the part of the party claiming the

estoppel. *Rogers* v. *Street Railway*, 100 Maine, 86, 93; Pomeroy Equity, Vol. II, Sec. 810; *Hobbs* v. *Parker*, 31 Maine, 143, 152; *Pond* v. *Pond Est.*, 79 Vt., 352; *Campbell* v. *Golden Cycle Mining Co.*, 141 Fed. Rep., 610, 616; *Crary* v. *Dye*, 208 U. S., 515, 521. This element was entirely lacking in this case. The plaintiff was equally as cognizant of the facts concerning the alleged rescission as the defendants. She claimed it herself, as her counsel's letter of December 3rd, 1914, to the defendants showed. There was no fraud practised upon her in this respect. The defendants' pleadings gave notice that as a defense to her action they also relied upon a waiver of the fraud alleged in her declaration.

Under the head of estoppels, or *quasi* estoppels as they are termed by some of the authorities, Bigelow on Estoppel, page 788, Am. & Eng. Ency. of Law, Vol. II, page 446, 2nd ed., are considered the effect of a position taken in a judicial proceeding, either by stipulations, admissions, or in the pleadings; and the general rule is that one may not to the prejudice of the other party deny any position taken in a judicial proceeding at least during that proceeding, nor, if successfully maintained, in any subsequent proceeding between the same parties or their privies involving the same subject matter. *Allegans contraria non est audiendus.* Bigelow on Estoppel, 6th ed., 789, 790; *Davis* v. *Wakelee*, 156 U. S., 680, 689; *Lackmann* v. *Kearney*, 142 Cal., 112; *Comstock* v. *Eastwood*, 108 Mo., 41, 50; *McQueen's Appeal*, 104 Pa. St., 595; *Caldwell* v. *Smith*, 77 Ala., 157, 165. In the event of a dismissal of the action, in which the position was taken, without any binding judgment, as in case of a non-suit, the fact that such a position was taken in a prior action may be admissible as evidence against the parties, but is not conclusive. *Beatty* v. *Randall*, 5 Allen, 441; *Waterman* v. *Merrow*, 94 Maine, 237. Where, however, no wrong is done the court or the other parties to the cause by permitting a change of position, a change should in principle and will in fact be allowed. Bigelow on Estoppel, 6th ed., 790; *Green Bay Canal Co.* v. *Hewitt*, 62 Wis., 316, 327.

The defendants in the former action pleaded double under their brief statement as they were permitted to do. *Potter* v. *Titcomb*, 16 Maine, 423, 425; *Adams* v. *Moore*, 7 Maine, 86; *Gordon* v. *Pierce*, 11 Maine, 213, 217; *Granite State Bank* v. *Otis*, 53 Maine, 133, 134.

Under their pleadings in that action they could have introduced evidence either of rescission, or a waiver of the fraud which would bar

rescission. The plaintiff is not prejudiced by the defendants denying rescission and relying on a waiver of the fraud in this case. Her action of deceit was a pure misconception of her remedy from its inception. She herself claimed the contract was rescinded. That the contract was terminated either by rescission on her part, or by her abandonment and rescission by the defendants, there never was any dispute. In either case the contract as a basis of an action for damages was eliminated. Her action of deceit from the undisputed evidence was bound to fall of its own weight. We think she is not now prejudiced by any position taken by the defendants in the former action.

We hold, therefore, that no principle of the law of estoppel was violated by the defendants denying rescission in this case and sustain the defendants' exception to the court's ruling that the contract must be treated as a rescinded contract.

Upon the evidence in the case, we think the motion of the defendants should also be sustained upon the ground that it clearly appears that either the alleged fraudulent representations were not relied upon by the plaintiff, or if any were made and relied upon, they were waived during her long occupancy of the premises, and that her rescission of the contract was not seasonably made.

We do not consider the other exceptions of the defendants.

Entry to be,

Exception sustained.
Motion sustained.
Verdict set aside.

STATE OF MAINE, By Indictment,

vs.

ALLIE BLAISDELL.

Kennebec County. Opinion January 15, 1919.

Indictments. General rule to be applied in the construction and interpretation of penal statutes. R. S., Chap. 130, Sec. 1, as amended by Public Laws, 1917, Chap. 126, interpreted.

The indictment charges that the respondent, on the twenty-sixth day of August, in the year one thousand nine hundred eighteen, did knowingly, wilfully, and feloniously defile and corrupt the waters of a certain spring, the waters of which spring were then and there used for domestic purposes, by then and there digging into and stirring up the bottom and sides of said spring with a stick. The State claims a violation of the provisions of R. S., Chap. 130, Sec. 1, which was amended by Chap. 126, Public Laws, 1917.

The record clearly shows that the respondent did stir up the mud and earth composing the sides and bottom of the spring, but did no other act by which the waters of the spring were disturbed or changed with respect to their purity.

The issue presented raises the question whether the acts proved to have been done by the respondent constituted a defilement or corruption of the water within the meaning of the statute.

Held:

1. That words in a statute are to be taken in their common and popular sense unless the context shows the contrary.
2. In view of the language used to define the felony and the severe punishment imposed, the intent of the legislature was to prevent the introduction into domestic waters, of some foreign, impure, poisonous substance which would change those waters from a sound to a putrid or putrescent state, which would taint them, which would vitiate them physically and render them dangerous or perhaps deadly for domestic use.
3. That the acts proven against the respondent did not constitute the crime defined by the statute.

Indictment for violation of the provisions of R. S., Chap. 130, Sec. 1, as amended by Chap. 126, Public Laws, 1917. After verdict of guilty, respondent filed certain exceptions to the rulings of presiding Justice. Judgment in accordance with opinion.

Case state in opinion.
William H. Fisher, County Attorney, for State.
Williamson, Burleigh & McLean, for respondent.

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

PHILBROOK, J. This case comes before us upon exceptions, several in number. After the testimony for the State was submitted in the trial court the respondent moved that the presiding Justice direct a verdict in her favor on the ground that the State's evidence was insufficient in law to warrant a conviction. This motion having been denied an exception was allowed. This exception involves interpretation of the statute under which the indictment was drawn and our conclusions upon this exception render examination of the other exceptions unnecessary.

The indictment charges that the respondent, on the twenty-sixth day of August, in the year one thousand nine hundred eighteen, did knowingly, wilfully, and feloniously, defile and corrupt the waters of a certain spring, the waters of which spring were then and there used for domestic purposes, by then and there digging into and stirring up the bottom and sides of said spring with a stick. The State claims a violation of the provisions of R. S., Chap. 130, Sec. 1, which was amended by Chap. 126, Public Laws, 1917. The amendment enlarges the offense from a misdemeanor to a felony and was in force when the act complained of was committed. While the rule requiring strict construction of penal statutes was more rigorously applied in former times, when the number of capital offenses was more than one hundred and sixty, yet the rule still obtains, and is so well recognized that citation of authorities is unnecessary. And the rule is equally well established that "the degree of strictness applied to the construction of a penal statute depends in great measure upon the severity of the statute." Endlich on the Interpretation of Statutes, Sec. 334. As a corollary to this rule it follows that a statute declaring an act to be a felony calls for more strict construction than one which declares an act to be a misdemeanor.

The amended statute, for the violation of which the respondent was convicted, reads thus: "Whoever knowingly and wilfully poisons, defiles, or in any way corrupts the waters of any well, spring, brook,

lake, pond, river or reservoir, used for domestic purposes for man or beast, or knowingly corrupts the sources of any public water supply, or the tributaries of said sources of supply in such manner as to effect the purity of the water so supplied, or knowingly defiles such water in any manner, whether the same be frozen or not, or puts the carcass of any dead animal or other offensive material in said waters, or upon the ice thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment for any term of years." The severity of this statute may be better appreciated when we contemplate that it is greater than those defining and imposing punishments for manslaughter, mayhem or assault with intent to murder. It should therefore be interpreted with a degree of strictness commensurate with its severity. The statute enumerates different acts which may constitute the crime charged against the respondent, but the indictment selects from those acts and charges, as we have already seen, that she defiled and corrupted the waters of the spring in question by digging into and stirring up the bottom and sides of the said spring with a stick. An examination of the record discloses, from the testimony of the only eye witness of the acts of the respondent, that she had a stick about four feet long, and perhaps two by three inches as to the other dimensions, with which she was stirring up the water of the spring and thus making it very roily. There was no testimony that the stick held any foreign, deleterious, or poisonous substance or matter on its surface. In short the testimony fails to disclose the introduction into the water of any substance or thing except this stick. Was this act a defilement or corruption of the water within the meaning of the statute under consideration. We have searched in vain for judicial definition of the words "corrupt" and "defile" when used in a criminal statute as they are employed in the act under contemplation. We therefore first observe the rule that words in a statute are to be taken in their common and popular sense, unless the context shows the contrary. *State* v. *Cumberland Club*, 112 Maine, 196. Turning to standard lexicographers we find the verb "corrupt," in Webster's new International Dictionary, to be defined thus: "To change from a sound to a putrid or putrescent state; to putrify; to taint," while the same authority says that "to defile" is "to pollute." The Standard Dictionary defines the verb "corrupt" thus: "To cause to become putrescent or putrid; to change from good to bad in any quality; to contaminate," and gives synonymous meaning to

the verb "to defile." The Century Dictionary defines the verb "corrupt" thus: "To vitiate physically; to change from a sound to a putrid or putrescent state," while the same authority defines "to defile" as meaning "to make unclean; to befoul." We also observe the rule which is paramount in the construction of statutes, namely, that not only the intent but the policy of the legislature should be ascertained and adopted. *State* v. *Kaufman*, 98 Maine, 546.

We take judicial knowledge of the fact that the legislature, by its amendment above referred to, regarded the subject of such importance that the emergency clause of the constitution was invoked to hasten its enactment and effect. Could it have been the intent and policy of that body to impose so drastic and severe a punishment upon one who merely stirred, with a clean stick, the natural soil which lined the sides and bottom of a spring whose waters chanced to be used for domestic purposes. Was it not rather, in view of the language used to define the felony and the severe punishment imposed, the intent and policy of that body to prevent the introduction into domestic waters, of some foreign, impure, poisonous substance which would change those waters from a sound to a putrid or putrescent state, which would taint them, which would vitiate them physically and render them dangerous or perhaps deadly for domestic use. We think these questions are self-answering.

An interesting case, not on all fours with the case at bar to be sure, but supporting our attitude, is *State* v. *Mitchell*, 35 S. E., 845, coming from the Supreme Court of Appeals of West Virginia. In that State a section of the Code prohibits the knowing and wilful throwing into domestic used waters of "any dead animal, carcass or part thereof, or any putrid, nauseous or offensive substance," and declares the act to be punishable as a misdemeanor. The court held that the statute, being penal, should be construed strictly and literally, that no person is to be made subject to it by implication, and all doubts concerning its interpretation are to preponderate in favor of the accused. In that case the respondent threw sawdust and saw mill waste into water used for domestic purposes. The court said "The statute imposes imprisonment, and is highly penal, imposing loss of liberty, and odium; and I may reasonably ask, did the legislature intend to visit this severity of punishment in every instance of casting sawdust into streams,—a practice so long prevalent in this State. . . . The evidence does not prove that the sawdust is putrid, nauseous, or

offensive. The most the evidence does show is that in time of drought the sawdust discolors and produces an apparent ooze. . . . That is not the offense created by the statute."

Many citations might be made to cases on the civil side of procedure, where injunctions were sought by water companies or individuals to prevent throwing noxious or poisonous substances into waters used for domestic purposes, but even in those cases, with their more liberal interpretation of statute, we find nothing to support the position taken by the State in the case at bar.

In view of the testimony introduced by the State, as applicable to the statute under consideration, we are of opinion that the respondent's motion should have been granted and the exception to the refusal to so do should be sustained.

The mandate will be, therefore,

Exception to denial of motion to direct verdict in respondent's favor sustained. Other exceptions not considered.

FRIEDA L. ELMS *vs.* REBECCA RIGGS CRANE.

Knox. Opinion January 21, 1919.

Rule as to time of filing motion for removal of action on account of diversity of citizenship.

Upon a petition for removal of the cause to the Federal Court, where the time for filing a plea in abatement has gone by, *Held:*

(1) That under the interpretation of the Removal Act, Chap. 373, Federal Statutes, 1887, as amended by Chap. 866 of Federal Statutes, 1888, by the Federal Courts, the petition for removal must be filed as soon as the defendant is required to make any defense whatever in the State Court, whether by plea in abatement or to the merits.

(2) *Craven* v. *Turner*, 82 Maine, 383, having been decided prior to the decisions in the United States Supreme Court interpreting this Act must be regarded as overruled.

Action for libel, entered at January term, Supreme Judicial Court, 1918, Knox County. The plaintiff is described in the writ as of Camden, Knox County, State of Maine, and the defendant as of New York, State of New York. At September term, 1918, defendant filed motion to remove said action to the United States District Court upon the grounds of diverse citizenship. Motion was overruled by presiding Justice, to which ruling exceptions were filed. Exceptions overruled.

Case stated in opinion.

Charles T. Smalley, for plaintiff.

A. S. Littlefield, for defendant.

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

WILSON, J. This is an action on the case for libel and was entered at the January term, 1918, in Knox County. No pleadings of any kind have been filed in the case. The time under our practice for filing pleas in abatement and other dilatory pleas has gone by, but the

defendant, unless ordered to do so by the court, is not required to plead to the merits until the case is ready for trial. At the September term, 1918, the defendant presented a petition accompanied by a proper bond asking that the case be removed to the United States District Court on the ground of diverse citizenship. All the facts necessary to warrant a removal of the cause to the Federal Court are admitted to exist, if the petition for removal was seasonably filed. The presiding Justice refused to grant the petition on the ground that it was not seasonably filed, to which ruling the defendant excepted. The case is now before this court on the defendant's bill of exceptions.

We must sustain the ruling of the presiding Justice. Some confusion has arisen in the past as to the correct interpretation of the Federal Statute authorizing the removal of causes from the State courts as to the time when the petition for removal must be filed, through diverse rulings in the Federal Circuit and Supreme Courts.

As to which of the Federal Courts the merit of the reasoning belongs, it is not necessary to consider. The Federal Statute of 1887, Chap. 373 as amended by Chap. 866 of the statutes of 1888 provides in terms that the petition for removal must be filed at or before the time when the defendant is required by the laws of the State or the rules of the State Court in which suit is brought to answer or plead to the declaration or complaint of the plaintiff.

The earlier decisions of the Federal Circuit Courts as found in *Gavin* v. *Vance*, 33 Fed., 84; *McKeen* v. *Ives*, 35 Fed., 801; *Tenn. Coal., etc.*, v. *Waller*, 37 Fed., 545; *Lockhart* v. *Memphis & L. R. R. Co.*, 38 Fed., 274; held that pleas in abatement and other special pleas, which do not reach the merits, were not pleas or answers to the declaration or complaint within the meaning of the Act. It was in this stage of Judicial interpretation of the Act that the case of *Craven* v. *Turner*, 82 Maine, 383 was decided and followed the rulings of the Circuit Courts in the above cases.

In the case of *Martins, Admr.*, v. *Baltimore & Ohio R. R.*, 151 U. S., 673, 684, the United States Supreme Court first indicated its construction of this Act and declared it to mean that the petition for removal must be filed as soon as the defendant was required to make any defense whatever in the State Court, whether by plea in abatement, or to the merits.

The Circuit Court in the Fourth Circuit refused to accept this decision as final on the ground that the point was not involved in the

case and its decision was not necessary to the determination of the cause, and was therefore *dicta* and not binding; and further was not in accord with the plain meaning of the language of the Act. *Mahoney* v. *New South Building and Loan Association*, 70 Fed., 513; *Wilson* v. *Winchester & P. R. Co., et al.*, 82 Fed., 15.

The Supreme Court, however, in three later decisions: *Goldey* v. *Morning News Co.*, 156 U. S., 518; *Railway* v. *Brow*, 164 U. S., 271 and *Powers* v. *Railways Co.*, 169 U. S., 98, adhered to its interpretation as laid down in *Martins, Admr.*, v. *Baltimore & Ohio R. R. Co.*, supra.

The interpretation by the Supreme Court of this Act in the last named case has never been questioned in this Circuit or the Second Circuit, see *Collins* v. *Stott*, 76 Fed., 613; *Gregory* v. *Boston Safe Deposit & Trust Co.*, 88 Fed., 3; *Head* v. *Selleck*, 110 Fed., 786; *Olds et als.* v. *City Trust Safe Deposit & Surety Co.*, 180 Mass., 1; *Olds et als.* v. *City Trust Safe Deposit & Surety Co.*, 114 Fed., 975, and now appears to be generally recognized by the Circuit Courts.

In the case of *Fidelity and Casualty Co.* v. *Hubbard*, 117 Fed., 949, the Fourth Circuit Court revised its opinion as expressed in the 70 Fed., 513, and 82 Fed., 15, and held that the view of the Supreme Court as laid down in the 151 U. S., 673, having been rendered " 'upon full consideration' and by an undivided court," and having been three times subsequently affirmed by that court must now be considered as "its final and conclusive construction of the removal statute of 1888."

It has also been recognized as conclusive in the later cases of *Atlanta K. & N. Rwy.* v. *Southern Rwy. Co.*, 131 Fed., 657, 660, in *Heller* v. *Ilwaco Mill & Lumber Co.*, 178 Fed., 111, and in *Indiana, Pennsylvania Co.* v. *Leeman*, 160 Ind., 16, 21. We do not find the rule to be now anywhere questioned: that the defendant should file his petition for removal at or before the time when he is required by law or practice of the State to make any defense whatever in its courts, whether by plea in abatement, or other form of dilatory plea, or to the merits, and in our State must be filed on or before the second day of the term at law, and within the time the defendant is required to file any pleadings whatever in equity.

Exceptions overruled.

EMMELINE NICKELS

vs.

ALEXANDER H. NICHOLS,
Executor of Will of Henrietta T. Nickels.

Cumberland. Opinion January 21, 1919.

Legacies; when payable. Rule under the Common Law. Amended by R. S., 1916, Chap. 70, Sec. 26. Rule as to Statutes being prospective in their operations.

Action of debt to recover a legacy. The only point in controversy is the date from which interest should be computed.

The testatrix died on February 26, 1914. Her will was allowed and admitted to probate on May 12, 1914. An appeal was taken to the Supreme Court of Probate and exceptions were there taken to the Law Court. The exceptions were overruled and the decree of the Probate Court affirmed on January 3, 1916. Then a petition was filed to revoke and vacate the decree of May 12, 1914. Final decision dismissing this petition was rendered on November 24, 1917.

At the time of the allowance of the will there was no statute in this State prescribing the time when pecuniary legacies should be due and payable. But the general rule prevailed, here as elsewhere, in the absence of statute, that such legacies were due and payable in one year after the death of the testatrix when no time of payment was specified in the will and there were assets belonging to the estate subject to legacies.

In 1915 the Legislature changed the rule then prevailing and created a statutory rule to the effect that legacies should be paid in one year after final allowance of the will. This act took effect in July, 1915.

Held:

1. The time of payment of the legacy in this case was not affected by this statute. On February 26, 1915, one year after the testatrix died, this plaintiff was entitled to her legacy. Interest began to run from that date, and interest after that date was a vested right which was not affected by the subsequent statute.
2. The plaintiff's claim however as set out in the writ is for the legacy with lawful interest thereon only from January 3, 1917. It is beyond the power of this court to order judgment for a greater sum than is demanded in the writ.

Action of debt to recover a certain legacy bequeathed to plaintiff, and interest upon same. Defendant filed plea of general issue, and upon agreed statement case was reported to Law Court. Judgment in accordance with opinion.

Case stated in opinion.

John B. Thomes, for plaintiff.

William P. Whitehouse, Robert F. Dunton, and Robert T. Whitehouse, for defendant.

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

CORNISH, C. J. This is an action of debt brought by the plaintiff to recover a legacy of $5,000 which was bequeathed to her by the will of Henrietta T. Nickels together with lawful interest thereon from January 3, 1917. The only point in controversy is the date from which interest should be computed.

The situation is as follows: The testatrix died on February 26, 1914. Her will dated November 9, 1911, was duly allowed and admitted to probate by decree of the Probate Court of Waldo County on May 12, 1914. An appeal from this decree was taken by one of the heirs at law to the Supreme Court of Probate where the decree of the Probate Court was affirmed. Exceptions were then taken to certain rulings in the Supreme Court of Probate and were presented to the Law Court. These exceptions were overruled and the decree of the Probate Court was affirmed, on the ground that the appellant was not an aggrieved person within the purview of R. S., (1903) Chap. 65, Sec. 28. *Thompson, App't*, 114 Maine, 338. This decision was announced January 3, 1916.

Subsequent to this decision the same appellant filed a petition in the Probate Court to revoke and vacate the decree of May 12, 1914, allowing the original will. On August 8, 1916, after due notice and hearing, the Probate Court entered a decree denying and dismissing this petition. From this decree an appeal was taken to the Supreme Court of Probate where, on December 4, 1916, the appeal was dismissed and the decree of the Probate Court was affirmed. Exceptions to the order of dismissal and to other rulings of the Supreme Court of Probate were presented to the Law Court and after due consideration these exceptions were also overruled and the decree of the Supreme Court of Probate dismissing the petition was affirmed. *Thompson, App't*, 116 Maine, 473. This decision was announced November 24, 1917.

At the time when this will was allowed in the Probate Court, May 12, 1914, there was no statute in this State prescribing the time when pecuniary legacies should be due and payable. But the general rule obtained here as elsewhere in the absence of statute that such legacies were payable in one year after the death of the testator or testatrix when no time of payment was specified in the will and there were assets belonging to the estate subject to such legacies. *Hamilton* v. *McQuillan,* 82 Maine, 204; *Doherty* v. *Grady,* 105 Maine, 36, 42; *Palmer* v. *Estate of Palmer,* 106 Maine, 25. This is the period fixed by the civil law and acquiesced in by common law courts and was allowed simply for the convenience and protection of the executor. He could not be compelled to pay before that time. Under this common law rule interest began to run at the expiration of one year from the death of the testatrix. In 1915 the Legislature changed the rule then prevailing and created a statutory rule in these terms: "Legacies shall be payable in one year after final allowance of the will" etc. Public Laws 1915, Chap. 244. R. S., (1916) Chap. 70, Sec. 26. This act was approved on March 31, 1915, and did not take effect until ninety days after the adjournment of the Legislature or until July, 1915.

Counsel for defendant claims that the legacy in the case under consideration is governed by this statute and that as the second decision of the Law Court was rendered on November 24, 1917, the executor could not be compelled to pay the legacy until the expiration of one year after that date or November 24, 1918.

In our opinion this contention cannot be maintained. The time for payment of legacies in this estate was not affected by the act of 1915. Miss Nickels died on February 26, 1914. At the expiration of one year from that date under the then existing law this plaintiff was entitled to the payment of her legacy. Interest began to run from February 26, 1915, and the right to the interest after that date as well as to the legacy itself was a right vested in the legatee. The act of the Legislature did not take effect until more than four months thereafter, and did not deprive the legatee of that vested right. The accruing interest had attached itself to the principal and was incident to it, and was not imposed upon the executor for his neglect. *Kent* v. *Dunham,* 106 Mass., 586.

Unless there is a clear intent to the contrary statutes are presumed to be prospective only in their operation, and the rights of the parties here had become fixed before the statute went into effect.

Since we hold that the statute of 1915 is not controlling in this case, it is unnecessary to determine whether the date of final allowance of the will should be deemed to be January 3, 1916, when the first decision of the Law Court was announced, or November 24, 1917, when the second decision of the Law Court was announced. Such discussion would be obiter dictum.

On principle the plaintiff's legacy should draw interest from February 26, 1915, and in her argument that contention is made. But her claim as set forth in the writ and declaration is for the legacy "with lawful interest thereon from said third day of January, 1917." It is beyond the power of this court to order judgment for a greater sum than is demanded in the writ.

The entry must therefore be,

Judgment for plaintiff for $5,000 with interest from January 3, 1917.

SIMON O'LEARY, et als. *vs.* EMILE J. MENARD, et als.

Penobscot. Opinion January 27, 1919.

General rule as to reversing the decision of single Justice in equity cause upon issues of facts. Rule as to decisions of sitting Justice upon questions of law. Meaning of word "dependent."

The presiding Justice sitting in equity held that Margaret O'Leary, an adult sister of William S. O'Leary, was a dependent of the latter so as to entitle her to the death benefit provided for by the constitution of the Cigar Makers International Union, of which unorganized society William was a member at the time of his decease. The case comes to the Law Court on appeal.

The appellee relies upon cases holding that the decision of a single Justice in equity will not be reversed unless clearly erroneous, and that the burden of showing such error is on the appellant.

Held:

1. That this rule is true as to issues of fact where the sitting Justice enjoys the opportunity denied to the Law Court of observing and hearing witnesses by whom the facts are established.
2. In passing upon questions of law, the presiding Justice occupies no such vantage ground. The opinion of the single Justice may produce conviction, but upon issues of law it brings with it no presumption.
3. The meaning of the word "dependent" as judicially interpreted in this and other States rests upon duty, not bounty; upon continuing obligation, not occasional giving; upon services imposed or undertaken, not upon favors voluntarily bestowed. True, the duty or obligation which it comprehends may be moral rather than legal, but the impulse that moves a brother to make gifts to his adult sister does not create the relation of dependency as the term is judicially defined.

Bill in equity to compel defendant to pay to plaintiff certain death benefits. Cause was heard upon bill, answer, replication and evidence. From the decree of sitting Justice, defendant entered an appeal. Judgment in accordance with opinion.

Case stated in opinion.

Edward P. Murray, for plaintiffs.

Morse & Cook, for defendants.

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

DEASY, J. William S. O'Leary, who died August 11, 1916, was a member and the defendants are members of the Cigar Makers International Union, an unincorporated society. The constitution of this society, by a provision having the force of a contract between its members, creates a death benefit, payable as follows: A member may in writing designate the beneficiary. If no such designation is made the benefit goes to his widow or minor children. If no widow or minor children "then to any relative of the deceased member who at the time of his death were dependent for support, in whole or in part, upon such deceased member." William O'Leary did not in writing designate a beneficiary. He was unmarried. Margaret, his youngest sister, was twenty-one years old and unmarried at the date of her brother's death. She and her brother William both lived in their father's family. William's earnings considerably exceeded those of his father. In 1916 Margaret was not a wage earner. Simon O'Leary, the father, referring to his son, William, testified: "He helped Margaret. Bought her shoes, clothed her, gave her spending money and like that." Margaret herself gave testimony that her brother William had helped her from the time he began to earn money until the time of his death. "He bought things I needed. He gave me spending money and music lessons for awhile. He gave me the money for anything I had to have." It also appeared in testimony that he paid money to his mother and helped other members of the family. The Justice sitting in equity who heard the case ruled that,

"At the time of the death of William S. O'Leary his sister, the plaintiff Margaret O'Leary, while neither completely dependent upon him for support nor yet so dependent in a strict legal sense was, nevertheless, in a material degree regularly partially dependent for support upon him."

The case comes to the Law Court on appeal by the defendants.

The appellee cites and relies upon a line of cases holding that the decision of a single Justice in an equity cause will not be reversed by the Law Court unless clearly erroneous, and holding further that the burden of showing such error falls upon the appellant. This is true as to issues of fact, where the sitting Justice enjoys the opportunity

denied to the Law Court of observing and hearing witnesses by whom the facts are established. In passing upon questions of law he occupies no such vantage ground. The opinion of the single Justice may produce conviction, but upon issues of law it brings with it no presumption.

The issue in this case is one of law. It rests upon the interpretation of the meaning of the word "dependent" in a written contract and the application of that interpretation to undisputed facts. The decision must be rendered in accordance with established legal principles.

The word "dependent" as used in this connection has been defined by this and other courts. As thus judicially interpreted it rests upon duty, not bounty, upon continuing obligation not occasional giving, upon service imposed or undertaken not upon favors voluntarily bestowed. True, the duty or obligation which it comprehends may be moral rather than legal, but the impulse that moves a brother to make gifts to his adult sister does not create the relation of dependency as the term is judicially defined.

The case of *Supreme Lodge, N. E. O. P.*, v. *Sylvester*, 116 Maine, 1, in which case dependency was held not to exist, is decisive of the case at bar. The details differ but the essential facts are the same. In both the element of duty or obligation is wanting. For reasons set forth and upon authorities cited in the opinion in that case we hold that Margaret O'Leary was not a dependent of her deceased brother, William.

Appeal sustained.
Bill dismissed.
No costs.

MARGARET E. KAUTZ

vs.

ETTA E. SHERIDAN and LYNDON S. WALDRON.

Cumberland. Opinion January 28, 1919.

Equity. Right to equitable remedy for fraudulent transfer. Rule where the obligation has not matured. Rule where credit has been obtained by fraud. General rule as to necessary conditions before granting an injunction.

The plaintiff, holding a note of one defendant, maturing June 1, 1918, began on January 10, 1918, a bill in equity alleging that her debtor had transferred her property to the other defendant, praying that such transfer be declared null and void and that an injunction issue against both defendants restraining further conveyance of the property.

Held:

1. The holder of a matured obligation has his equitable remedy in case of a fraudulent transfer of his debtor's property. He need not first reduce his claim to judgment. His remedy exists notwithstanding at the time of the fraudulent transfer his claim was unmatured or even contingent. But the mere fact that a debtor has fraudulently transferred his property will not justify the beginning of a suit either at common law or in equity before the debt is due.
2. In the absence of a statute otherwise directing, the extraordinary remedy of an injunction will not be granted, save for the protection of legal rights adjudicated and settled, or in cases where great and irreparable damage is threatened.

Bill in equity asking that a certain bill of sale given by one of the defendants to the other be declared null and void, and further that the said defendants be enjoined from disposing of the property mentioned, in said bill of sale. Cause was heard upon bill, answer, replication and evidence, and by agreement of parties was reported to Law Court. Judgment in accordance with opinion.

Case stated in opinion.

Hinckley & Hinckley, for plaintiff.

Harry E. Nixon, for defendants.

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

DEASY, J. In this case the plaintiff, a creditor, praying for relief in equity says that the female defendant, her debtor, has fraudulently and without consideration transferred all her property to the other defendant. Stated thus it would seem like an ordinary creditor's bill where the equitable remedy is appropriate and often applied. But this case presents two unusual features: The obligation upon which the plaintiff bases her bill had not matured when the suit was brought and she prays not that present payment be compelled but that ultimate payment, rendered precarious by the transfer, be in a manner secured.

The cause above merely outlined may be stated more fully thus: On December 1, 1917, the defendant, Etta E. Sheridan, whose sole property consisted of the furnishings of a lodging house, borrowed of the plaintiff $260, and gave therefor her promissory note, payable in six months, and therefore maturing June 1, 1918. On or about December 27, 1917, said defendant gave a bill of sale of said furnishings to the other defendant, Lyndon S. Waldron, who took possession of the same and removed them to his own premises. This conveyance was dated December 1, 1917, and was recorded December 29, 1917.

On January 10, 1918, more than four months before the note became due, the plaintiff brought this bill in equity against both defendants alleging fraud in and want of consideration for the conveyance, praying that it be declared null and void and that an injunction issue restraining both defendants from disposing of the property.

The holder of a matured obligation has his equitable remedy in case of a fraudulent transfer of his debtor's property. R. S., Chap. 82, Sec. 6, paragraph XI. He need not first reduce his claim to judgment, *Donnell* v. *Railroad Company*, 73 Maine, 567. His remedy exists notwithstanding at the time of the fraudulent transfer his claim was unmatured or even contingent. *Howe* v. *Ward*, 4 Maine, 195; *Whitehouse* v. *Bolster*, 95 Maine, 460.

But the mere fact that a debtor has fraudulently transferred his property will not justify the beginning of a suit either at common law or in equity before the debt is due. *Wildasen* v. *Long*, (W. Va.) 82

S. E., 205; *Frye* v. *Miley* (W. Va.) 46 S. E., 135; *Simon* v. *Ellison*, (Va.) 22 S. E., 860; *McDuffie* v. *Lynchburg, etc., Co.* (Ala.) 59 So., 567; *England* v. *Adams*, 157 Mass., 451; 20 Cyc., 430.

Where credit is obtained through fraud the equitable remedy need not await the expiration of the term of such credit. In the case at bar, however, the defendant, Waldron, against whom relief is mainly sought was not concerned in the original credit transaction.

There is evidence tending to show that Waldron received a conveyance of Mrs. Sheridan's property without consideration and for a fraudulent purpose. Waldron denies this and says that he purchased the property in good faith and for value.

But assuming the testimony of the plaintiff and her witnesses to be true and disregarding that of the defendant we hold that this equitable proceeding is premature and, therefore, not maintainable.

The plaintiff prays for an injunction. In the absence of a statute otherwise directing, this extraordinary remedy will not be granted save for the protection of legal rights adjudicated and settled or in cases where great and irreparable damage is threatened. No proof or allegation in this case justifies the issuance of an injunction.

Mrs. Sheridan is said to be impecunious. Nothing in the case, however, shows or suggests that the defendant, Waldron, is other than financially responsible. If he be responsible and if the facts are as the plaintiff claims, R. S., Chap. 115, Sec. 77, provides a legal remedy that may be abundantly adequate.

For reasons above stated the bill must be dismissed. Moreover, we have carefully read and weighed the testimony offered on both sides and are not satisfied that the plaintiff has sustained the burden of proving her allegation of fraudulent conveyance.

Bill dismissed with one bill of costs.

STATE OF MAINE *vs.* STANISLAUS GASTONGUAY.

Androscoggin. Opinion January 28, 1919.

Meaning of word "nuisance." Meaning of word "use" as given in the Statute relating to liquor nuisances.

Prosecution for maintaining a common nuisance in violation of R. S., Chap. 23, Sec. 1, to wit: "All places used . . . . for the illegal sale or keeping of intoxicating liquors . . . . are common nuisances." The verdict was guilty.

Counsel for the respondent requested the following instruction:

"In order to find a judgment of guilty against the respondent they (the jury) must find that the premises mentioned in the indictment must have been habitually and customarily used for the purposes mentioned in the indictment."

The presiding Justice refused to give this instruction, but he said:

"I do not give you the instruction in those terms, but I tell you, however, that for a period of time longer or shorter, those premises must have been used for the purposes mentioned in the indictment; that is, for the illegal keeping of intoxicating liquors intended for unlawful sale in this State."

It has been repeatedly held that the word "use" as employed in the statute above quoted means an habitual or common use. The Justice very properly instructed the jury that the period of use might be longer or shorter, but, although requested, failed to instruct them that whether longer or shorter the use must be a customary or common use. This was prejudicial error.

From the circumstances of a single act of keeping or selling, a jury may be justified in finding a custom or habit of keeping or selling. But in this case the jury for want of an explanation which was seasonably requested, may have in their deliberations understood that such a finding was not necessary.

Indictment for maintaining a liquor nuisance. Jury returned verdict of guilty. Exceptions were filed by respondent to certain rulings of presiding Justice. Exceptions sustained.

Case stated in opinion.

William H. Hines, County Attorney, for State.

George S. McCarty, for respondent.

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

DEASY, J. Prosecution under R. S., Chap. 23, Sec. 1, for maintaining a nuisance. Verdict guilty. Exceptions to instructions given and refused.

We are justified in assuming that intoxicating liquor intended for unlawful sale by some person was found upon the respondent's premises, not being a place of resort and that the liquor was so deposited with the consent of the respondent and with his knowledge that it was intoxicating liquor intended for unlawful sale. These necessary elements we shall not further advert to.

Counsel for the respondent requested the court to give the following instruction to the jury:

"In order to find a judgment of guilty against the respondent they (the jury) must find that the premises mentioned in the indictment must have been habitually and customarily used for the purposes mentioned in the indictment."

The presiding Justice refused to give this instruction.

Revised Statutes, Chap. 23, Sec. 1, under which this prosecution is brought defines and provides penalties for several species of the genus "nuisance." We are concerned with two.

1—"All places used . . . . for the illegal sale or keeping of intoxicating liquors . . . . are common nuisances."

2—"All places of resort where intoxicating liquors are kept, sold, given away, drank, or dispensed in any manner not provided for by law are common nuisances."

The first relates to all places, the second only to places of resort. Illegal use is the important element in the first definition. Neither those words nor any tantamount to them are found in the second. Acts, innocent when done elsewhere, may make a place of resort a nuisance. Other places become nuisances only by reason of illegal acts. It is not contended that the defendant's premises belonged to the second class. It was not a place of resort. Therefore, the opinion of the court in *State* v. *Cumberland Club*, 112 Maine, 196, has little or no bearing upon the case at bar.

The respondent, through his counsel, contends that his premises were not within the meaning of the law *used* for the illegal keeping of intoxicating liquor.

The verb "use" or "used" has two meanings recognized by all lexicographers and unconsciously differentiated in common speech. 1—To employ or be employed or occupied. In this sense the word would include a single isolated instance of use. 2—To practice customarily or (in the case of a place or thing) to be the subject of customary practice, employment or occupation.

In which sense does our statute employ the word? This is not a jury but a court question. Courts have repeatedly answered it.

"The intention was to declare 'all places' to be 'common nuisances' whenever they should habitually or customarily be appropriated for, or converted to the purpose of the illegal sale of such liquor." *State* v. *Stanley*, 84 Maine, 561.

"The place must be habitually, commonly used for the purpose before it becomes a common nuisance." *State* v. *McIntosh*, 98 Maine, 400.

"It was obviously the intention of the legislature by this enactment to declare all places to be common nuisances whenever they should commonly and habitually be used for the illegal sale or keeping of intoxicating liquors. *State* v. *Kapicsky*, 105 Maine, 130.

See also: *Commonwealth* v. *Patterson*, 138 Mass., 500, and *Commonwealth* v. *McArty*, 11 Gray, 456.

The instruction requested by the defendant's counsel and above set forth states the law in accordance with the above decisions. It is specific and pertinent. While the presiding Judge was undoubtedly justified in refusing to give it without qualification,—in substance, and with a qualification negativing any inference of continuity or permanence, the instruction should have been given.

Was it in substance given? The presiding Justice said, repeating in effect the instructions already given:

"I do not give you the instruction in those terms, but I tell you, however, that for a period of time longer or shorter, those premises must have been used for the purposes mentioned in the indictment; that is, for the illegal keeping of intoxicating liquors intended for unlawful sale in this State."

The Justice very properly instructed the jury that the period of use might be longer or shorter; but although requested failed to instruct them that whether longer or shorter the use must be a customary or common use. This was prejudicial error.

Nothing that we have said relates to the quantum of evidence necessary to prove a nuisance. From the circumstances of a single act of keeping or selling a jury may be justified in finding a custom or habit of keeping or selling. But in this case the jury for the want of an explanation which was seasonably requested may have in their deliberations understood that such finding was not necessary.

In view of the above conclusions we need not consider the respondent's other objections.

Exceptions sustained.

E. COREY COMPANY, Pet'r,

vs.

H. P. CUMMINGS CONSTRUCTION CO., et als.

Oxford. Opinion January 28, 1919.

Chap. 96, Secs. 29-30 interpreted. Meaning and scope of the word "consent" as used in the lien Statute. What interest may be included in the word "owner". General rules applicable to establish the fact of knowledge on part of the owner where lien is claimed for labor and materials.

The owner of a building site leased it, providing in the lease that the building to be erected thereon by the lessee should remain and be personalty and not become a part of the realty, and that the lessee, its successors or assigns, might enter and remove the same from said premises at the expiration of the lease. The lessee erected a mill upon the leased premises and later, with the knowledge and consent of the lessor, contracted for the erection of an addition thereto. Upon proceedings to enforce a lien in behalf of a material man who furnished materials, which entered into the addition, to a subcontractor under the general contractor for the entire work:

Held:

That a lien upon the interest of the lessor in the leased premises cannot be sustained.

While the lessee observed all the terms and conditions of the lease, the lessor could not prevent the erection of the addition, and therefore could not be said to have given or withheld his consent, although the general contract for erecting the building was made with the actual knowledge and consent of the lessor. In such a case, consent amounts only to acquiescence in that which the lessor could not prevent.

Nor can a lien be sustained in behalf of such material man, upon the interest of the lessee who had no actual knowledge that the lien claimant who dealt with a sub-contractor under the general contractor, was furnishing materials for the building.

Revised Statutes, Chap. 96, Sec. 30, pre-supposes that the owner has knowledge of the furnishing of materials; without such knowledge, he cannot protect his property by giving the notice mentioned in that section; nor in strictness can the owner be said to consent to that, of which he has no knowledge.

So, when a sub-contractor under the general contractor makes a contract with another for materials intended to be used, and which are actually used in the construction, of which contract the owner has no knowledge, the owner's consent to the furnishing of such materials should not be inferred in favor of the material man so dealing with the sub-contractor, against the established fact that the necessary knowledge of the owner on which to base such consent, and the necessary opportunity to consent or to object do not exist.

Bill in equity to enforce a lien under Revised Statutes, Chap. 96, Secs. 29-30. Cause was heard upon bill, answer, replication and agreed statement, and by agreement case was reported to Law Court for final determination. Judgment in accordance with opinion.

Case stated in opinion.

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

George F. Gould, for Fletcher & Crowell Company and Carroll B. Skillin, Trustee in Bankruptcy.

Drummond & Drummond, for Maine Coated Paper Company and Rumford Falls Power Company.

William H. Gulliver, for H. P. Cummings Construction Company.

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

MORRILL, J. The plaintiff claims to establish a lien on the land of Rumford Falls Power Company and the buildings thereon occupied by Maine Coated Paper Company, for materials used in the construction of an addition to the mill of the latter corporation, furnished to Fletcher & Crowell Company, a sub-contractor under H. P.

Cummings Construction Company, the general contractor for the entire work. The case is reported upon a stipulation and agreed statement of facts.

On the eighth day of August, 1913, Rumford Falls Power Company leased to Maine Coated Paper Company the land described in the bill for a term of twenty-five years from the first day of August, 1913, with an option to purchase the same, which has not been exercised by the lessee.

Later, (the exact date does not appear), Maine Coated Paper Company erected a mill on the leased premises, and on the twenty-seventh day of April, 1916, made a contract with H. P. Cummings Construction Company to "do and perform all the work and provide all the materials required" in building an addition adjoining and attaching to the present building of the Maine Coated Paper Company. This contract was made "with the actual knowledge and consent of the Rumford Falls Power Company."

By correspondence between April 24, 1916, and June 7, 1916, both inclusive, H. P. Cummings Construction Company made a contract or contracts with Fletcher & Crowell Company to furnish certain portions of the iron and steel materials for installation in said building under construction.

By correspondence and personal interviews between May 9, 1916, and June 7, 1916, both inclusive, Fletcher & Crowell Company, with the actual knowledge and consent of H. P. Cummings Construction Company, contracted with E. Corey & Company for certain of the materials which, as E. Corey & Company knew, were for the building then in process of construction at Rumford under the contract between H. P. Cummings Construction Company and Maine Coated Paper Company. The material so contracted for was actually furnished and delivered by E. Corey & Company at the forge shop in Portland, of Fletcher & Crowell Company between May 29, 1916, and June 22, 1916, both inclusive, as H. P. Cummings Construction Company at the time actually knew; the agreed price therefor was $1654.05; all of the material so delivered by E. Corey & Company at the forge shop of Fletcher & Crowell Company was delivered and received for the purpose of being shipped to Rumford for incorporation into the building there under construction as aforesaid, "after the material should have been painted, put together, drilled with holes,

bolted, welded or otherwise worked into the shape and condition necessary for meeting the requirements of the building contract in so far as the materials in the shape in which they were supplied by E. Corey & Company were not already in such necessary shape and condition;" but E. Corey & Company had no control whatever over the disposition of said material after it was delivered to Fletcher & Crowell Company.

Certain portions of the material supplied by E. Corey & Company and delivered to Fletcher & Crowell Company, at their shop, in Portland, were actually incorporated and used in erecting, constructing, altering and repairing the building and appurtenances then being erected on the leased premises by H. P. Cummings Construction Company under its contract with Maine Coated Paper Company, after having been, as hereinbefore stated, painted, welded, bolted, drilled with holes and otherwise worked into the shape and condition necessary for meeting the requirements of the building contract of H. P. Cummings Construction Company; the value of such material at the original contract prices between Fletcher & Crowell Company and E. Corey & Company was $1530.90.

The Rumford Falls Power Company had no actual knowledge that Fletcher & Crowell Company were furnishing materials in the erection of said building for Maine Coated Paper Company, but knew that a contract had been entered into between Maine Coated Paper Company and H. P. Cummings Construction Company, and that said building was being erected and the materials required by the contract for its erection were being furnished and installed.

The claim of a lien upon the interest of Rumford Falls Power Company in the leased premises cannot be sustained. The lease contained an express provision that the building "shall remain and be personalty and not become a part of the realty, and that the said lessee, its successors or assigns, may enter and remove the same from said premises at the expiration of this lease." The lessor did not participate in the improvement; nor was it to reap any ultimate benefit therefrom; it was not an affirmative factor in procuring the erection of the addition to the then existing mill. As long as the Maine Coated Paper Company observed the conditions and terms of the lease, and particularly the condition that it should "never occupy or use said premises, or any part thereof, for any purpose other than

those in which it is authorized under its certificate of organization to engage," the lessor could not prevent the erection of the addition, and therefore cannot be said to have given or withheld its consent; and its interest cannot be charged with the lien claimed by plaintiff, (2 Jones on Liens, Secs. 1275, 1276; *Francis* v. *Sayles*, 101 Mass., 435; *Rice* v. *Culver*, 172 N. Y., 60, 65) although, as the case states, the general contract for erecting the building was made with the actual knowledge and consent of the lessor. In such a case, consent amounts only to acquiescense in that which the lessor could not prevent. "Consent within the meaning of the statute means something more than acquiescense. It implies an agreement to that which could not exist without such consent." 2 Jones on Liens, Sec. 1253; *Hanson* v. *News Publishing Co.*, 97 Maine, 99, 103; *De Klyn* v. *Gould*, 165 N. Y., 282, 80 Am. St. Rep., 719.

This case is clearly distinguishable from cases like *Baker* v. *Waldron*, 92 Maine, 17; *Borden* v. *Mercer*, 163 Mass., 7; *Burkett* v. *Harper*, 79 N. Y., 273; *Otis* v. *Dodd*, 90 N. Y., 236.

We pass also without discussion, and without expressing any opinion thereon, the point which has been exhaustively argued, whether the materials were furnished by E. Corey & Company *in erecting, altering or repairing the building.* See *Munroe* v. *Clark*, 107 Maine, 134; *Boston Furnace Co.* v. *Dimock*, 158 Mass., 552; *Scannell* v. *Hub Brewing Co.*, 178 Mass., 288.

It is incumbent upon the plaintiff to show that the materials for which he would establish a lien were furnished "by virtue of a contract with or by consent of the owner." The word "owner" is comprehensive enough to include the owner of a leasehold estate. 2 Jones on Liens, Sec. 1272.

It is not claimed that the plaintiff had a contract with Maine Coated Paper Company; its contract was with Fletcher & Crowell Company, a sub-contractor under the general contractor for the entire work, H. P. Cummings Construction Company. It is agreed that "Maine Coated Paper Company had no actual knowledge that Fletcher & Crowell Company were furnishing the materials which were furnished by Fletcher & Crowell Company for the building, nor did it have actual knowledge that E. Corey & Company furnished these materials to Fletcher & Crowell Company."

The single question then is: Can the consent of Maine Coated Paper Company to the furnishing of these materials by E. Corey & Company, be inferred under the circumstances of this case? We think not.

Secs. 29 and 30 of Chap. 96 of the Revised Statutes, upon the construction of which the decision of this case depends, originated in Chap. 207 of the Public Laws of 1868; Secs. 2 and 3 of the latter act were condensed, in the revision of 1871, into the following language: "If the labor or materials were not furnished by a contract with the owner of the property to be affected, such lien shall not attach unless the person before furnishing the labor or materials gives notice to such owner of his intention to claim the lien. The owner may prevent such lien for labor or materials not then performed or furnished, by giving written notice to the person performing or furnishing the same, that he will not be responsible therefore." This section was amended by Chap. 140 of the Public Laws of 1876, by striking out the provision for a notice by the laborer or material man, leaving the section in substantially the form in which it now appears: "If the labor or materials were not furnished by a contract with the owner of the property affected, the owner may prevent such lien for labor or materials not then performed or furnished by given written notice to the person performing or furnishing the same, that he will not be responsible therefor."

It is clear that this section in its present form pre-supposes that the owner has knowledge of the furnishing of the materials; without such knowledge, he cannot protect his property by giving the notice mentioned in this section. Nor in strictness can the owner be said to consent to that, of which he has no knowledge. And so in *Morse* v. *Dole,* 73 Maine, 351, on page 354, decided in 1882, the court, in discussing the claim for priority of a lien over a mortgage, said: "At least the knowledge of the mortgagee must in some way appear, before the written notice mentioned in R. S., Chap. 91, Sec. 28 (R. S., 1916, Chap. 96, Sec. 30) can be required from him in order to prevent a later claim from taking precedence of the mortgage."

But in several cases, decided since the amendment of 1876, this court has held that the consent of the owner sufficiently appeared, although it did not affirmatively appear that he had actual knowledge that the lien claimant in the particular case was furnishing materials.

In *Norton* v. *Clark*, 85 Maine, 357, (1893) the court permitted the contract between the owner and the general contractor for the entire work to be put in evidence, saying: "The fact that such a contract was made, clearly tends to prove that the owner consented to the furnishing of labor and materials by others at Clark's procuration. He could not reasonably have expected Clark to personally perform all the labor, and have on hand all the materials. He must have anticipated that Clark would procure much of the labor and materials from others. Hence, his consent thereto may be reasonably inferred from his making such a contract."

In *Shaw* v. *Young*, 87 Maine, 271, (1895) the consent of the owner for preservative repairs was inferred, but the decision was limited to the facts of that particular case; and in this connection, see *Harkinson* v. *Vantine*, 152 N. Y., 20.

In *Baker* v. *Waldron*, 92 Maine, 17, 22, (1898) the land owner had made an agreement to sell a parcel of land on condition that the purchaser should build a dam and erect a mill, and the court said: "But the owner's consent that the mill might be erected on his land is a consent that a lien for materials and services procured for erecting the same may be established on his land."

York v. *Mathis*, 103 Maine, 73, (1907) was a case of lessor and lessee, and a lien was established against the owner of the buildings upon the ground that the conduct of the owner justified the expectation and belief that he had consented to the making of the repairs, and attention was called to the fact that a portion, at least, of the improvements were a permanent addition to the building and were of no value for removal.

In *Central Trust Company* v. *Bodwell Water Power Company*, 181 Fed. Rep., 735, affirmed 190 Fed. Rep., 700, the Circuit Judge considering these cases, says: "A fair construction of the statute and of the decisions of the Supreme Judicial Court of Maine in reference thereto, must come back to something of that nature, that is, to the proposition that, in order that the interest in real estate of any person shall be affected by reason of his statutory consent, he must be held to have set in motion a train of circumstances which necessarily or reasonably, or ordinarily resulted in the furnishing of labor and supplies for which a lien is claimed."

We think that the decision in each of these cases must be regarded as based upon and limited by the facts of the particular case; and the

language quoted from *Central Trust Company* v. *Bodwell Water Power Company* should be limited to these cases, and not regarded as a general rule. It may well be that when the owner enters into a general contract for the entire work, he may be held to contemplate that the general contractor will sub-contract certain portions of the work, and so be held to give his consent to such sub-contracts for labor and materials; also, an owner by his conduct in the particular case may be held, in the absence of notice under Sec. 30, to have given consent, as in *Shaw* v. *Young* and *York* v. *Mathis*. In all these cases the owner has placed himself where his consent may be inferred; he has such knowledge of the facts as will enable him to give notice under Sec. 30; and he must be vigilant to give his notice of dissent.

But when a sub-contractor under the general contractor makes a contract with another for materials intended to be used, and which are actually used in the construction, of which contract the owner has no knowledge however vigilant he may be, we think the owner's consent to the furnishing of such materials should not be inferred in favor of the material man so dealing with the sub-contractor, against the established fact that the necessary knowledge of the owner on which to base such consent, and the necessary opportunity to consent or to object do not exist.

In the case before us the owner had no knowledge that Fletcher & Crowell Company were furnishing the materials which were furnished by that corporation for the building; nor did the owner have knowledge that E. Corey & Company furnished those materials to Fletcher & Crowell Company; the owner, therefore, could not give the notice provided by Sec. 30.

Upon these facts, Maine Coated Paper Company cannot be held to have consented to the furnishing of materials for the building, by E. Corey & Company, of which transaction it did not have knowledge; the bill must be dismissed in accordance with the stipulation. The Rumford Falls Power Company was not represented at the argument in the Law Court; accordingly it will recover costs taxed to the date of report, April 29th 1918. As to the other defendants, the controversy relates to a fund in which they are all interested, and we think that costs should not be allowed.

Bill dismissed with costs to Rumford Falls Power Company only to date of report.

BURNS B. BRAGDON *vs.* WESLEY S. KELLOGG.

Aroostook. Opinion February 1, 1919.

Revised Statutes, Chap. 26, Sec. 2 interpreted. General rules of law applicable to drivers of automobiles or teams approaching street corners. Rule in case of imminent danger where driver has not taken the safest or best course being guilty of the charge of negligence.

This case involves a mixed question of law and fact. It grows out of an automobile accident, happening in broad daylight, on a road of ample width to allow two cars to pass each other without danger of interference.

The law of the road, R. S., Chap. 26, Sec. 2, applies to automobiles, and makes it mandatory that cars approaching each other to meet must "seasonably turn to the right of the middle of the traveled part of the way."

Held:

1. That the fact that a party is on the wrong side of the road at the time of a collision is strong evidence of carelessness, and, unexplained and uncontrolled, exclusive evidence of carelessness.
2. This clearly throws the burden on the offending party in such a case.
3. That operators of cars, in seasonably turning to the right, must anticipate not according to the legal, but the usual experience of mankind in running automobiles in the public ways.
4. That it is a matter of common knowledge, "the usual experience," that automobiles are more often driven without any reference to legal speed than in the observation of it.
5. That operators are not authorized to rely on the legal presumption that an approaching car is coming at a legal rate of speed, but must exercise due care in the operation of their own car, especially in approaching corners, curves and turns in the road, where their vision may be wholly or partially obscured.
6. If each party driving a car, fast or slow, approaching a street corner, or a curve or bend in the road, whether the corner or the curve is blind or visible, would keep to the right of the middle of the traveled part of the road, no collision could ever occur; hence the rule that operators should so drive their cars at these places.
7. Applying this rule of due care to the present situation, we are of the opinion that the plaintiff's car was guilty of contributory negligence.

Action on the case to recover damages on account of the alleged negligence of defendant. Defendant filed plea of general issue. Verdict for plaintiff in the sum of $165.00. Defendant filed motion for new trial. Judgment in accordance with opinion.

Case stated in opinion.

Shaw & Thornton, for plaintiff.

Verdi Ludgate, and Hersey & Barnes, for defendant.

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

SPEAR, J. This case involves a mixed question of law and fact. It grows out of an automobile accident, happening in broad daylight, on a road of ample width to allow two cars to pass each other, without the least danger of interference.

The facts in this case show but a repetition of the negligent conduct in the operation of cars, that constitutes a prolific source of the accidents that occur in this class of cases.

This accident happened in the village of Sherman, town of Sherman, Aroostook County. The plaintiff's son was driving a new Buick car, westerly, upon Main Street, a well wrought piece of road, with the intention of turning to his left at practically a right angle into North Street. The defendant was on North Street, travelling south, intending to turn at a right angle to his right into Main Street. That is, these parties were approaching, each to turn the same corner into the same street from which the other was coming.

As North Street formed a junction with Main Street without crossing it, it was evident to any one approaching either side of North Street from Main Street, that a car coming from the north must turn either to the right or the left, into Main Street, when it reached the junction.

These two streets meeting each other in this way present a somewhat different situation than would arise if they crossed each other, forming four corners, in this, that a car on Main Street approaching North Street, is charged with the knowledge that a car coming from North Street must necessarily turn to the right or the left into Main Street. Therefore it is inevitable, that each party, where one intends to turn to the north and the other to the west, knows that he may

meet the other, at any moment, at the corner made by the junction of these two streets. If they can see each other, as they approach the corner, there is no earthly excuse, why they should meet in collision. If they cannot see each other, then greater is the duty with which they are each charged that they be absolutely on their proper side of the road.

The law of the road was established many years ago, before electric roads or automobiles were heard of, yet it provided that even slow moving vehicles like teams, upon approaching to meet on a way should "seasonably turn to the right of the middle of the travelled part of it, so far that they can pass each other without interference." R. S., Chap. 26, Sec. 2. As the word "team" now includes an automobile, this statute is applicable now to this class of vehicles. This statute is mandatory when it says travellers must "seasonably turn to the right." It means that they must turn in season to prevent a collision, and the one who fails to obey this mandate is prima facie guilty of negligence, and must sustain the burden of excusing his presence upon the wrong side of the road.

In *Neal* v. *Randall*, 98 Maine, 69, a leading case, this rule of conduct, even of teams, is fully confirmed. This is a case in which the street upon which the parties were passing in opposite directions, was located in the City of Auburn and was from 40 to 50 feet wide. Either side of the middle of the travelled part of the way was wider than the wrought part of the ordinary country road. There was ample room, on either side of the middle for three teams to pass abreast. The defendant was on his wrong side of the road, with ample room to pass the plaintiff, without interference; "but just as the teams were about to meet and pass each other the horse attached to the wagon in which the plaintiff was riding, became suddenly frightened . . . and shied towards the defendant's team" and the accident happened. The court found that "there was no other evidence of any negligence on the part of the defendant except the mere fact of the position of his team on the left of the middle of the travelled part of the road." Upon this state of facts the court, on report, found that the case should stand for trial.

But the grounds upon which the case was decided is the important consideration. On page 73, "Seasonably turn" is defined as follows: "Seasonably turn" means "that travelers shall turn to the right in

such season that neither shall be retarded in his progress, by reason of the other occupying his half of the way, which the law has assigned to his use, when he may have occasion to use it in passing. In short, each has an undoubted right to one-half of the way whenever he wishes to pass on it, and it is the duty of each, without delay, to yield such half to the other."

Upon the question of prima facie negligence the court say: "This is a regulation to avoid collisions, and if one neglects it, and an accident follow, an explanation of the occurrence must begin with some presumption against him. Cooley on Torts, page 666. This court has held the fact that a party was on the left side of the road at the time of the collision "strong evidence of carelessness," and has said that unexplained and uncontrolled, it would not only be strong but conclusive evidence of carelessness." *Larrabee* v. *Sewall*, 66 Maine, 381. The court further say, same page: "Notwithstanding the statutory duty to turn to the right of the middle of the traveled way the defendant had the right to be upon any part of the road, and his negligence must arise out of his failure to exercise ordinary care under all the circumstances. There was ample room for the plaintiff and her husband to pass on the defendant's left, and they would have passed in safety had they kept upon the same course. On the other hand, the defendant was on the wrong side of the road, he saw the plaintiff approaching in ample time to turn to the right of the middle of the traveled road. There was nothing to prevent his doing so, and the evidence tended to show that had he done so there would have been no collision."

These citations state the responsibility that rests upon the slow moving horse team in its duty to observe the law of the road, and declares a collision on the wrong side of the road, unexplained "conclusive evidence of carelessness." This clearly throws the burden on the offending party in such a case. This same case then treats the question of duty or care which the law imposes upon travelers, moving with animal power. On page 76 it is held: "To hold the defendant, however, it is not necessary that he should be able in the exercise of ordinary prudence to foresee the precise form in which the injury in fact resulted. *Hill* v. *Winsor*, 118 Mass., 251. "The injury must be the direct result of the misconduct charged, but it is not to be considered too remote if, according to the usual experience of mankind, the result ought to have been reasonably apprehended."

These rules of conduct and responsibility on the road apply to vehicles moved by animal power. They must accordingly be applied with emphasized severity to vehicles weighing tons, capable of great speed and propelled by mechanical power. Because, most duties in life are measured by the consequences of a breach; and ordinary care is always predicated upon the degree of danger of which it is spoken.

Yet the persistent claim of automobile operators is that they have a right to use any part of the road, which they do, and are entitled to always rely in their use of the road upon the presumption that the other party is driving at a legal rate of speed, so that they can regulate their conduct upon this legal presumption. But this rule cannot be invoked even in ordinary cases of negligence much less in an automobile case. Such operators cannot confine their anticipation to a legal rate of speed as a protection. They are held to anticipate that, according "to the usual experience of mankind the result ought to be reasonably apprehended." These operators must anticipate not according to the "legal" but the "usual" experience of mankind in running automobiles on the public highways.

It is, then, a matter of common knowledge, the "usual experience," that automobiles are more often driven without any reference to legal speed than in observation of it. True, in the trial of automobile cases there are almost always two rates of speed that might be marked, plaintiff's 1, and plaintiff's 2, in which the plaintiff is seldom ever going over a speed of from 8 to 12 miles, while the defendant is going at from 25 to 45 miles an hour, and sometimes so fast that his speed produces a result in the nature of a blur, as he passes. Nevertheless, the truth is, that automobile operators pay little attention to the legal rate of speed. Hence it is "the usual experience" of operators that they are not authorized to rely on the legal presumption that an approaching car is coming at a legal rate of speed, but must exercise due care in the operation of their own car, especially in approaching corners, curves and turns in the road, where their vision may be wholly or partially obscured. Accordingly, the claim that an operator has a right to rely on the presumption of a legal rate of speed, cannot be admitted. Nor is the presumption of legal reliance allowed in many other cases of negligence. The gates at a railroad crossing are to warn the public, when down, and invite it across, when up, yet the court holds that lifted gates do not relieve the traveler from contributory negligence, if he relies wholly upon them. A railroad train

is confined to a speed of six miles an hour through the thickly settled parts of villages, yet it is held that the public cannot rely upon the legal presumption of this rate of speed and thereby claim relief against the charge of contributory negligence. And so the instances might be multiplied. Accordingly, if as a matter of law the operator of an automobile is not authorized to rely upon the presumption of a legal rate of speed by the other car to relieve him from the charge of contributory negligence for being on the wrong side of the road, himself, in a collision, then arises the vital question, what are the duties imposed upon him, that will enable him to sustain the burden of proof against the legal presumption, of his own negligence, by being in an accident on the wrong side of the road?

It should be noted as above seen, that, unexplained, a collision is "conclusive evidence of carelessness," against the party on the wrong side of the middle of the traveled part of the road. In view of the great speed at which automobiles are capable and at which they are actually driven, we think it not a difficult task to deduce a workable rule. In *Savoy* v. *McLeod*, 111 Maine, 234, we laid down the general rule touching the operation of automobiles. There we said that in the operation of street cars "the court should establish as a law the rule which prevents injury or loss of life rather than that which invites or even permits it," and that the same rule applies to the operation of automobiles "except that the degree of dilgence is varied to correspond with the diminished danger."

But since the announcement of that opinion, we believe it to be a matter of common knowledge that the operation of automobiles is not now one of "diminished danger."

It seems to us that it is now advisable to reduce these somewhat disconnected principles of law to a more specific rule of due care, with reference to accidents that are so frequently occurring between cars approaching to meet at street corners, and upon curves in the road. It is difficult to say which place has become the more dangerous. It is a matter of common knowledge, however, that our country roads, located in the woods and bordered by trees, in their course are so constantly turning to avoid hills, ledges, marshes and other obstacles, that it is not seldom, but often, that cars approaching to meet, at a street corner or upon a curve, can see each other but a short distance ahead. This condition is recognized by the Automobile Association

of Maine, so that it also becomes a matter of common knowledge, that this association has wisely, at no small expense, caused the erection of signs at blind curves in the road, and at blind street corners, bearing the warning signal, "Go slow, Danger ahead" or some similar notice.

Yet it is claimed upon nearly every trial involving this class of accident that a vehicle of any kind including an automobile, has a right to travel in any part of the way, and has a right to rely on the presumption that every approaching car will observe the speed laws; and that if it had the other would have had plenty of time to have reached its own side of the road. Now, there is no question that any kind of a vehicle has a perfect right to travel in any part of the road, so long as it does not violate the rule of due care. But what is due care? What is the object of establishing legal rules of duty? Nothing more or less than to discover from actual experience what conditions produce danger, and then declare what shall be done to prevent such conditions. It matters not whether it is overspeed or underspeed if it is a cause of accident. It is to prevent the causes of accidents whatever their origin, that rules of due care are made. Experience has demonstrated that accidents are constantly occurring, at street corners and around blind curves on the road, for want of observance of proper care by automobile operators. Why, then, should not a rule be suggested that will obviate these dangerous conditions?

In this class of cases the following deduction is unanswerable: If each party driving a car, fast or slow, approaching a street corner or a curve or bend in the road, whether the corner or the curve is blind or visible, would keep to the right of the middle of the traveled part of the road, no collision could ever occur. Hence the rule that operators should so drive their cars at these places. We think this precaution is reasonable, and necessary to prevent accident, and should be imposed as a legal duty. This rule imposes no hardship but, if observed, will save life and limb. It is not new. It is as old as the law of the road. It applies the words of the statute, "seasonably turn to the right" to the speed of an automobile over the speed of a horse, precisely as before the automobile, it applied them to the speed of a horse over the speed of an ox. If at a corner or bend or on a straight road, one car can see the other, it is a statutory duty to

"seasonably turn" to the right. A fortiori should it be a statutory duty to so turn, at a blind corner, or turn in the road, when legally bound to anticipate that an approaching car may at any moment appear.

Applying this rule of due care to the present situation, we are of the opinion that the plaintiff car was guilty of contributory negligence. Without deciding that the inexperience, per se, of the driver, made him incompetent, we yet strongly feel that he lacked that experience necessary to give proper satisfaction that his lack of experience did not contribute to the accident. His father had owned this Buick car but eleven days. His experience with other cars, before this spring, was in his own words, "somewhere around 100 miles." This must be regarded as meager experience for a boy 19 years old to prepare him to operate, upon the public streets, that tremendous engine of power known as a Buick 6.

But aside from this question of inexperience, it is apparent from the evidence that the driver of the plaintiff's car was guilty of contributory negligence in his failure to observe the law of the road in turning his car into North street. The evidence is so voluminous that space will not permit of an extended discussion. In analyzing the evidence, however, we do not overlook the fundamental law that makes the jury the judge of all questions of fact. They could have found many of the facts, single or in groups, in favor of the plaintiff without the right of interference; but when their finding is against the concurrence of such a weight of evidence, and inconsistent with so many contradictory circumstances, as to rebut the plaintiff's contention with proof of inherent improbability, such finding should not be permitted to stand.

From the facts and circumstances revealed by the evidence, we cannot avoid the conclusion that the plaintiff car turned into North Street within a few feet of the corner of the Dennett platform; that the defendant was so near, when he first saw the other car that he thought a collision imminent; that he immediately turned to his left, the wrong side, to avoid the impending accident; that the driver of the plaintiff car, inexperienced and obeying the instinct of his instructions, immediately turned to his right.

As seen in the statement of the case, the plaintiff and defendant were approaching a right angle corner of two streets, each to turn

into the street from which the other was coming. Accordingly, applying the rule to this particular case we have no hesitancy in saying that it was the legal duty of the defendant to keep his right hand side of the road in approaching that corner, whether he could see the approach of the coming car or not; that it was equally the plain duty of the plaintiff to keep his right hand side of the road, whether he could see the approaching car or not. If they could see each other, it was their duty to look, and only an emergency could excuse the one on the wrong side. If they could not see each other, by reason of obstructions, then it was the legal duty of each to anticipate that the one car might be approaching to turn that corner at the moment the other might reach it; and, regardless of the presumption of legal speed, each should be on his side of the road, if he would avoid the charge of contributory negligence.

This accident happened on the plaintiff's side of the road. We have said that when an accident happens by a collision of vehicles in the highway the one on the wrong side is prima facie guilty of negligence, unless something appears from the nature of the accident, or from extrinsic evidence, to overcome such guilt. It may be rebutted by showing a case of emergency in which a party may be justified in taking the wrong side of the road. And the exception proves the rule that one cannot take the wrong side deliberately when it is his duty to turn seasonably to the right, whether from actual observation, or legal anticipation, of an approaching car. Do the law and the evidence rebut the presumption against the defendant in this case? We think they do.

In case of imminent danger when two alternatives are presented, an exercise of intelligent and prudent judgment will excuse one from the charge of negligence, although the course taken may not prove to have been the safest or best. *Larrabee* v. *Sewall*, 66 Maine, 376; *Skene* v. *Graham*, 114 Maine, 229. In case of emergency a swerving of a traveler to the wrong side of the road is not negligence. *Skene* v. *Graham*, 114 Maine, 229. A driver is justified in turning to the left side of the road in order to avoid a collision. *Clark* v. *Woap*, 159 App. Div. N. Y., 437; *McFern* v. *Gardiner*, 121 Mo. App. 1, S. W. A., 72. "So, in an action of injury sustained when two automobiles collided in the highway, plaintiff, turning to the left, while acting as a reasonable man upon the honest belief that he would thereby avoid

a collision with defendant, was absolved from obeying the law of the road, and turning to the right." *Lloyd* v. *Calhoun,* 78 Wash., 438, 139 Pac., 231. We think this was just what happened. The emergency existed and the defendant had instantly to choose what course he would pursue to avoid it.

Whether guilty of contributory negligence in any other respect, is here immaterial, but we cannot say that the conduct of the defendant in turning to his left, did not comport with "that degree of care that an ordinarily prudent person might have exercised under the same circumstances." *Borders* v. *B. & M. Railroad,* 115 Maine, 210. Whatever may have been the culpability of the defendant, we think, the evidence is overwhelmning that the plaintiff car was guilty of contributory negligence.

Motion sustained.

LAVINIA BARRY, et als. *vs.* ISABELLA MCCOSE AUSTIN.

Hancock. Opinion March 7, 1919.

Wills. Creation of life estates with power of disposal. Rule where in a will an absolute gift is followed by an attempted gift over. General rule to be followed in construction of wills, providing that no positive rule of law is violated. Creation of life estate by implication. Actual and judicial intention in the interpretation of wills. Application of R. S., Chap. 79, Sec. 16.

Bill in equity to construe the will of Virginia D. Austin. Clause two provides: "I give, bequeath and devise to my beloved husband William B. Austin all the rest, residue and remainder of my estate real, personal and mixed wherever found and however situated, and to have full power to sell any or all of my estates and to convey the same for his own use." The next clause provides that at the death of her husband "any of my estates are left real or personal after paying his funeral charges and erecting a suitable set of grave stones or monument at his grave, I give bequeath and devise to my cousins or their . . . heirs" etc.

Held:

1. That the actual intention in the mind of the testatrix was not to give the husband an absolute estate in fee simple, but a life estate with power of disposal for his personal use and benefit during his lifetime.
2. The will, though inartificially drawn, fulfils the purpose of the testatrix and violates no positive rules of law and no fixed canons of interpretation.
3. When a devise is expressed in such general terms as to create an estate of inheritance under R. S., Chap. 79, Sec. 16, and is coupled with an absolute and unqualified power of disposal either in express language or by implication, a gift over of any estate that may remain at the death of the first taker is repugnant and void.
4. If however the words of the general gift under the statutes are followed by a qualified and restricted power of disposal in the first taker a life estate by implication is thereby created and the limitation over is valid.
5. The power of disposal in the husband under this rule is limited in this case to his personal use and benefit. It is not restricted in its source to the income alone, nor in its purpose to the bare necessities of life. He could use the principal as well as the income, if he so desired. He could sell and convey for the specified purpose, but had no authority to give by will which would be to dispose of the property not for his own use but for the use of another.
6. The husband therefore was given a life estate by implication in the estate of his wife, coupled with a qualified power to dispose of the same during his lifetime for his own use, but not a power to dispose of the unused portion by will, as he attempted to do, and at his decease the unused remainder passed to the cousins of the testatrix or their heirs, and not to the second wife who is devisee under his will.

Bill in equity asking for the construction of will of Virginia D. Austin. Cause was heard before single Justice upon bill, answer and replication, and by agreement of parties same was reported to Law Court for determination. Judgment in accordance with opinion.

Case stated in opinion.

Hale & Hamlin, for complainant.

Fulton J. Redman, for respondent.

SITTING: CORNISH, C. J., SPEAR, HANSON, PHILBROOK, DUNN, MORRILL, WILSON, JJ.

CORNISH, C. J. This court is asked to construe the Will of Virginia D. Austin, late of Lamoine, in the County of Hancock. The will is brief. The first clause directs the payment of debts and funeral charges. Clauses numbered two and four (there is no clause three) which give rise to the controverted questions, are as follows:

"2nd. I give, bequeath and devise to my beloved husband, William B. Austin all the rest, residue and remainder of my estate real and personal and mixed, wherever found and however situated, and to have full power to sell any or all of my estates and to convey the same for his own use."

"4th. At the decease of my husband, William B. Austin, any of my estates are left real or personal after paying his funeral charges and erecting a suitable set of grave stones or monument at his grave I give, bequeath and devise to my cousins Lavinia Barry, Lottie Fordney, Daisy Fordney or their heirs the rest residue of my estate real and personal and mixed, wherever found and however situated, and I do hereby appoint my said husband William B. Austin sole executor of this my last will and testament hereby revoking all former wills by me made and it is my wish that said William B. Austin give no bonds."

This will was dated December 31, 1894, and Mrs. Austin died on February 25, 1910.

The precise question to be determined is the nature of the estate devised to the husband; was it a life estate with qualified power of disposal and a valid limitation over, as claimed by the plaintiffs, the residuary devisees, who are cousins of the testatrix, or was it an absolute estate in fee simple in the husband, and was the attempted limitation over void for repugnancy, as claimed by the defendant, who is the second wife of Mr. Austin and the sole devisee and legatee under his will?

As always in this class of cases, two fundamental questions arise:

First, what was the real intention of the testatrix as gathered from the entire instrument, viewed in the light of existing circumstances?

Second, is that real intention so expressed in the will that it can be effectuated or is the expressed intention so far in conflict with some positive rule of law that it cannot be carried into execution?

The former might perhaps be called the actual intention, the latter the judicial intention; and the latter is not to be substituted for the former unless the court feels itself compelled so to do by canons of interpretation so firmly established as to have become fixed rules of law governing the transfer of property. In such a case the observance of the settled legal rule, although it may defeat the actual intention of the testator, "is deemed indispensable to the required

certainty and security in establishing titles to property and especially in the disposition of landed estates." *Bradley* v. *Warren*, 104 Maine, 423-427. On the other hand such a rule, if it clearly overrides the real purpose of the testator, is to be applied cautiously, and is not to be forced. *Hopkins* v. *Keazer*, 89 Maine, 347-353; *Holcomb* v. *Parker*, 106 Maine, 17, 19.

1. ACTUAL INTENTION.

Of the actual intention in the mind of the testatrix when this will was drawn and executed there can be little doubt. She desired and intended to provide for her husband's comfort in the most ample and generous manner, but not to give him an absolute title. The will itself shows this when we consider all its parts. The first clause of the gift is: "I give, bequeath and devise to my beloved husband William B. Austin all the rest, residue and remainder of my estate, real, personal and mixed, wherever found and however situated." So far she does not say whether the gift is in fee or for life, and had the devise stopped there, with no accompanying words to qualify or explain it, it is undoubtedly true that under our statute, R. S., Chap. 79, Sec. 16, the legal effect would have been to give the husband a fee in the realty and an absolute estate in the personal property. But the testatrix did not stop there. She annexed to it as a part of the same sentence these significant words, "to have full power to sell any or all of my estates and to convey the same for his own use." These qualifying words essentially modify the preceding sentence, and taking all the words together as forming one sentence, it is obvious that she did not intend to give her husband an absolute estate but an estate for his life, the limit beyond which his earthly happiness could not reach, with power during life to sell and convey the estate for his own use. While therefore the technical words "life estate," or "estate for life" are not expressly used, yet the limitation of the power of disposition to a sale and conveyance "for his own use" expresses the same idea in untechnical language. The words are there in another form. In essence the expressions are equivalent.

This implication is confirmed when we consider the next clause in which she gives in fee by apt words any residuum that may be left at the decease of her husband to her three cousins or their heirs, subject to the payment of his funeral charges and the erection of a suitable monument. Had the testatrix intended to give an abso-

lute title in fee to her husband there was no occasion for item four, because there would be no remainder to be disposed of, nor would there be any necessity of her imposing a charge upon the property for the payment of the husband's funeral expenses and monument. If his title to the property were absolute those expenses would necessarily be paid out of it. But it would be his property that would pay them and not hers. When she imposed this charge it could be on no other theory than that it was still in a sense her estate, which was passing along to the objects of her bounty, and that after the cessation of the life estate in the husband, the remainder should belong to the next takers, the cousins or their heirs, subject to these expenses.

It is also to be noted that in clause two, the devise to the husband does not mention heirs, while the devise to the cousins specifies heirs. True, the omission of that word does not conclusively affect the nature of the devised estate, under R. S., Chap. 79, Sec. 16, which provides that "a devise of land conveys all the estate of the devisor therein, unless it appears by the will that he intended to convey a less estate," but its exclusion in the clause giving an estate to the husband and its inclusion in the clause giving the residue to the cousins are significant, and throw some light, as a matter of fact and of evidence, upon the real intention in the mind of the testatrix and the distinction which she sought to create between the quantity of the two estates devised.

When we consider the circumstances and the relations of the parties the same result is reached. Mrs. Austin's first concern was for her husband and she desired to provide generously for him. They had no children who might share in the estate, and she therefore desired him to receive the full personal benefit of the entire property during his lifetime. At his death however she naturally wished the remaining property, if any, to go to her heirs and not to his, nor to a second wife. She therefore provided in the fourth clause that the remainder should be divided among her three cousins or their heirs, and as showing her entire confidence in her husband, although he was the sole beneficiary under clause two, she nominated him as executor and without bond under clause four.

The very thing happened which Mrs. Austin endeavored to guard against. Her husband married again, the precise date is not given, he died on April 30, 1914, leaving a will dated July 19, 1911, in

which he devised and bequeathed all his property to this second wife, the defendant in this bill in equity. She now claims under his will not only all the estate belonging to Mr. Austin in his own right, but also all the property owned by the first wife and passing under her will, thus setting aside the rights of the cousins and disregarding the evident intention to make them the residuary objects of Mrs. Austin's bounty. We need say no more concerning the actual intent of the testatrix.

2. THE JUDICIAL INTENTION.

We come now to the second fundamental question, was Mrs. Austin's actual intention expressed in such form that it must fail of execution, and must her property pass into other channels than those selected by herself, or can her purpose be legally effectuated?

This question may admit of more doubt, but on the whole we are of opinion that the interpretation of the instrument which fulfils the actual purpose of the testatrix violates in this case no positive rules of law, and no fixed canons of interpretation.

In *Stuart* v. *Walker*, 72 Maine, 145, Chief Justice PETERS in his characteristically clear manner discussed various established rules of construction and gave the reasons for their adoption and retention. It may be helpful to recast in brief form such of those rules as have been discussed by counsel in this case. They may be stated as follows:

First: Where an absolute gift in fee simple is followed by an attempted gift over, the latter is void. The reason is that the gift exhausted itself in the first giving and nothing remains for the second taker. A fee cannot be limited upon a fee. The attempted gift over is repugnant to the first gift and the two cannot stand together. The testator may seek to but cannot accomplish two or more inconsistent purposes in one bequest. Illustrations of the application of this familiar rule may be found in the following cases:

"I give and devise to my wife Sarah all the rest and residue of my real estate. But on her decease, the remainder thereof I give and devise to my said children" etc. *Mitchell* v. *Morse*, 77 Maine, 423.

"I will, devise and bequeath to my beloved wife Sila, my home lot, etc.; and at her decease what remains I wish to be equally divided between B and W," etc. *Taylor* v. *Brown*, 88 Maine, 56.

"The residue of my estate I give, devise and bequeath to wit: . . one moiety thereof to my daughter Alice . . . provided however that if my said daughter . . . shall have entered into possession of said estate so much thereof as may remain at her decease shall so descend and be distributed to and among my heirs at law" etc. *Bradley* v. *Warren,* 104 Maine, 423.

"I give and devise to Nathan and Ellen, children of my son Isaac and their heirs and assigns forever all the real estate in Buckfield village that I own at my decease, etc. . . . to them or the survivor of them, and in case both shall die without issue, and without selling the same, then I give and devise the same to such of my heirs," etc. *Morrill* v. *Morrill,* 116 Maine, 154. The case at bar does not fall within this rule. An estate in fee was not given to the first taker.

Second: Where a life estate in the first taker is created in positive and express terms, it cannot be enlarged to a fee simple by implication arising from an annexed power of disposal, however broad and unqualified. "Implication is admitted in the absence of and not in contradiction to an express limitation." Thus "I give and bequeath and devise to my beloved wife . . . . all the rest and residue of my estate, to have and to hold the same to her own use and benefit during her life, with full power to sell any or all of it and to use the principal thereof, if in her judgment her comfort requires it, etc. . . . . and whatever remains at her decease not disposed of by her, it is my will shall be given to the Baptist Home Mission Society" etc. *Hatch* v. *Caine,* 86 Maine, 282. Other illustrations may be found in *Ramsdell* v. *Ramsdell,* 21 Maine, 288; *Stuart* v. *Walker,* 72 Maine, 145; *Copeland* v. *Barron,* 72 Maine, 206; *Small* v. *Thompson,* 92 Maine, 539; *Richards* v. *Morrison,* 101 Maine, 424.

The case at bar does not fall within this rule. A life interest in express terms was not given to the first taker.

Third: If the devise is expressed in such general terms as to create an estate of inheritance under R. S., Chap. 79, Sec. 16, and an absolute and unqualified power of disposal is added, either in express language or by implication, with a gift over of any estate that may remain at the death of the first taker, the gift over is repugnant and void, for the reasons already given under rule one. The full and unqualified power of disposal neither adds to nor detracts from the

absolute estate first given. It is already embraced in that estate and merely emphasizes its character. The same repugnancy and inconsistency exist as under the first rule and the limitation over is void. To illustrate:

"As to the residue of my estate, whatever, after payment of my just debts, I give and bequeath the same to my beloved wife. . . . And lastly, I further direct that if there be any of my said property left after the decease of my said wife, then said property left be equally divided," etc. *Jones* v. *Bacon*, 68 Maine, 34.

"Second, I also give and bequeath to my said wife $4,500, to be paid to her in cash or in such personal securities as she may select from my estate. Fifth: And upon the decease of my said wife I give, bequeath and devise all that may remain unexpended of the real, personal or mixed estate given to my said wife in the second clause, to J. L. Hayes," etc. *Loring* v. *Hayes*, 86 Maine, 351.

This rule does not apply to the case at bar, because neither in express language nor by implication is an absolute and unqualified power of disposal added to the words of general gift in the first taker.

Fourth: If however the devise is expressed in such general terms as would otherwise create an estate of inheritance under R. S., Chap. 79, Sec. 16, and these general terms are followed by a qualified and restricted power of disposal in the first taker, a life estate by implication is created and the limitation over is valid. This rule is stated by Chief Justice PETERS in *Stuart* v. *Walker*, 72 Maine, 145, as follows:

"A life estate by implication usually arises where a donor devises property generally, without any specification of the quantity of interest and adds some power of disposition of the property and provides a remainder. For instance A gives an estate to B with a power of disposal annexed and a gift over to C. . . . A power of disposal is annexed by A to his bequest to B. The effect of this depends upon whether it is a qualified or an unqualified power. If it is an absolute and unqualified power it really neither takes from nor adds to the amount of the estate previously given, though there be a gift over. . . . .

But when the power of disposal is not an absolute power, but a qualified one, conditioned upon some event or purpose and there is a remainder or devise over, then the words last used do restrict and

limit the words first used and have the force and efficacy to reduce what was apparently an estate in fee to an estate for life only. Thus A gives an estate to B, with the right to dispose of so much of it in his lifetime as he may need for support, and if anything remains unexpended at B's death, the balance to go to C. Here there may be something to go over. B is to dispose of the estate only for certain specified purposes. He can defeat the remainder only by an execution of the power. The clear implication of such a bequest, taking all its parts together, is that B is to possess a life estate. Here a life estate is implied and not expressly created."

The same rule is restated by the same learned Chief Justice in another case in the same volume as follows:

"Words of inheritance are now prima facie implied by a general or naked devise. From the nature of things any power of disposal added to such a devise cannot extend it. It now only seems to emphasize and repeat the gift. But a limited or special power of disposal annexed to a general devise, with limitation over, may restrain and limit the devise to the lifetime of the devisee." *Copeland* v. *Barron*, 72 Maine, 206. Those two cases, *Stuart* v. *Walker* and *Copeland* v. *Barron*, are not referred to as precedents in the case at bar because in each a life estate was expressly created in the first taker and are cited above as illustrations of the second rule. But these extracts are made because they define with clearness and discrimination the true rule upon this fourth point.

The crucial question therefore to be determined in this case is whether a life estate was created by implication and that depends upon whether under the peculiar terms of this instrument the power of disposal in the husband was qualified or unqualified, limited or unlimited.

We think the power of disposal was qualified and limited. The words authorizing sale and conveyance "for his own use" can have no other meaning in this connection than for his personal and exclusive use. We cannot disregard them as a mere empty phrase, an attempted legal formality of no effect or of the same general effect as the words "to his own use and behoof forever" employed in the habendum of a deed and derived from feudal lore long since forgotten. We have here not technical words, nor words used in a technical sense, but common, ordinary language employed by a testatrix

and a scrivener apparently unskilled in the use of legal phrases, to express her intent and last wishes in the disposition of her property. Why should they not be "construed according to the common meaning of the language," according to the statutory rule? R. S., Chap. 1, Sec. 6, Par. 1.

"His own use" cannot be for the use of anyone else. Lexicographers define the adjective "own" as belonging peculiarly, especially or exclusively to. It has received like judicial interpretation. Thus, "I give to Martha Brady two thousand dollars for her own use was held to be for her separate use. "The giving it for her own use" say the Court, "is an uncommon expression and denotes some particular intention. If it had been intended barely to give the legacy, subject to the marital rights of the husband, it would have been sufficient to say 'I give it to Martha Brady.' But the addition of the words 'for her own use' is tantamount to saying not for the use of the husband, because if it was for his use it could not be for her own use." *Jamison* v. *Brady*, 6 Serg. & R., 466.

What can be more personal than a use belonging exclusively or especially to a devise? Even under the widest import of the ordinary meaning of those words it can only be his personal use, his personal benefit that is meant. Within that limit the power was broad. It was not confined in its source to the income alone nor in its scope to the bare necessities of life. The husband could doubtless use the principal as well as the income if he so desired, *McGuire* v. *Gallagher*, 99 Maine, 334, 336; *Haseltine* v. *Shepard*, 99 Maine, 495; *Williams* v. *Dearborn*, 101 Maine, 506. But he could defeat the remainder only by an execution of the power, to sell and convey for his own use. This meant in this case, by conveyance during his lifetime for the specified purpose, but no authority was given for testamentary disposition, which would take effect at his decease. Such disposition transferred the property not for his own use but for the use of another, the devisee under the will. If he sold during his lifetime he had the use of the proceeds. If he disposed of the property by will, it was a gift, and that exceeded the contemplated and expressed power.

Absolute and exact precedents in the construction of wills are rare, *Taylor* v. *Titcomb*, 92 Maine, 184, but among somewhat analogous cases the following are suggestive and helpful.

"All the rest and residue of my estate . . . I give, devise and bequeath to my said wife, to be used and appropriated by her as much

as she may wish for her happiness without any restrictions or limitations whatsoever, and I give, devise and bequeath whatever of said property remains undisposed of at the decease of my said wife to "C" etc. *Mansfield* v. *Shelton*, 67 Conn., 390.

"I give and bequeath to my beloved husband all the residue of my estate, . . that I may die possessed of, to use the same as to him may seem best and to sell all the real estate or any part thereof as he may desire . . . If at the time of the death of my said husband any part of my said real estate or personal estate may not have been used or expended by him," shall pass to the legal heirs of the testatrix. *Gruenewald* v. *Neu*, 215 Ill., 132.

A devise to the wife "to her own use and behoof forever," provided that if any of the property which I have given my beloved wife aforesaid shall not have been expended by her for her support and maintenance during her lifetime" so much as remained should go to certain persons named. *Chase* v. *Ladd*, 153 Mass., 126.

Our conclusion therefore is that the husband, William B. Austin, was given a life estate by implication in the estate of his wife, coupled with a qualified power to dispose of the same during his lifetime for his own use, but not a power to dispose of the unused portion by will, as he attempted to do, and that at his decease the unused remainder passed to the cousins of the testatrix or their heirs, as the wife intended and expressly provided that it should under the succeeding clause four of the will.

This construction satisfies all the words of the will, harmonizes all its provisions, effectuates the actual purpose of the testatrix and violates no positive rule of legal construction.

We think that the parties were justified in applying to this Court for instructions, and it is proper that the estate involved should bear the reasonable expense of the litigation. *Bailey* v. *Worcester*, 103 Maine, 170, 178. Reasonable counsel fees may be fixed by the sitting Justice.

Bill sustained with costs.
Decree in accordance with the opinion.

DUNN, J., and MORRILL, J., did not concur.

DOCITE CHASSE *vs.* HENRY SOUCIER.

Aroostook. Opinion March 7, 1919.

Reports of referees. Acceptance of same. Exceptions to ruling of court accepting referee's report. General rule covering discretion of court in such matters.

On exceptions to the ruling of the presiding Justice, accepting the report of referees appointed under a rule of court, it is

Held:

1. The acceptance of the report of referees is a matter of judicial discretion and when that discretion is judicially exercised, the decision of the presiding Justice is final and conclusive.
2. By making the ruling of another Justice at a previous term upon the recommitment of the report, a part of the bill of exceptions, the scope of inquiry is not enlarged and the correctness of the ruling of the former Justice cannot be examined here, when no exceptions to that ruling were taken. That ruling could have been brought before this court only by exceptions duly signed and allowed by the Justice who made it or by one of the methods prescribed by R. S., Chap. 82, Secs. 55 and 56.

Exceptions to the ruling of presiding Justice accepting the report of referees. Exceptions overruled.

Case stated in opinion.

Hersey & Barnes, for plaintiff.

Shaw & Thornton, for defendant.

SITTING: CORNISH, C. J., HANSON, PHILBROOK, WILSON, DEASY, JJ.

CORNISH, C. J. This is an action of assumpsit brought under the statute to recover the value of improvements on real estate made by a squatter. R. S., 1903, Chap. 106, Sec. 43, P. L., 1911, Chap. 74, R. S., 1916, Chap. 109, Sec. 43.

The writ was entered at the September term, 1915, of the Supreme Judicial Court for Aroostook County. At the November term, 1915, by agreement the case was referred to three referees under a rule of Court. At the November term, 1916, the referees filed their report awarding the plaintiff damages in the sum of nine hundred

and thirty-eight dollars. On the third day of that term the defendant filed a motion to recommit the report to the referees for further hearing and determination, assigning six reasons therefor.

Upon this motion, testimony was taken, and after a full hearing the presiding Justice filed his decision, giving somewhat fully his reasons therefor and concluding : "I therefore overrule the request to set aside the finding and award of the referees." Counsel for the defendant contends that this was not a ruling upon the motion as presented, that motion being to recommit and not to set aside the findings. From the reading of the entire decision however, it is apparent that the presiding Justice was satisfied that the report was correct and should be neither modified nor set aside. While the language of the decision might have followed more closely the language of the motion yet his determination was a virtual denial of the motion to recommit. The only purpose of such a motion is by further hearing to secure a change in the award. An affirmation of the award as made is a necessary denial of the motion to recommit. The greater includes the less. No exceptions were taken to this ruling.

At the November term, 1917, a hearing was had on the acceptance of the report and the presiding Justice ordered the report accepted. To this ruling the defendant filed an exception and that is the only exception before this Court. True, the bill of exceptions states "writ, pleadings, report of the referees, the motion to recommit the report to the referees and the report of Justice MADIGAN on the motion to recommit are referred to and made a part of the bill of exceptions" but that does not enlarge the scope of our inquiry so that the correctness of the ruling of the former Justice can be examined here. That ruling could have been brought before this Court only by exceptions duly signed and allowed by the Justice who made it or by one of the methods prescribed by R. S., Chap. 82, Secs. 55 and 56. But, as before stated, no exceptions were taken to that ruling, and the single issue now presented is the validity of the acceptance of the report at the November term, 1917.

This was a matter of judicial discretion and if the discretion was judicially exercised as defined by this Court in *Charlesworth* v. *American Express Co.*, 117 Maine, 219, 221, no exceptions lie to the ruling. Under such circumstances the decision of the presiding

Justice is final and conclusive. *Walker* v. *Sanborn*, 8 Maine, 288; *Cutler* v. *Grover*, 15 Maine, 159; *Preble* v. *Reed*, 17 Maine, 169; *Harris* v. *Seal*, 23 Maine, 435; *Furbish* v. *Ponsardin*, 66 Maine, 430. Nothing has been brought to our attention in this case showing any abuse of discretion nor is that contention made. Therefore the ruling must stand.

It might be added that were the ruling of the former Justice made at the November term, 1916, legally before us it would be governed by the same principles and would be sustained for the same reasons.

Exception overruled.

CAROLINE MCKELLAR,
By RODNEY I. THOMPSON, her Guardian ad litem,
Appellant from Decree of Judge of Probate.

Knox. Opinion March 8, 1919.

Rule of practice in regard to probate appeals.

This case is before the Law Court on exceptions to a ruling of the presiding Justice dismissing an appeal from a decree of the Judge of Probate of Knox County.

The will and codicil were allowed by the Judge of Probate, July 7th 1915. From the decree allowing the same, appeal was taken and was by this court dismissed.

The appellant states in the appeal and reasons for appeal "that the codicil should have been declared null and void for the reason that the testator at the time of making said codicil was of unsound mind and incapable of making a codicil to said will."

Held:

1. This contention was disposed of by the decree of the Judge of Probate, July 7, 1915, and there is no provision of the statutes authorizing a reopening of the question by the method here adopted by the appellant.
2. The ruling of the presiding Justice was in harmony with the law governing probate proceedings in this State.

Exceptions to ruling of presiding Justice dismissing appeal from a decree of the Judge of Probate. Exceptions overruled.

Case stated in opinion.

J. H. Montgomery, and R. I. Thompson, for appellant.

A. S. Littlefield, for appellee.

SITTING: CORNISH, C. J., SPEAR, HANSON, DUNN, MORRILL, JJ.

HANSON, J. This case is before the Law Court on exceptions to a ruling of the presiding Justice dismissing an appeal from a decree of the Judge of Probate of Knox County. The appeal and reason for appeal follow:

"To the Honorable, the Judge of the Probate Court in and for the County of Knox:

Respectfully represents Caroline McKellar of Rockland, Knox Co. Me. by Rodney I. Thompson her guardian ad litem duly appointed by this Court that she . . . interested as legatee under the will of Eliza J. Willoughby late of Rockland in said County of Knox, deceased, of which said Court has now jurisdiction that she is aggrieved by your Honor's decree made at a Probate Court held at Rockland, in and for said County of Knox, on the twentieth day of November, A. D. 1917, whereby her petition to have the codicil to said will of said Eliza J. Willoughby declared null and void was denied and hereby appeals therefrom to the Supreme Judicial Court, being the Supreme Court of Probate to be held at Rockland, within and for the County of Knox, on the second Tuesday of January, A. D. 1918 and alleges the following reasons of appeal, viz:

Because she says that her said petition should have been allowed and the prayer therein granted, and said codicil should have been declared null and void for the reason that said Eliza J. Willoughby at the time of making said codicil was of unsound mind and was then and there incapable of making a codicil to said will and was incapable of an understanding necessary for such purpose.

Dated this first day of December, A. D. 1917.

CAROLINE MCKELLAR,
By RODNEY I. THOMPSON,
her guardian ad litem."

At the April term, 1918, of the Supreme Judicial Court for Knox County, the executors and residuary legatee filed their motion to dismiss the appeal, upon the ground that neither this court nor the Probate Court in which these proceedings originated have any jurisdiction to entertain the same, or any jurisdiction or authority under the allegations in the petition, to revise or modify the decree allowing the will or codicil.

The appellant contends (1) that the motion contains matters dehors the record and should for that reason have been overruled; (2) that in making his ruling, the presiding Justice assumed as matter of fact certain allegations in the motion to dismiss, that these should have been the subject of a hearing, and that he was denied the right to be heard.

The will and codicil were allowed by the Judge of Probate July 7th, 1915. From the decree allowing the same, appeal was taken and was by this court dismissed.

The appellant states in the appeal and reasons for appeal that "the codicil should have been declared null and void for the reason that the testator at the time of making said codicil was of unsound mind and incapable of making a codicil to said will." This contention was disposed of by the decree of the Judge of Probate July 7, 1915, and there is no provision of the statutes authorizing a reopening of the question by the method here adopted by the appellant.

The presiding Justice in his ruling used the following language:

"There is now among the papers in the case the paper introduced by the appellant entitled Appeal and Reasons of Appeal. The appellant says she is aggrieved by a decree made by the probate court held at Rockland in and for the County of Knox on the 20th day of November, A. D. 1917, whereby 'her petition to have the codicil of said will of said Eliza Willoughby declared null and void was denied.' That is not a petition to vacate a decree. A decree was on the records of the probate court allowing the codicil of the last will and testament of Eliza J. Willoughby, —I say there was a record of a decree. Now it does not appear that the petitioner filed a petition in the probate court to have that decree set aside, but it apparently was a petition to have the codicil declared null and void. Such a decree could not be made in the face of an existing decree. The only way the earlier decree can be disposed of is by reopening or else by annulment before such decree could be made as set forth here. So

that upon the face of the papers as I view the situation,—upon the face of the papers, the petition, and not for reasons set forth in the motion referred to, but upon the face of the papers, it does not seem to me that the appeal is properly before the court; and I must rule that the appeal be dismissed."

As has been seen, the only question involved in the reasons of appeal,—the testamentary capacity of Eliza J. Willoughby, had been adjudicated, and cannot be reopened by this proceeding.

The ruling of the presiding Justice was in harmony with the law governing probate proceedings in this State.

Exceptions overruled.

WILLIAM M. INGRAHAM, Guardian
Appellant from Decree of Judge of Probate
in re Will of ROBERT C. FOSTER.

Cumberland. Opinion March 10, 1919.

Wills. General rule of law to be applied in the interpretation of R. S., Chap. 79, Sec. 9.

It is a presumption of the law, that the omission to provide for a child, or the issue of a deceased child, living when a will is made, is the result of forgetfulness, infirmity, or misapprehension, and not of design. But this presumption is rebuttable. With the wisdom or propriety of the act of the testator, in pretermitting his child from his will, the law has nothing to do.

That such omission was intentional, or was not occasioned by mistake, on the part of the testator, may be established by evidence extrinsical the will itself. All the relevant facts and circumstances, including the intention of the testator as he declared it before, at, or after the making of the will, may be shown.

In the instant case, the proof is adequate and convincing, that, the child then being present to his mind, the testator, when the will was made, purposely dis-

inherited him. It, therefore, is conceived by the court to be its duty to sit aside and disregard the verdict of a jury otherwise advising. It is neither necessary nor desirable again to send the case to a jury. The mandate to the court below will be, that the omission of the appellant's ward from devise in the will of the ward's father, Robert C. Foster, was intentional, and not occasioned by mistake, on the part of the testator. The decree of the Probate Court denying that petition for the payment to appellant's ward of the same share of the estate of the testator, as he would have taken if no will had been made, is affirmed.

Motion for new trial after findings of jury on certain questions of fact submitted to them in the matter of the will of Robert C. Foster. Judgment in accordance with opinion.

Case stated in opinion.

Augustus F. Moulton, for appellant.

Scott Wilson, and John B. Thomes, for appellee.

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

DUNN, J. Robert C. Foster, namesake of his father, distinguished from him as junior, and whose only prospective heir he was, is pertermitted from his father's will; a document executed when the child was less than five years old, and which became operative, before he had attained the age of eight years, by its probate in Cumberland County on May 4, 1916.

The question in this case is, whether exclusion of the boy from provision of that will was intentional, and not occasioned by mistake, on the part of the testator; a subject of investigation regarding which the will itself is silent.

At the outset, and without scrutiny, the disposition of the estate may seem to be unreasonable and unnatural, even to savor of unjustness; but, under the rule of law applicable, the maker of the will was not bound to have good or any reason for what he did, or if he had reason, to state it. With the wisdom or propriety of his act the law has nothing to do. If adequate and convincing proof, extrinsical the will, shall show, that when that instrument was made, the son being present to his mind, the parent purposely ignored him, and otherwise made bestowal of his bounty, then we must hold that the testator's will be done. *Whittemore* v. *Russell,* 80 Maine, 297; *Merrill* v. *Hayden,* 86 Maine, 133.

In natural and moral law is the basis of the relationship of parent and child. From this source flows the presumption, crystalized in a statute (R. S., Chap. 79, Sec. 9) harking back to the Province of Massachusetts Bay (12 William III, Chap. 7; Ancient Charters page 351), that the omission to provide for a child, or the issue of a deceased child, living when a will is made, is the result of forgetfulness, infirmity or misapprehension, and not of design. But the presumption is rebuttable. The statute adverted to reads: "A child, or the issue of a deceased child, not having any devise in the will, takes the share of the testator's estate, which he would have taken if no will had been made, unless it appears that such omission was intentional, or was not occasioned by mistake, or that such child or issue had a due proportion of the estate during the life of the testator." R. S., Chap. 79, Sec. 9. There is no pretence that Robert C. Foster, Jr., had befitting share of the estate in the lifetime of his father. The sole inquiry of the case is, to repeat, whether omission to provide for him in the will was intentional, and not occasioned by mistake, on the part of his immediate ancestor. The clause, "or was not occasioned by mistake," is introduced in the statute to enforce or give emphasis to the meaning of the preceding word, "intentional," which is the ruling expression. It is written in *Hurley* v. *O'Sullivan*, 137 Mass., at page 89, the word "mistake," as here used, is not to be construed as meaning such mistake "as would or might have caused the testator to entertain a different intention from that which omission from the will would show, but mistake or accident in the will or in its transcription." It must, in the context, refer to such mistake or mistakes as are likely accidentally to occur in the preparation of a will, as momentary rather than purposed forgetfulness, owing to the distress of the testator; or error, on the part of the scribe or otherwise, in reducing the testator's intention in that behalf to writing; and not to misapprehension or misunderstanding as to matters outside the will, whether of law or of fact. The statute does not state two contingencies in which omission from the will would work to deprive the child of his share, that is to say, an intentional omission, and also where, but for a mistake, the testator would not have done that which he intended to do, and actually did. On the contrary it states one and only one contingency. *Hurley* v. *O'Sullivan*, supra.

In its language the statute is broad enough to embrace all competent evidence tending to prove that such omission was intentional

and not occasioned by mistake. *Whittemore* v. *Russell*, 80 Maine, 297; *Merrill* v. *Hayden*, 86 Maine, 133. The evidential office of the will is to prove that the child is without devise under it. The inquiry as to whether he was omitted therefrom by design and without mistake, and not by blunder or oversight, arises under the statute. Seeking the testator's intention it is pertinent to inquire, consonantly with the law of evidence, concerning him and his son; the affection, or lack thereof, that subsisted between them; of the motives which may be supposed to have operated with the testator, and to have influenced him in the disposition of his property. All the relevant facts and circumstances, including the intention of the testator as he declared it before, at, or after the making of the will, may be shown. *Whittemore* v. *Russell*, supra; *Wilson* v. *Fosket*, 6 Met., 400.

What then of Robert C. Foster, the elder? Of his child and his relation to him, of his property, of its testamentary disposition, and of his intention, as he may have declared it, that concerning? Bred to the law, he came to the bar, and entered upon the practice of the profession at Portland, in partnership with his own father, but he did not especially actively concern himself with the business of the firm. In 1906 he married. The child first born of the marriage died in early infancy. In 1910 his wife left him, taking little Robert, not then two and one-half years old, and going to her girlhood home in Illinois. Efforts to bring about reconciliation between husband and wife, in which both the testator and his parents participated, the one by letters manifesting his better traits and characteristics, and importuning that she return to live with him, the others by personal interviews with the wife, after a journey afar for that purpose, were unavailing. A month after the dissociation, the Probate Court in Cumberland County granted the mother custody and care of the child, to continue throughout his minority. Three or four months later on, while Mr. Foster was absent in Europe, his wife, who previously had returned to Portland, removed her property and effects from what had been the family domicile. Within eight months from that time this court decreed the wife matrimonial divorcement. Promptly thereafter, for the consideration of five thousand dollars to her paid, she released to her former husband all her interest in his real and personal estate, and exempted him from all liability to provide for, or to contribute to, the support and education of their son, while he had been, and

should continue to be, in her custody. Mrs. Foster thereupon permanently removed from Maine. She settled in Illinois, and married again.

From the day that his wife left him until that of his death, Robert Foster never had opportunity to speak to his child. The case ungrudgingly concedes that, while the family lived together, he was an affectionate father, proud of his child, and ambitious for his future. When the boy was taken elsewhere to live, the father's interest in him waned. For Christmas, twenty days from the day on which Robert's mother took her child away from the paternal home, he sent him five dollars, accompanied by a note couched in words of a parent's love. On the third anniversary of the child's birth, in the next July he sent him another present of money. Beyond those gifts, after the separation, he gave him nothing. He made no provision for him or his welfare, excepting the gross payment made to the mother at the time she assumed responsibility for the child's support. Not altogether without foundation in fact, though not entirely based on truth, Mr. Foster was told that his son was known and called by the name of the step-father. At once his attitude underwent decided change. He abandoned effort to see the boy. He gave away the toy bank in which for him it had been his habit to deposit dimes, assigning as a reason that he never expected again to see the child. In the summer of the year of 1912, and once more in the summer of the very next year, the boy visited at the home of a maternal aunt, the site of whose house was a lot of land adjoining, and back of that on which was located the residence of Mr. Foster, in Portland. His attention called to the fact that the lad was at play in the nearby yard, Mr. Foster came from out one room into another, and looked through a window at him. What passed through his mind, and was reflected in his eyes, as he contemplated his son, was fleeting; but as he gazed he soliloquized, and she who, in other days, had been nurse to that child both in Maine and in Illinois, then, pausing in her housework, during the father's monologue, and herself looking at the boy in the yard, heard the parent say: "They have treated me meanly, and I am through with them." At another time he spoke to his friend and physician, Dr. Gray, already familiar with the estrangement, and told him of his formed intention, his considered and positive purpose, that his property should not go at his death to his former wife or to his child.

After the divorce had been granted, and his former wife had gone away from Maine, Mr. Foster remained in and about Portland. In April 1913, Foster's father, then stricken with the illness that was his last, sent for him, and when he had come, the father said: "Robert, I have made my will giving all my property to you, and your mother has made hers giving hers to you; now I want you to make yours, so that if anything should happen to you before it does to us that there won't any of your property go into that family (the family of Robert's former wife), but will come back into our family." And Robert said that he would. Less than a fortnight later, at the law office of the firm, in his father's absence, Robert Foster with his own hand wrote out his will, and then and there executed it. In his will he gave five hundred dollars to his housekeeper. The rest of his property, both real and personal, he devised and bequeathed to his father and mother, or to the one of them who should live longer than the other, omitting his child without mention. When he had signed and published the will, and it had been subscribed by the attesting witnesses, he took it to his father, and the latter put it with his own and Robert's mother's will, in the family safe in the father's home, where, always accessible to the maker, it remained until taken to the court for probate.

Robert C. Foster's property was not the fruit of his own industry. The house that he owned and occupied, and the personal property consisting, additionally to his household effects, of a few bonds and other evidences of indebtment, of which at the time of the divorcement he was possessed, were gifts to him from his parents. Two years later on, when his father died, the bulk of the father's property passed by will to Robert. He then abandoned the practice of the law; sold his dwelling-place, and went to live in an apartment house. He began the study of medicine. A policy of insurance on his life was cancelled for the reason, as he stated, that, as his mother, the beneficiary named in his will, already had ample estate of her own, there was no occasion to carry the contract, and the money requisite for premiums thereon might the more conveniently be used by him in defrayment of medical school expenses. At Christmas time in 1915, before his death in March next following, while at home through a recess of the medical school in which he was enrolled as a student, he talked with his mother respecting the disposal of his property in case she outlived him. He

told her of a person or two to whom, as expressive of his affection for them, he wished certain of it to be given; he said that he wanted some of it to go to Bowdoin College, of which he was a graduate. But in that solemn conversation, from its beginning to its end, when after the manner of mankind he must have scanned with telescopic vision both the present and the past, and have endeavored to peer into the mysterious economy of the future, the name of his child never was mentioned. Candid consideration of all the evidence in the case leads irresistibly to the conclusion, that soon after the entry of decree on her libel for divorce, and before the making of his will, she who had been Robert C. Foster's wife, and with her the child born to them in wedlock, the disinherison of whom originated this case, together went out of that man's life forever. Afterward he exercised what was his undoubted legal right: he denied his property to him for whose presence on earth he was responsible. The weight of the burden of his executrix and principal beneficiary, herself going down life's steep declivity, would have been greatly lessened had he stated in his will, that touching the omission of devise to the boy he did what he designed to do. Why he did not so say is conjectural. He may have thought all men would know without his saying. He may have forgotten that the silence of the grave is tongueless. Be that as it may, the conclusion of the court is, that the omission and failure on the part of Robert C. Foster to provide in his will for his only living child, was intentional, and not occasioned by mistake.

It is conceived by the court to be its duty to set aside and disregard the verdict of the jury. It is neither necessary nor desirable again to send the case to a jury. The mandate to the court below will be that the omission of the appellant's ward from devise in the will of the ward's father, Robert C. Foster, was intentional, and not occasioned by mistake, on the part of the testator. The decree of the Probate Court denying the petition for the payment to appellant's ward of the same share of the estate of the testator, as he would have taken if no will had been made, is affirmed.

The case is remanded to the Supreme Court of Probate for decree accordingly.

JOHN P. SYLVESTER *vs.* JOSHUA GRAY.

Franklin. Opinion March 11, 1919.

Damages. Interpretation of R. S., Chap. 26, Sec. 2. General rules of the road. Burden of party alleging negligence to show that he was in the exercise of due care.

Plaintiff and defendant were traveling on a State road where for five hundred feet each could see the other approaching. The preponderance of the testimony indicated that the plaintiff was on the wrong side of the road and that he did not turn out or leave his position. The plaintiff offered no explanation of the delay, in turning out.

Held:

That the plaintiff had the burden of showing that at the time of the injury he was in the exercise of due care and that no want of due care on his part contributed to the injury.

Action on the case to recover damages on account of alleged negligence on part of the defendant. Defendant filed plea of general issue and also brief statement. Verdict for plaintiff in the sum of two hundred dollars. Defendant filed motion for new trial. Motion sustained. Verdict set aside.

Case stated in opinion.

Thomas D. Austin, for plaintiff.

Frank W. Butler, for defendant.

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

HANSON, J. Action on the case for injury to the plaintiff's automobile resulting from a collision with the automobile of the defendant. The plaintiff recovered a verdict for $200. and the case is before the court on the defendant's general motion for a new trial.

The evidence shows that the plaintiff's automobile was coasting on a hill over a distance of forty or fifty rods at a speed of at least fifteen miles an hour, and that the automobile was, during the time required to go that distance, on the wrong or left hand side of the road; that

at the moment of impact his automobile was still to the left of the middle of the travelled part of the way. The plaintiff's chauffeur testified that he did not see the defendant's car approaching until he was within 100 feet of the same. The plaintiff's automobile was on the wrong side of the way, the defendant's car on the defendant's right side of the way; but the plaintiff contended that the defendant was intoxicated, and was driving his automobile at a very high rate of speed, as he says, 35 to 40 miles per hour.

Even so, the claim if established, does not place full and exclusive liability upon an intoxicated defendant, and relieve the plaintiff from the exercise of the care which the law generally, and the law of the road particularly, requires of both plaintiff and defendant. An intoxicated driver may still be able to obey the law of the road, and the defendant whether intoxicated or not, was obeying the statute which requires a person "travelling with a team approaching to meet another on a way, to seasonably turn to the right of the middle of the travelled part of it, so far that they can pass each other without interference." R. S., Chap. 26, Sec. 2.

It is clear that the defendant was well out on his right side of the way, when the plaintiff's chauffeur saw his car, and from the evidence and the position of the car after the accident, the defendant at no time encroached upon the lawful rights of the plaintiff.

Was the plaintiff in the exercise of due care and did it appear affirmatively that he did not by his own act or fault contribute to produce the injury? In order to establish his case the plaintiff had the burden to show, by proper evidence the truth of the allegations in his declaration, in which he sets up the claim that he was using due care, and was not chargeable with contributory negligence.

A careful study of the evidence leads to but one conclusion. Both parties to the collision were negligent. The jury found that the plaintiff was not negligent. That conclusion is not supported by the evidence and the jury was not warranted in so finding.

Plaintiff and defendant were travelling on a State road where for five hundred feet, each could see the other approaching. The testimony of the sheriff who was on the scene early, indicates that the plaintiff did not turn out or leave his position on the wrong side of the way. The plaintiff has offered no explanation of the delay in turning. He has the burden of showing that no want of due care on his

part contributed to the injury. *McCarthy* v. *Railroad Co.*, 112 Maine, 1. And that at the time of the injury he was in the exercise of due care. *Gleason* v. *Brewer*, 50 Maine, 22; *State* v. *M. C. R. R. Co.*, 76 Maine, 357; *Fournier* v. *Mfg. Co.*, 108 Maine, 357; *Bragdon* v. *Kellogg*, 118 Maine, 42.

His testimony fails to sustain the burden in either respect.

It appears from the whole record that the verdict is clearly wrong. The entry will be,

Motion sustained.
Verdict set aside.

MATTIE E. D. GAMMONS *vs.* WILLIAM M. KING.

Lincoln. Opinion March 11, 1919.

False arrest. Necessary facts upon which to base a plea that a debtor is about to leave the State and thereby cause his arrest. What is meant by and included in the words "property or means" as used in R. S., Chap. 115, Sec. 2.

This is an action of trespass for false imprisonment in which the jury returned a verdict for the plaintiff for $931.25. The case is before the court on the defendant's general motion for a new trial.

Held:

1. The questions involved were entirely for the jury, and the evidence was conflicting upon points vital to the result. In such case the conclusion of the jury will not be reversed, unless the preponderance against the verdict is such as to amount to a moral certainty, that the jury erred.
2. A careful reading of the record discloses a preponderance of the evidence in favor of the plaintiff's position, that the defendant did not have reason to believe that the plaintiff was about to depart and take with her property or means of her own exceeding the amount required for her immediate support.
3. Such belief should be derived from facts and evidence sufficient in themselves to justify a man of ordinary prudence and caution, when calm and not swerved

by self interest from the realms of reason and common sense, in believing the truth of the statements to which he makes oath. The oath clearly means that at the time it is made the debtor has within the State, property, tangible or intangible, which he is about to take with him outside of the State.

Action to recover damages for false arrest. Defendant filed plea of general issue. Verdict for plaintiff in the sum of $931.25. Motion for new trial filed by defendant. Motion overruled.

Case stated in opinion.

George A. Cowan, for plaintiff.

A. S. Littlefield, for defendant.

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

HANSON, J. This is an action of trespass for false imprisonment in which the jury returned a verdict for the plaintiff for $931.25. The case is before the court on the defendant's general motion for a new trial.

The plaintiff, a non-resident, leased from the defendant a summer hotel, and in addition had bought from him various supplies to be used in connection with the hotel business.

There was a balance due the defendant exceeding ten dollars at the date of the capias writ issued on August 21, 1916. The oath was in due form, and the case and briefs of counsel disclose that the only issue presented involved the good faith of the defendant in making the oath, and it was presented to the jury substantially in the words of the oath.

1. Did the defendant believe and have reason to believe that the plaintiff was about to depart and reside beyond the limits of the State, and

2. To take with her property or means of her own exceeding the amount required for her immediate support;

The defendant attempted to justify by his testimony that the plaintiff told him that she had money but would not pay him, that she owned property in another state; that she had previously had a similar contract and left without paying her rent, and that she was going on a lecture tour on or before September 10th, and that she had made substantially the same statements to Mr. Feltis, another creditor, who had communicated the same to him.

All of which testimony is denied by the plaintiff in every important detail. The questions involved were entirely for the jury, and the evidence was conflicting upon points vital to the result. In such case the conclusion of the jury will not be reversed, unless the preponderance against the verdict is such as to amount to a moral certainty, that the jury erred. *Enfield* v. *Buswell*, 62 Maine, 128. *Young* v. *Chandler*, 104 Maine, 184.

A careful reading of the record discloses a preponderance of the evidence in favor of the plaintiff's position, that the defendant did not have reason to believe that the plaintiff was about to depart; the defendant claiming that the plaintiff told him she would leave on or before September 10, for a lecture tour. The plaintiff denied this, placing the time of her intended departure in October.

1. The jury found that the testimony did not warrant a conclusion that the plaintiff was about to depart as contended by the defendant.

The defendant was the plaintiff's landlord and grocer, and had dealings with her as he says "every few days," and was situated so he could know of the slightest change in her business, or of any preparation for flight. He was aware of the arrival of guests at the hotel the day of the arrest. Confronted by these facts and circumstances the jury could not well find otherwise.

2. Was the plaintiff about to depart "with property or means of her own exceeding the amount required for her immediate support?"

The jury found she was not about so to depart and take with her such property or means, and the record again shows the finding to be without error.

With the same means of knowing, the defendant knew that summer hotel business in the year 1916, was not a paying occupation. He knew that the plaintiff came to his house with little if anything of real value; that the season was dull, boarders were not coming in the numbers expected, and the enterprise was not successful.

He knew that to sustain herself under her lease and transactions with him, she had to borrow funds from a friend outside the State, and that he received a large portion of that borrowed money in trade. He knew, or must be held to have known, that the property brought in to the State by her had no attachable value, or was not subject to attachment, for while the property was still in the hotel and in use, he did not attach it, but elected to arrest her.

The conclusion is irresistible that he relied upon the information and belief that ownership of property outside the State was sufficient to bring her within the meaning and intention of the Statute. Here again he was in error. The finding is abundantly supported by the evidence, and in harmony with the decided cases.

In *Dunsmore* v. *Pratt,* 116 Maine, 22, this court in considering the same question, held, that "such belief should be derived from facts and evidence sufficient in themselves to justify a man of ordinary prudence and caution, when calm and not swerved by self interest from the realms of reason and common sense, in believing the truth of the statements to which he makes oath." . . . . "the oath clearly means that at the time it is made the debtor has within the State, property, tangible or intangible, which he is about to take with him outside of the State. Neither can it be claimed that because the debtor owned real estate in Cleveland he would by his departure remove from this State 'means.' As used in the statute, 'means' is not method, but portable assets, tangible or intangible."

We are not able to say that the damages are excessive. The jury had the benefit of the presence of the parties, the details of a most extraordinary arrest and detention for eight days, with a disclosure added. They had in contemplation the arrest of a person as an absconding debtor, while for the purposes of this case, she was yet in her own house, and about her household duties. They had in contemplation too, the injury to her health, her feelings, and her business, all proper for their consideration. In view of the record we do not feel justified in saying that the damages were excessive.

The entry will be,

Motion overruled.

HARRY L. WILLIAMS, In Equity,

vs.

HENRY F. LIBBY, et al.

Somerset. Opinion March 20, 1919.

Power of court in equity to correct a mutual mistake of fact. Rule as to subrogation where the rights of third parties are prejudiced.

1. Where there was a mutual mistake of facts as to the condition of a title intended to be conveyed, a court of equity will correct same.
2. A mistake as to title is a mistake of fact, even though arising from an erroneous view of the legal effect of a deed.
3. When money due upon a mortgage is paid, it may operate to cancel the mortgage or in the nature of an assignment of it, placing the person who pays the money in the shoes of the mortgagee as may best subserve the purposes of justice and the just and true interests of the parties.
4. Equity will not declare the cancellation of a discharge of a mortgage when it will result prejudicially to third parties, nor when the rights of third parties have intervened.
5. Subrogation will not be allowed so as to do injury to the rights of others.

Bill in equity asking that the discharge of a certain mortgage be decreed as invalid and that said mortgage so discharged be decreed to be in full force and effect. Cause was heard upon bill, answer and replication and proof. From the decision of the single Justice, an appeal was taken by defendants. Judgment in accordance with opinion.

Case stated in opinion.

George W. Gower, for plaintiff.

Manson & Coolidge, for defendants.

SITTING: CORNISH, C. J., SPEAR, HANSON, WILSON, DEASY, JJ.

SPEAR, J. This is a bill in equity based upon the following facts:

On August 15, 1907, Cora M. Everett, wife of Richard H. Everett, was the owner of certain real estate situated in the town of Hartland

contiguous to land owned by the plaintiff. On that day Mr. and Mrs. Everett mortgaged this real estate to Carl M. Randlett, to secure the payment of three hundred dollars and interest. The mortgage was duly recorded. On December 13, 1913, the Everetts, and one Stanhope gave a note to the defendant bank for seventeen hundred dollars. On November 11, 1914, the bank placed an attachment upon Mrs. Everett's real estate, and caused a record to be made in the usual manner, but made no service on Mrs. Everett. On November 30, 1914, Mrs. Everett conveyed the same real estate to the plaintiff by warranty deed, representing it to be free from incumbrances, except the Randlett mortgage and two years' taxes. The mortgage debt the plaintiff assumed and agreed to pay.

The deed was recorded December 1, 1914. Richard H. Everett, her husband, quitclaimed his interest in this real estate by deed recorded January 16, 1915. On December 18, 1914, the defendant bank received a payment of $615, on its note. May 14, 1915, the plaintiff paid the Randlett mortgage and taxes amounting to $349.50, and the mortgage was discharged on the same day, acknowledged July 3, 1915 and recorded July 9, 1915. No service of the writ, upon which the attachment was made, having been made upon Mrs. Everett, the case was continued from term to term, until the April term 1916, at which term, after notice by publication, a default was entered for nine hundred and sixty dollars debt and twenty-seven dollars and twenty-two cents costs.

June 12, 1916, the defendant Libby acting for the bank, purchased this same real estate at sheriff's sale on the execution, issued on this judgment. The first knowledge the plaintiff had of this claim of the bank against Mrs. Everett and this attachment of her real estate was some two or three weeks before the sale. The evidence also shows that the plaintiff, during the time covered by these transactions, was much afflicted both physically and mentally. Under this state of facts the inference is inevitable that the plaintiff purchased the equity in this real estate and agreed to assume and pay the mortgage for the sole purpose of acquiring a good title in the property. It could not be contended for a moment that he intended to pay and discharge this mortgage for the benefit of the bank. It is equally clear that Mrs. Everett intended to convey to him a perfect title, except the mortgage and taxes. She had no knowledge of the attach-

ment. He had no knowledge of it. Hence there was a mutual mistake of facts as to the condition of the title which she intended to convey and which the plaintiff thought he was to receive. A mistake as to title is a mistake of fact, even though arising from an erroneous view of the legal effect of a deed. Words and Phrases, second series, Mistake of Facts, page 417, and cases cited. That a mutual mistake of fact may be corrected by equity needs no citation. We have no doubt, therefore, that as between these two parties equity will lie to correct the mistake. But she should be made a party, which can be done by amendment, and which, therefore, equity assumes to be done.

But the defendant contends, even so, the plaintiff was guilty of laches in not examining the records and finding out about the attachment. In view of the fact that no personal service was made on Mrs. Everett, as the plaintiff might naturally expect, if a suit had been brought; that he was put off his guard rather than on his guard, by this fact; and was in a physical and mental condition necessarily following the result of three paralytic shocks; we are of the opinion that the plaintiff cannot be charged with culpable negligence, in not taking the precaution to look up the record, and that he is excused from so doing under the principle laid down in *Cobb* v. *Dyer*, 69 Maine, 494.

Again the defendant invokes R. S., Chap. 86, Sec. 59 as a bar to the maintenance of the bill. This statute reads: "When a right of redeeming real estate mortgaged or taken on execution, is attached; and such estate is redeemed or the encumbrance removed before the levy of the execution, the attachment holds the premises discharged of the mortgage or levy, as if they had not existed."

But we think this statute applies to a discharge, in fact, and not to a discharge by mutual mistake, the validity of which may be set aside. The statute should be construed in the light of the principle laid down in *Kinsley* v. *Davis*, 74 Maine, 498. The court say: "The principle, which it seems may be abstracted from the cases is, that when money due upon a mortgage is paid, it may operate to cancel the mortgage, or in the nature of an assignment of it, placing the person who pays the money in the shoes of the mortgagee, as may best subserve the purposes of justice and the just and true interests of the parties." Such substitution is subrogation. *Stevens* v. *King*, 84 Maine, 291.

We are unable to discover how the subrogation of the plaintiff to the rights of the mortgagee, in this case, could infringe any of the rights of Mrs. Everett and the bill should be sustained with respect to her on the ground of mutual mistake of fact.

We now come to the vital issue in the case, would the subrogation of the plaintiff to the rights of the mortgagee infringe the rights of any third party? The bank is a third party. They had an attachment on this mortgaged real estate. The attachment when put on covered only the equity of redemption. Whatever that was worth the bank could recover and no more. They subsequently did nothing themselves which in the least enchances the value of their attachment or lien. The only advantage they have gained is through the money paid by the plaintiff, without any consideration whatever moving from them. They claim the benefit, solely, through the mistake of the plaintiff. The bank does not pretend to have earned a farthing of their claim. They simply say, the cold blood of the law permits them to take $349.50 of the plaintiff's money. Their only outlay was the costs of the sale, which the plaintiff in his bill offers to pay.

It is a well settled rule that equity will lie in such circumstances. In *Kinsley* v. *Davis*, 74 Maine, page 502 it is said: "Payment of a debt secured by a mortgage may operate as a discharge or an assignment as may best serve the purposes of justice, even though the mortgage be finally discharged." This case also holds that "an assignment of a mortgage to one who had assumed its payment would not avail as against the party with whom the agreement was made." In the case before us the plaintiff assumed the payment of the mortgage debt, but we have already seen that there was a mutual mistake in regard to the existence of the attachment, which would have relieved the plaintiff in equity, hence the agreement to assume must be treated as cancelled.

It is also well settled that equity will not declare the cancellation of a discharge of a mortgage when it will "result prejudicially to third persons." *Cobb* v. *Dyer*, 69 Maine, 494; nor when "rights of third parties have intervened." *Kinsley* v. *Davis*, 74 Maine, 498, 501; *Cross* v. *Beane*, 81 Maine, 525. Subrogation will not be allowed "so as to do injury to the rights of others." *Stevens* v. *King*, 84 Maine, 291.

What rights of the bank, then, would the subrogation of the plaintiff to the rights of the mortgagee, infringe?

The defendant contends that, on an execution sale, "the law will not relieve the purchaser from a defective title and partial failure of consideration as, for instance, an outstanding incumbrance," and cites *Dresser* v. *Kronberg*, 108 Maine, 423. "So the execution to the amount of $700 has been satisfied, that is, the bank has lost the right to collect $700 from Cora M. Everett." The opinion cited does not go to the extent claimed. The language does not, and the spirit is entirely the other way. That case, to be sure, involved an entire failure of title to the property sold, but the logic and reasoning apply with equal force to a partial failure, the test being, not a partial failure of title, but the availability of placing the interested parties in statu quo. After discussing the right of the execution creditor, who is also the purchaser at the execution sale, to a new execution for the full amount, the court say: "Suppose the judgment creditor bids in the property at the sale and subsequently it is taken from him as the property of another. Clearly a new execution for the full amount would be granted." *Piscataquis County* v. *Kingsbury*, 73 Maine, 326. The situation is no different if the purchase has been made by another and the creditor has repaid the purchase price either voluntarily or involuntarily. The original purchase was under a mistake of facts and the remedy here asked puts the parties in statu quo. We are unable to discern why this principle does not apply to a partial failure of consideration as well as to a total failure, provided the machinery of the law can be so applied as to put the parties in statu quo. If this can be done, we think the plaintiff should be subrogated to the rights of the mortgagee.

Predicated upon the assumption of subrogation, that the mortgage was still unpaid and valid, the bank held on the day of the sale, by its attachment, a lien on the equity of redemption, only. Having sold the property and not the equity, as a matter of law the bank took nothing by the sale. There was accordingly as a matter of law a total failure of the consideration paid by the bank, and their execution was in no part satisfied, hence their case comes within *Piscataquis County* v. *Kingsbury*, 73 Maine, 326. But we think that equity requires the plaintiff to pay the bank whatever the equity, upon the day of the sale, was worth. He should also pay the costs of the sale. This would put the bank in statu quo so far as the plaintiff and the

bank are concerned. But another question arises. Notwithstanding the bank choose to sell the property of Mrs. Everett instead of proceeding against her personal property non constat that she did not have personal property with which she might have been able to respond, hence this question is open; but, if the bank, in view of its former proceeding, would avail itself of this defense, the burden is upon them to prove it. Upon this state of facts: Bill sustained. Case remanded. Defendants to execute and deliver release deed to plaintiff covering same interest derived under execution sale upon payment of the several sums to be determined by a single Justice or master as follows:

(1) Value of the equity of redemption in Mrs. Everett at date of sale.

(2) Costs of sale instead of above if equity had no value or if costs exceed value.

(3) Amount collectible from her at time of sale less amount now collectible. On this issue burden to be on defendants.

(4) Interest on sums payable from date of sale to date of payment.

Decree in accordance with this opinion.

STATE *vs.* FRED DAMEREST.

Knox. Opinion March 20, 1919.

Jurisdiction of Municipal Courts.

Complaint and warrant under R. S., Chap. 45, Sec. 34, alleging the offense to have been committed at Swans Island, in the County of Hancock. The complaint was before the Municipal Court of the City of Rockland, Knox County. Objection was raised to the jurisdiction of the Court in Knox County.

Held:

The jurisdiction of a court in criminal matters is confined to offenses committed in the county, unless a special statute extends it beyond.

Complaint and warrant under R. S., Chap. 45, Sec. 35. Respondent filed demurrer with right to plead anew if demurrer was overruled. Presiding Justice overruled demurrer and respondent filed exceptions. Exceptions sustained. Demurrer adjudged good.

Case stated in opinion.

Henry L. Withee, County Attorney, for State.

A. S. Littlefield, for respondent.

SITTING: CORNISH, C. J., SPEAR, HANSON, WILSON, DEASY, JJ.

SPEAR, J. This is a complaint against the defendant for having in his possession a certain number of short lobsters, and comes up on demurrer. The offense is alleged to have been committed at Swans Island in the County of Hancock. The complaint was before the Police Court of the City of Rockland, and is now pending in the Supreme Court in the County of Knox.

Objection is raised to the jurisdiction of the court in Knox County. We think it valid. R. S., Chap. 45, Sec. 34, provides that the several municipal and police courts have jurisdiction under the seventeen preceding sections, and further, that "any warrant issued by any such court shall cover offences occurring in the county where such court is established, or in any adjoining county."

The offense for the unlawful possession of short lobsters is found in Sec. 35, of Chap. 45. The jurisdiction of a court in criminal matters is confined to offenses committed in the county unless a special statute extends it beyond. The special provisions in this chapter, extending jurisdiction, apply to the seventeen sections preceding section 34, but do not apply to section 35.

It is accordingly apparent upon the face of the papers that the court in Knox County has no jurisdiction.

Demurrer sustained.

CHARLES W. STARKEY *vs.* WILLARD S. LEWIN, et al.

Aroostook. Opinion March 24, 1919.

General rule as to the refusal of court to give certain requested instructions being subject to exceptions.

Questions, the answers to which involve the conclusions the jury is to find from all the evidence are objectionable and should be excluded.

Where an erroneous instruction is given or a correct instruction is refused, if the erroneous instruction or refusal may have misled the jury, and the court is not clearly satisfied that under a correct instruction a different verdict could not have been given, or, if given, could not be permitted to stand, exceptions thereto must be sustained.

Action of assumpsit to recover the value of certain goods delivered to a person other than defendant Lewin. Defendants filed plea of general issue. Verdict for plaintiff in the sum of $430. Defendant filed motion for new trial; also exceptions to certain rulings of presiding Justice. Exceptions sustained.

Case stated in opinion.

Doherty & Tompkins, for plaintiff.

Pierce & Madigan, and Shaw & Thornton, for defendants.

SITTING: CORNISH, C. J., SPEAR, HANSON, WILSON, DEASY, JJ.

WILSON, J. This is an action of assumpsit to recover for certain supplies delivered by the plaintiff to the defendant Horton, who was engaged in conducting a lumber operation for defendant Lewin. The jury found a verdict against the defendant Lewin for the sum of four hundred and thirty dollars.

The case comes before this court on exceptions of the defendant Lewin to the admission of certain testimony and to a certain part of the Judge's charge, and to the refusal of the presiding Justice to give a certain requested instruction, and also on motion for a new trial on the usual grounds. We shall consider only the exceptions.

The only issue was, did the defendant Lewin promise to pay for the goods delivered to Horton; or to put it in another form, on whose credit were the goods sued for delivered. If upon an original promise of Lewin before delivery, as claimed by the plaintiff, then Lewin was, of course, liable; but if in any part upon the credit of Horton, Lewin was not liable, the alleged promise, if any was made, being an oral one. 20 Cyc., p. 165c. Chitty on Contracts *442.

In the course of the trial the plaintiff's counsel asked him the following question: "Upon the strength of whose credit did you deliver these goods?" Against the defendant Lewin's objection he was permitted to answer: "I gave them on Mr. Lewin's credit." To this ruling the defendant Lewin excepted on the ground that it involved the issue which the jury were to determine from all the evidence.

We are of the opinion that the defendant's contention is correct in principle and in accord with the authorities, and that the correct rule is laid down in *Walker* v. *Moors*, 125 Mass., 352. It would have been permissible as held in *Folsom* v. *Skofield*, 53 Maine, 171, to have inquired of the plaintiff as to whom he intended to give credit when he delivered the goods, but to inquire on whose credit they were delivered involved not only his own intent, but the defendant Lewin's acquiescence, which was the very point in dispute for the jury to determine. *Pope* v. *Medill*, 12 N. Y. S., 306; *Drew* v. *Kenfer*, 30 N. Y. S., 733.

However, since the real issue, as stated above, was, did the defendant Lewin promise to pay for these goods at all, except upon conditions which he claims were never fulfilled, we deem more prejudicial

to him the refusal of the court to give the following requested instruction: "The plaintiff cannot recover upon the ground that Lewin received the benefit of the goods sold by Starkey, unless you find that Lewin agreed to pay for them;" or to state the necessary inference to be drawn from the refusal: If you find that Lewin received the benefit of the goods delivered to Horton, Lewin is liable, even though he did not agree to pay for them.

The court saying: "I cannot give you that in the face and eyes of the Colbath Seed case" (referring to 112 Maine, 277) "I call your attention again to the fact," and after again reading the requested instruction said: "I must decline to give you that statement." To appreciate the probable mischievous effect on the jury, it is only necessary to state briefly the contentions of the parties.

The plaintiff's contention is, that prior to the delivery of the goods sued for, the defendant Lewin over the telephone and in conversation on the street told the plaintiff to let Horton have such goods as he wanted for his operation and he, Lewin, would pay for them. It was also contended by counsel that liability on the part of Lewin might also arise from the furnishing of the goods to Horton, since Horton was at the time engaged in conducting a lumbering operation for Lewin and Lewin was indirectly, at least, benefitted thereby.

The defendant Lewin's contention is that he only agreed to pay for the first bill of goods delivered to Horton to enable him to get started on his contract, which goods it is admitted have already been paid for and are not a part of the goods sued for in this action; and that the conversation on the street went no further than that, while he would not be personally responsible for Horton's bills, if the plaintiff would present bills every thirty days and Horton would approve and order him to pay them, and there was money due Horton under his contract, he would see that they were paid. No contention was made by him, or his counsel, that, if any promise by him was made, it was a collateral one, and, therefore, was within the statute of frauds. In short, his sole and entire defense was that he made no such promise as claimed by the plaintiff.

There was no evidence in the case of any independent promise by Lewin to pay for the goods in consideration of any possible benefits resulting to him, except the alleged original promise to pay before delivery, which, if made as alleged by the plaintiff, needed no accruing benefits to render it binding, even though not in writing.

The court, however, in its charge called the attention of the jury to the claim of the plaintiff that the benefit received by Lewin from his employee or contractor having the necessary supplies for his operation might be a sufficient consideration for a promise that would be outside the Statute of Frauds under the rule laid down in the *Colbath Seed Case*, 112 Maine, 277. And although in the course of the instructions to the jury upon this point the words promise and promissor were used as applied to the defendant Lewin, no instructions were given as to whether the indirect benefits resulting from the relations of the parties in this case were sufficient to form a consideration for any promise to pay under the doctrine laid down in the Colbath Seed case. See *Hardware Co.* v. *Goodman*, 68 W. Va., 462. Nor were they instructed except by inference that in such cases an express promise was necessary.

While the refusal to give the requested instruction was no doubt due to some inadvertence, we cannot help but feel that the jury notwithstanding the prior instructions of the court, may have acted upon the only inference to be drawn from the refusal, viz: That if any benefits were received by the defendant Lewin from the furnishing of these supplies to Horton, no promise or agreement to pay on his part was necessary to render him liable in this action; and therefore the jury may have failed to give due consideration to the real defense set up by Lewin, that he never agreed to be responsible for all goods delivered to Horton.

While we cannot say that the jury would have arrived at a different verdict if the requested instruction had been given, they might. The defendant Lewin contends that the evidence discloses that the goods were not delivered solely on his credit, nor even on his credit at all. That they were originally charged on the plaintiff's books to the Seymour Horton Lumber Account, and that his name did not appear on the plaintiff's books until after August 1st, 1916, while the account began in January, 1916; that when his name was inserted on the books, as the bookkeeper testifies, it was done on the plaintiff's order "to make it stronger" and that when the bills were sent out they were made out in the name of and given to the defendant Horton as appears by the exhibits in the case.

The preponderance of the evidence, we think, is not overwhelming either way and would warrant a verdict for either party according

as the testimony of the witnesses was believed by the jury. The defendant Lewin, therefore, has a right to consider himself aggrieved by the refusal to give the requested instruction. *Page* v. *Alexander*, 84 Maine, 83, 84.

It is true that when it is clear to the court that no other verdict could be rendered under correct instructions, exceptions will not be sustained to erroneous rulings. We think, however, the correct rule is found in *Noyes* v. *Shepherd*, 30 Maine, 178, 179; *Thatcher* v. *Jones*, 31 Maine, 534; *Hopkins* v. *Fowler*, 39 Maine, 568, 570; *King* v. *Ward*, 74 Maine, 349, 351; *Page* v. *Alexander*, 84 Maine, 83, 84; *State* v. *Houlehan*, 109 Maine, 285. If the erroneous instruction or refusal *may* have misled the jury, and the court is not clearly satisfied that under correct instructions a different verdict could not have been given, or if given, could not be permitted to stand, the exceptions should be sustained.

Entry must be,

Exceptions sustained.

MATTIE T. COTTING, Appellant, *vs.* ESTATE OF ALONZO TILTON

Penobscot. Opinion April 6, 1919.

Probate appeals. Rule as to the findings of the Justice of Supreme Court of Probate in matters of fact being conclusive. Rule as to his findings being reviewable on exceptions.

Appeal from and exceptions to the decree of a Justice of the Supreme Court of Probate.

1. There is no provision of statute for an appeal from a decree of the Justice of the Supreme Court of Probate and such attempted appeal cannot be entertained or considered.
2. Exceptions to the decree of a Justice of the Supreme Court of Probate raise only questions of law. If as matter of law there is no evidence to sustain the decree then the exceptions must be sustained, otherwise overruled.

Appeal from the allowance of an executor's account. Judgment in accordance with opinion.

Case stated in opinion.

Charles H. Bartlett, for appellant.

Mayo & Snare, for appellee.

SITTING: CORNISH, C. J., SPEAR, PHILBROOK, DUNN, MORRILL, WILSON, DEASY, JJ.

PHILBROOK, J. This cause originated in the Probate Court of Penobscot County. The first account of the executor having been allowed, the appellant, interested as heir at law, appealed from the decree of the Probate Court to the Supreme Court of Probate under the provisions of statute in such case made and provided. In the latter tribunal issues of fact were presented to a jury, the same having been framed by the presiding Justice at the request of the appellee.

At the close of the testimony counsel for the appellant moved the court to enter judgment in her favor on the ground that the evidence was not sufficient to warrant the payment of certain items in the executor's account, the allowance of which payment gave rise to the appeal. The presiding Justice overruled this motion, to which ruling the appellant took exceptions. The trial of the issues resulted in jury findings unfavorable to the contentions of the appellant but favorable to the grounds upon which the decree appealed from was based. Following the advisory verdict of the jury the presiding Justice ruled that the propriety of paying the items in dispute had been sustained by the burden of proof, and thereafterward signed a decree affirming the decree of the Probate Court from which the appeal had been taken. The record, as disclosed by the bill of exceptions, is, "And the plaintiff appellant is aggrieved at the ruling of the presiding Justice in overruling the motion as aforesaid, and in his decision as a matter of law, and excepts thereto and prays that her exceptions may be allowed."

In addition to the bill of exceptions, filed and allowed, the appellant also filed, as part of her case, the following appeal:

"After the close of the testimony and arguments by counsel, the presiding Justice decided (following the advisory verdict of the jury) that both the claimants had sustained the burden of proof to raise an implied promise on the part of Alonzo Tilton to pay Clara E. Johnson

the sum of $3120, as claimed, and Camillus K. Johnson the sum of $504, as claimed, and allowed both of said claims.

The plaintiff is aggrieved by the decision of the court in this respect, viz:

1st. As to the claim of Clara E. Johnson, the circumstances disclosed by the evidence are not sufficient upon which to base an implied promise of payment.

2nd. Even if so, the amount allowed is excessive.

3rd. As to the claim of Camillus K. Johnson, the circumstances disclosed by the evidence are not sufficient upon which to base an implied promise of payment.

4th. Even is so, the amount allowed is excessive.

Wherefore, the plaintiff appeals to the Law Court from the decision of the presiding Justice and prays that her appeal may be allowed."

THE APPEAL. It will be observed that we are now about to discuss the appeal from the Supreme Court of Probate to the Law Court, not the appeal from the Probate Court of original jurisdiction to the Supreme Court of Probate. Counsel on both sides of the case, in their briefs, have apparently assumed that this appeal is, in effect, a motion for a new trial, but we do not feel justified in concurring with that assumption.

Courts of Probate are wholly creatures of the legislature, *Taber* v. *Douglass*, 101 Maine, 363; they are of special and limited jurisdiction, their proceedings are not according to the course of the common law, *Bradstreet* v. *Bradstreet*, 64 Maine, 204. A Supreme Court of Probate is created by R. S., Chap. 67, Sec. 31, as an Appellate Court, its jurisdiction and proceedings are clearly defined by statute. While provision is made by statute for appeal from the Probate Court of original jurisdiction to the Supreme Court of Probate it is significant that no provision is made for any appeal from the Supreme Court of Probate, itself an Appellate Court, to the Law Court. An appeal from an Appellate Court would be somewhat anomalous and such a proceeding, in the absence of express conditions, cannot be presumed as allowable practice. The right of appeal from any decree or order of the Probate Court is conferred by statute only and can extend no further than the statute provides. *Sprowl* v. *Randell*, 108 Maine, 350. We are of opinion that the appeal cannot be considered.

THE EXCEPTIONS. The dispute arises over the allowance of the payment of $3120.00 by the executor to his wife, Clara E. Johnson, for her personal services in nursing, waiting on and caring for the deceased testator, and washing, ironing and mending his clothing for a period of six years; and over the allowance of the private claim of the executor, Camillus K. Johnson, for board and lodging of the deceased testator for a period of three hundred twelve weeks, at three dollars per week, amounting to $936.00, on which credit was given for use and occupation of the house of the deceased during the same period, six years, at $72.00 per year, leaving a balance of $504.00. Both these items were allowed by the Probate Court of original jurisdiction, a jury found a verdict sustaining the allowance, and the presiding Justice in the Supreme Court of Probate affirmed the decree of the court from which the appeal was taken.

"The findings of the Justice in the Supreme Court of Probate in matters of fact are conclusive, if there is any evidence to support them. And when the law invests him with the power to exercise his discretion, that exercise is not reviewable on exceptions. If he finds facts without evidence, or if he exercises discretion without authority, his doings may be challenged by exceptions." *Palmer's Appeal,* 110 Maine, 441; *Gower, Applt.,* 113 Maine, 156. An exception like the one under consideration "can only raise the question whether there was any evidence upon which the ruling and finding could be based. If there was any such evidence, its sufficiency was a question of fact upon which the finding of the court is conclusive, not to be reviewed by the law court." *Eacott, Appellant,* 95 Maine, 522.

It is not claimed that there was any express contract between the deceased, and either Mr. or Mrs. Johnson, for payment of the sums claimed, but both claimants rely upon implied promises. The legal rules in such cases are well settled. "There having been no express agreement to pay, it was incumbent on the plaintiff to prove that the services were rendered by the plaintiff either in pursuance of a mutual understanding between the parties that she was to receive payment, or in the expectation and belief that she was to receive payment and that the circumstances of the case and the conduct of the defendant justified such expectation and belief. It is not enough to show that valuable service was rendered. It must be shown also that the plaintiff expected to receive compensation, and that the defendant's intestate, so understood, by reason of a mutual understanding or

otherwise, or that under the circumstances he ought so to have understood. Both propositions are essential and must be proved." *Leighton* v. *Nash*, 111 Maine, 525. As applicable to these rules what does the record disclose?

CLAIM OF MRS. JOHNSON. Holding fast to the rule of conclusiveness of the findings of the presiding Justice upon questions of fact, if there be any evidence to support those findings, and bearing in mind that the value of the services, the circumstances of their rendition, the right to expect payment, and understanding on the part of the deceased that payment should be made, are all questions of fact, we are of opinion that a careful examination of the record discloses some supporting evidence on all these questions and thus far the decree of the presiding Justice stands.

CLAIM OF MR. JOHNSON. An equally careful study of the record fails to satisfy us that the claim of Mr. Johnson for allowance for board and lodging of the deceased is sustained. In this respect the decree of the presiding Justice must be modified.

Claim of Clara E. Johnson allowed.

Claim of Camillus K. Johnson disallowed.

Case remanded to the Supreme Court of Probate where decree will be drawn and executed in accordance with this opinion.

DUNN, J. } Do not concur in respect to
MORRILL, J. } allowance to Clara E. Johnson.

CLARENCE B. MERCHANT'S CASE.

Franklin. Opinion April 8, 1919.

Interpretation of R. S., Chap. 50, Sec. 16, as bearing upon the meaning of the word "lost" and the phrase "lose use of" as used in the statute.

Claim under the Workmen's Compensation Act. The injury consisted of a laceration of the back of the left hand which affected the extensor muscles controlling the third and fourth fingers, and rendered them practically useless.

The only issue is whether the claimant has "lost" these two fingers within the contemplation of R. S., Chap. 50, Sec. 16, and should receive the compensation specified therein or whether he has suffered a partial disability and should be compensated as specified in Section 15.

Held:

1. That this is a question purely of statutory construction and the word "loss" must be interpreted in the sense in which it is commonly understood, taking into consideration the context and the subject matter.
2. That under Section 16, which provides for compensation for the "loss" of a member or of a portion of a member, the statute contemplates actual physical severance, and not merely loss of use.
3. That under this construction the plaintiff is not entitled to the compensation which might be awarded for the loss of two fingers, and the decision of the Chairman of the Industrial Commission was without error.

Appeal from the decision of the Industrial Commission. Judgment in accordance with opinion.

Case stated in opinion.

Sumner P. Mills, for applicant.

Charles P. Conners, and L. E. Henry, for respondents.

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

CORNISH, C. J. This claimant under the Workmen's Compensation Act was an employee of the Maine and New Hampshire Granite Corporation and met with an accident on November 21st, 1917. The injury consisted of a laceration of the back of the left hand, which affected the extensor muscles controlling the third and fourth fingers,

the third finger being drawn toward the palm of the hand at an angle of about forty-five degrees, and the fourth finger at an angle of about ninety degrees. These two fingers were thereby rendered practically useless.

It is agreed that the injury arose out of and in the course of the employment and that the earning capacity of the claimant, who is a painter, has not been diminished by the accident. The real and only issue is whether the claimant has "lost" these two fingers within the contemplation of R. S., Chap. 50, Sec. 16, and should receive the compensation specified therein, to wit: "For the loss of the third finger, one-half the average weekly wages during eighteen weeks. For the loss of the fourth finger, ... one-half the average weekly wages during fifteen weeks;" or whether he has suffered a partial disability and should be compensated as provided in Section 15, the basis of compensation being the difference in his earning capacity before and after the accident.

The claimant contends for the former construction and urges that the loss of the use of the third and fourth fingers must be construed as a loss of those fingers which entitles him to the specified amounts, without regard to the question whether his earning capacity has or has not been lessened. The Chairman of the Industrial Commission overruled this contention and fixed the amount of damages under Section 15. The correctness of this ruling is before this court in proper proceedings so far as the record shows and we think it must be sustained.

This question is one solely of statutory construction and in construing this statute, the words are to be interpreted in the sense in which they are commonly understood "according to the common meaning of the language." R. S., Chap. 1, Sec. 6, paragraph 1, taking into consideration the context and the subject matter relative to which they are employed. Let us apply this familiar rule.

Apart from the context of the statute, the "loss" of a member in the ordinary acceptation of the term implies a physical separation. To lose, in its primary sense, is "to part from or be separated from," Standard Dic. When in ordinary conversation it is said that one has lost his hand or his arm or his leg, nothing else is understood than an actual severance. It is true that for the sufferer the loss of the use of a member may be equivalent to the loss of the member itself so long as the disuse remains, but the two things are quite distinct and if one

has lost the use of a member it would be so described and never as the loss of the member. "It may be the disability would be as great as though the hand or foot was gone but the Courts have no authority to extend the terms of the law beyond its plain provisions," *Bigham* v. *Clubb*, 42 Texas, Cir. App., 312, 95 S. W., 675, a case involving exemption from the payment of a poll tax because of the "loss" of a hand or foot.

Analyzing the statute under consideration, we find that the common meaning of the language is preserved. Sec. 14 of R. S., Chap. 50, covers compensation for total disability, that is, while the actual incapacity for work is total, and prescribes the method of computation. There is added a provision as to what might be termed, presumptive total incapacity: "In the following cases, it shall for the purposes of this act, be conclusively presumed that the injury resulted in permanent total disability, to wit: The total and irrevocable loss of sight in both eyes, the loss of both feet at or above the ankle, the loss of both hands at or above the wrist, the loss of one hand and one foot, an injury to the spine resulting in permanent and complete paralysis of the legs or arms" etc. This language is most significant as distinguishing sharply between loss and loss of use and as specifying the one or the other according as the one or the other is intended. Thus the first clause does not say the loss of both eyes, which would mean removal, but the total and irrevocable loss of sight in both eyes, which is but another expression for total loss of use. The loss of the eye is one thing, the loss of sight which means the loss of the use of the eye is another. The second clause provides for the loss of both feet at or above the ankle. This admits of no other construction than an amputation at or above a certain point. So of the next clause "the loss of one hand at or above the wrist;" while the last clause "an injury to the spine resulting in permanent and complete paralysis of the legs or arms" again recognizes the loss of use as distinguished from actual loss. Otherwise it might simply have read the loss of the legs or the arms.

Section 15 provides for compensation in case of partial disability. In Sec. 16, under which the plaintiff claims, the word "loss" is used in the same sense as in Section 14, and as there, is equivalent to severance or amputation. That Section is entitled "schedule of accidents provided for" and again certain accidents are arbitrarily specified as entitling the injured party to a certain fixed sum during a certain

fixed number of weeks, and are deemed to create a total disability for the period specified, whether they do in fact or not. They are injuries of such a nature that they are made to automatically carry with them certain fixed amounts for a stated period, viz: "For the loss of a thumb, one-half the weekly wages during fifty weeks" and then follow the amounts for loss of the first finger, the second finger, the first toe, the second toe, etc.

It would be presumed that the word "loss" should have the same meaning in this section as in Section 14, as they are parts of the same act, even if there were no internal and independent evidence to confirm it. But such evidence exists. For instance, not only are there provisions for loss of a thumb, of a finger and of a toe, but also for the loss of the first phalange of a thumb, of a finger or of a toe which shall be considered as a loss of one-half of such thumb, finger or toe, while the loss of more than one phalange shall be considered the loss of the entire thumb or finger or toe. This, as phrased, must contemplate severance. Here too, as in Section 14, the idea of severance is apparent from the several clauses concerning the loss of an arm or any part above the wrist, for the loss of a leg or any part above the ankle, etc. And in the last clause the distinction is again clearly made when it specifies that "for the loss of one eye, or the reduction of the sight of an eye. . . . . to one-tenth of the normal vision" one-half the average wages for a hundred weeks shall be awarded. Were there no difference between loss and loss of use, there was no need of this careful phrasing. Throughout these sections when loss of use without removal or severance is contemplated, it is so stated in unambiguous words and when "loss" is used it means loss in the ordinary acceptation of the term, that is, the physical loss of a member.

It may well be that in fixing an arbitrary compensation for the loss of these various parts the Legislature purposely refrained from extending these provisions to loss of use in all but the two excepted instances before referred to, for the reason that a use which might be deemed lost at the beginning might be regained in whole or in part long before the expiration of the arbitrarily fixed period, while the loss by severance is irreparable. Some uncertainty might exist with regard to the one, none in regard to the other.

Our attention has been called by the claimant to various cases where a loss of use has been deemed equivalent to loss. These cases, however, arose under certificates issued by fraternal beneficiary societies, or policies of insurance issued by health or accident associations and the plaintiff's rights were based upon the language of the particular contracts. Such contracts are always held to be construed in favor of the insured.

No case has been cited to us, nor have we found any arising under the Workmen's Compensation Act which holds that the "loss of use" should be given the full effect of "loss." On the other hand, there is approved authority sustaining our conclusion under Workmen's Compensation Acts. *Packer* v. *Olds Motor Works*, 195 Mich., 497, 162 N. W., 80; *Adomites* v. *Royal Furniture Co.*, 196 Mich., 498; *Northwestern Fuel Co.* v. *Industrial Commission*, 161 Wis., 450; Ann. Cas., 1918 A 533, and extended note, the introduction of which is as follows: "The general rule deducible from the cases cited throughout this note is that unless a Workmen's Compensation Act provides that when a member is so impaired as to be permanently incapable of use compensation shall be awarded as for the 'loss' thereof, 'loss' of a member is construed to mean loss by severance only." See also the definitions in *Grammici* v. *Zinn*, 219 N. Y., 322.

Our conclusion, therefore, is that the ruling of the Chairman of the Industrial Commission was without error and the entry must be

Appeal dismissed.

CORNELIUS J. RUSSELL, Pet'r, *vs.* FERDINAND E. STEVENS.

CHARLES P. LEMAIRE, Pet'r, *vs.* JOHN L. READE.

WILLIAM P. LAMBERT, Pet'r, *vs.* NATHANIEL P. GOULD.

JOHN D. CLIFFORD, JR., Pet'r, *vs.* ALBERT E. VERRILL.

Androscoggin. Opinion April 8, 1919.

Interpretation of R. S., Chap. 7, Secs. 87, 88. Burden of proof under same. Rule as to casting out entire vote of ward where some illegal practice had been permitted therein.

These four petitions were brought under R. S., Chap. 7, Secs. 87 to 91, the petitioners claiming that they were elected respectively to the offices of Sheriff, Clerk of Courts, Register of Deeds and County Attorney of Androscoggin County at the State election held on September 9, 1918.

Outside of ward four in the City of Auburn, the petitioners had each a plurality of the votes cast in the County. The tabulation in ward four gives each of the remonstrants a plurality. Including all the ballots in ward four, the net result of the tabulation in the entire county is as follows:

Stevens'	plurality	145
Reade's	"	66
Gould's	"	85
Verrill's	"	48

The total number of the ballots in the ballot boxes in ward four was found to be 456. Sixty of these were spurious, leaving 396 legal ballots, and as one of these was cast by a party who impersonated another, the actual number of legal ballots was 395.

Held:

1. That the fact that 61 ballots out of a total of 396 were illegally cast, does not cause the rejection of the entire vote of the ward. Legal voters are not to be disfranchised for such a reason.
2. Even after such fraud was discovered, the burden of proof was still upon the petitioner in each case to show that he received a sufficient number of legal ballots in ward four to give him a greater number of votes throughout the County than his opponent.
3. The petitioners having offered no evidence as to the actual number of votes received by them in ward four, have failed to show that they have been elected and that they are entitled to the offices claimed by them. The burden of prov-

ing their election rests upon the petitioners throughout the case, and at no stage shifts to the respondents. The contestants here cannot both oust the defendants and seat themselves, unless they prove that they were elected by the legal vote of the entire county of Androscoggin. The legal vote outside of Ward 4 is not sufficient. This the petitioners failed to do.

Bill in equity brought under R. S., Chap. 7, Sec. 87. Cause was heard upon bill, answer and proof, and from the decision of the sitting Justice an appeal was entered according to R. S., Chap. 7, Sec. 89. Judgment in accordance with opinion.

Case stated in opinion.

McGillicuddy & Morey, W. R. Pattangall, and H. E. Locke, for petitioners.

Harry Manser, for Ferdinand E. Stevens, John L. Reade and Albert E. Verrill.

Edward R. Parent, for Nathaniel P. Gould.

SITTING: CORNISH, C. J., SPEAR, HANSON, PHILBROOK, DUNN, WILSON, DEASY, JJ.

CORNISH, C. J. These four petitions were brought under R. S., Chap. 7, Secs. 87-91, the petitioners claiming that they were respectively elected to the offices of Sheriff, Clerk of Courts, Register of Deeds and County Attorney of Androscoggin County at the State election held on September 9, 1918. The cases involved the same questions and were tried together. After a full hearing, all the petitions were dismissed by the single Justice. They are now before us on appeal. As presented to the single Justice the issues were two: First: As to the legal counting of certain disputed ballots; Second: As to alleged fraudulent practices in Ward 4 in the City of Auburn and the legal effect thereof.

Under the first issue, one hundred and eighty-four disputed ballots were submitted to the single Justice and were passed upon by him. His findings and the reasons therefor are stated at length in his written decision. So far as this appeal is concerned, and the questions argued before us, his determination in all these disputed ballots, except possibly in eleven, is acquiesced in by the parties, and the consideration of these eleven becomes unnecessary under the conclusion arrived at on the other and main issue of the case.

The result of the Justice's tabulation in the entire county, not including the ballots from said Ward 4, is as follows:

FOR SHERIFF:

C. J. Russell	4779
Ferdinand E. Stevens	4775
Russell's plurality	4

FOR CLERK OF COURTS:

Charles P. Lemaire	4802
John L. Reade	4730
Lemaire's plurality	72

FOR REGISTER OF DEEDS:

William P. Lambert	4780
Nathaniel P. Gould	4726
Lambert's plurality	54

FOR COUNTY ATTORNEY:

John D. Clifford, Jr.	4823
Albert E. Verrill	4736
Clifford's plurality	87

The tabulation of all the votes in Ward 4, by the Justice, is a follows:

FOR SHERIFF:

Ferdinand E. Stevens	293
C. J. Russell	144
Stevens' plurality	149

FOR CLERK OF COURTS:

John L. Reade	292
Charles P. Lemaire	154
Reade's plurality	138

FOR REGISTER OF DEEDS:

Nathaniel P. Gould	291
William P. Lambert	152
Gould's plurality	139

FOR COUNTY ATTORNEY:

Albert E. Verrill	288
John D. Clifford, Jr.	153
Verrill's plurality	135

Including all the ballots of Ward 4, as above, the net result of the tabulation in the county is as follows:

Stevens'	plurality	149- 4 = 145
Reade's	"	138-72 = 66
Gould's	"	139-54 = 85
Verrill's	"	135-87 = 48

This brings us to a discussion of the legal effect of the illegal ballots and the fraudulent conduct in Ward 4. When the ballot-box was opened at the close of the polls, it was found to contain 456 ballots. The number of names checked on the incoming list was 396, and that represents the number of voters who voted and therefore the legal number of ballots cast. The ballot-box therefore contained these sixty spurious votes. The single Justice found that this result was rendered possible by utter disregard of the election laws on the part of ward officers and election clerks, and that these spurious ballots were fraudulently deposited in the ballot-box with the knowledge and connivance, if not with the active participation of the warden, who did not see fit to testify in the case, although present at the hearing.

The petitioners, in their petitions, base their claims to office upon the proposition that because of these irregularities and fraudulent practices in Ward 4, the entire vote of said ward should be rejected, the legal and illegal votes being so commingled that the exact legal vote cannot be determined.

This was the legal issue as presented to the single Justice at the time of the hearing, and upon this point the Justice held as follows:

"By proof of these fraudulent acts the record and return of this election in Ward 4 in the City of Auburn have been impeached. Their value as legal evidence of the result in that ward has been destroyed; their probative force is gone. *Attorney General* v. *Newell*, 85 Maine, 273, 276; *People ex rel. Judson* v. *Thatcher*, 55 N. Y., 525; 14 Amer. Rep., 312; McCrary on Elections, 4th ed., Sec. 569, 570. The cases cited on brief of petitioners' counsel amply sustain this conclusion.

But the case shows that there were 395 voters in that ward who legally cast their votes at that election; at least there is no evidence to show otherwise; only one name of the 396 checked on the incoming check lists, has been shown to have been fraudulently checked, and that through impersonation of the voter by another. We do not know what ballots these legal voters cast, or for whom they voted; the fraudulent ballots carry no marks. I cannot assume that they were all cast for the Republican candidates in these cases, although if I were to do so, all the respondents except Mr. Verrill would be shown to be elected. Some of these fraudulent ballots may have been cast for Democratic candidates, and some may not have been cast for any party to these petitions.

The petitioners contend that the true vote, therefore, cannot be ascertained and that the entire vote of the ward must be rejected. I cannot accede to this contention. The vote cast in that ward becomes a matter of proof by other evidence than the record and return. In a leading and oft cited case, it is said, 'In election cases, if the return is discredited, so that it is no longer evidence of the right of the party claiming under it, then the question who received the majority of the votes is to be ascertained by other legal proof. The vote of the district or precinct to which the return relates is not to be disregarded. The electors ought not to be disfranchised because no return is made, or because it has been rendered valueless by the fraud or mistakes of others. . . . . In this case if the return was

rejected, the parties were remitted to other proof to ascertain the result of the election in the disputed district.' *People ex rel. Judson* v. *Thatcher,* supra, 14 Amer. Rep., at page 321. So in the instant cases I think that the value of the record and return as evidence having been destroyed, the vote of the entire ward is not to be rejected, but the parties were remitted to other evidence. The practice of calling the electors themselves to testify has been approved even under secret ballot laws, the personal privilege of the witness to refuse to disclose for whom he voted being respected. *People ex rel. Smith et al.* v. *Pease,* 27 N. Y., 45; *People ex rel. Judson* v. *Thatcher,* supra; *Reid* v. *Julian,* 2 Bart., 822, cited at length in McCrary on Elections, 4th ed. sec. 572."

The petitioners now abandon the claim that the entire vote of Ward 4 should be rejected, and accede to the rule of law as laid down by the Justice, which in our opinion, was correctly stated. Legal voters are not to be disfranchised by such a method. But the petitioners now contend that under the circumstances, the return being discredited, the burden of proving the number of legal ballots cast in Ward 4 was upon the respondents and not upon the petitioners, and as the respondents introduced no testimony on this point, the petitioners were entitled to judgment because outside of Ward 4 they had a plurality. This question of the burden of proof became the ultimate ground of decision, and on this point the ruling of the sitting Justice and the reasons therefor were stated at length:

"Upon each petitioner falls the burden of showing that he was elected to the office which he claims. Before the Court can enter judgment in his favor it must appear 'that the petitioner has been elected, and is entitled by law to the office claimed by him.' It is not sufficient to show that the incumbent was not elected; the petitioner must show that he himself was elected and is entitled by law to the office. *Benner* v. *Payson,* 110 Maine, 204, 207; *Libby* v. *English,* 110 Maine, 449, 459; *Murray* v. *Waite,* 113 Maine, 485, 492. Prior to the enactment of the statute upon which these proceedings are based, 'the only existing process by which the right of one unlawfully holding an office could be inquired into, was by quo warranto. This writ issues in behalf of the State against one who claims or usurps an office to which he is not entitled, to inquire by what authority he supports his claim or sustains his right. The proceeding is instituted by the attorney general on his own motion or at the relation of any

person, but on his official responsibility. . . . . It removes the illegal incumbent of an office, but it does not put the legal officer in his place. It is insufficient to redress the wrongs of one whose rights have been violated. To restore a person to an office from which he has been unlawfully excluded, the proper process is by mandamus. By quo warranto the intruder is ejected. By mandamus the legal officer is put in his place.' The statute accomplishes by one and the same process the objects contemplated by both these results. *Prince* v. *Skillin*, 71 Maine, 361, 366. And it enables a claimant of an office held by another to institute proceedings upon his own initiative, without the intervention of the attorney general. The form of procedure is new, but the position of the petitioners and the rules of evidence are the same. In quo warranto the burden is upon the respondent to show his title to the office claimed and occupied by him. *Attorney General* v. *Newell*, 85 Maine, 276. But when the process is instituted by the attorney general upon the relation of a private individual claiming the office held by the respondent, failure on the part of the respondent to prove his title to the office does not establish the title of the relator, for upon that issue the plaintiffs have the affirmative, and the burden is upon them to maintain it. *People ex rel. Judson* v. *Thatcher*, 55 N. Y., 525; 14 Amer. Rep., 312, 316; Note to *State* v. *Kupferle*, 44 Missouri, 154, in 100 Amer. Dec. at foot of page 271. So in these cases before the court, the burden is upon each petitioner to show that he was elected and is entitled by law to the office which he claims."

"Neither petitioners nor respondents have seen fit to introduce other evidence. I think therefore that the decision of these cases turns upon a determination of the question upon whom the burden of proof rests. The petitioners say that this burden is upon the respondents, but we have seen that in the instant cases the burden is upon each petitioner to establish his title to the office claimed. Notwithstanding the fact that upon the vote of the rest of the county the petitioners appear to be elected, yet after the petitioners had destroyed by evidence of fraud the probative value of the record and return in Ward 4, and in doing so had disclosed that a possible maximum of 395 legal ballots were cast in that ward, I think and therefore rule that the burden of proof was still upon the petitioner in each case to show that he received a sufficient number of those legal ballots in Ward 4 to give him a greater number of votes throughout the county,

than his opponent. The petitioners have therefore failed to show that they have been elected and are entitled to the offices claimed by them, and the entry in each case must be—Petition dismissed with costs."

This is a correct exposition of the law as it obtains in this State. The proceeding is wholly statutory and the statute places the burden of proving his entire case squarely upon the petitioner. He is the moving party, the claimant, and he must establish his claim. Under R. S., Chap. 7, Sec. 87, "Any person claiming to be elected to any county or municipal office . . . . may proceed as in equity against the person holding, or claiming to hold such office, or holding a certificate of election to such office, or who has been declared elected thereto by any returning board or officer, or who has been notified of such election." The proceeding is permitted against not only the holder of a certificate of election, but against four other classes of respondents, viz: one holding the office, one claiming to hold it, one declared elected, and one notified of election. The certificate cuts little figure. The decision must rest upon the number of legal ballots received by the petitioner and he must show that in the election throughout the entire district, he has received a plurality of all the legal ballots cast. He cannot select all the precincts but one, even though some illegal or fraudulent ballots may have been shown cast in that one, and resting upon a plurality in that selected portion, compel the respondent to go on with the proceeding and show the number of legal ballots the respondent received in that remaining precinct. The statute contemplates no such procedure. Its words are "And if it appears upon such trial or hearing that the petitioner has been elected and is entitled by law to the office claimed by him . . . . such Justice shall render judgment in favor of such petitioner, if he is found, upon hearing, to be entitled thereto." Sec. 88. The burden to make this appear under this statute rests throughout the case upon the petitioner, and at no stage shifts to the respondent. The contestants here cannot both oust the defendants and seat themselves, unless they prove that they were elected by the legal vote of the entire county of Androscoggin. The legal vote outside of Ward 4 is not sufficient.

This the petitioners failed to do. Therefore, the entry must be:

Petitions dismissed, with costs for respondent in each case.

ERNEST RAWLEY,
Appellant from Decree of Judge of Probate.

Knox. Opinion April 9, 1919.

General rule as to probate practice. Rule as to party entitled to open and close case. Rule as to the refusal of right to open and close being subject to exceptions.

Appeal from decree of Judge of Probate allowing a will. Undue influence is the only specified reason of appeal. Contestant claimed right of opening and closing and excepted to denial of this right. The questions involved are: Were exceptions properly allowed, and was the contestant entitled to the right of opening and closing?

Held:

1. Exceptions were properly allowed under R. S., Chap. 82, Sec. 55.
2. The right of opening and closing is a legal right, not a matter of judicial discretion. Unless clearly shown to be non-prejudicial exceptions lie to its erroneous denial.
3. The right to open and close belongs to the party against whom judgment would be rendered if no evidence were introduced on either side.
4. An appeal from a Probate Court vacates the decree appealed from.
5. The omission to challenge in the reasons of appeal due execution and legal capacity does not relieve the proponent of the will from the primary burden of proving such execution and capacity. Having the primary burden the appellee had the right to open and close.

Probate Appeal in the matter of will of Barney F. Rawley. To the rulings of the Justice at Supreme Court of Probate, appellant filed exceptions. Judgment in accordance with opinion.

Case stated in opinion.

A. S. Littlefield, for appellant.

Edward C. Payson, and Gilford B. Butler, for appellee.

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

DEASY, J. Appeal to the Supreme Court of Probate from allowance of will of Barney F. Rawley by the Probate Court of Knox County. The only specified reason of appeal is undue influence.

A jury trial was asked and ordered at the September term, 1918. The contestant claimed the right of opening and closing and objected to testimony offered by the appellee to make formal proof of the will. This claim was denied and objection overruled by the presiding Justice.

To these rulings the contestant excepted and filed his bill of exceptions.

After hearing the Judge made his decree affirming that of the Judge of Probate. To this decree the contestant excepted and filed a second bill of exceptions.

Both bills of exceptions were allowed, but to the first the presiding Justice appended this clause: "The foregoing exceptions are, therefore, allowed, if, in the opinion of the law court, the same are allowable and the appellant entitled to have them allowed."

ALLOWANCE OF EXCEPTIONS.

These exceptions were properly allowed.

The rulings were not findings of fact and not discretionary. They were rulings of law. If erroneous and prejudicial, exceptions afford a proper and perhaps the only appropriate remedy.

The rulings were an opinion and direction in a civil proceeding of "the court held by one justice." The contestant being aggrieved seasonably presented exceptions as authorized by R. S., Chap. 82, Sec. 55.

It may be urged, however, that the rulings which are the subject of the contestants first bill of exceptions are not and cannot be prejudicial, inasmuch as a jury verdict in a probate appeal is advisory only and the opinion of the presiding Justice cannot be supposed to be affected by the course of procedure.

To so hold in a case where we have not the evidence before us would be in effect to say that a judge in making his decree cannot under any circumstances be influenced by a jury verdict.

THE RIGHT TO OPEN AND CLOSE.

The right of opening and closing is a legal right, not a mere matter of judicial discretion. Unless clearly shown to be non-prejudicial, exceptions lie to its erroneous denial. *Johnson* v. *Josephs*, 75 Maine, 547. *Reed* v. *Reed*, 115 Maine, 441.

The right to open and close belongs to the party against whom judgment would be rendered if no evidence were introduced on either side. *Reed* v. *Reed*, supra, and cases cited.

The appellant contends that the appellee needs to produce no evidence in the first instance and none at all except to refute, if he can, the appellant's evidence of undue influence. He urges that if no evidence were produced by either party it would be the duty of the court to affirm the decree of the Probate Court. The appellee maintains, on the other hand, that notwithstanding the only reason of appeal is undue influence he would not be entitled to have the probate decree affirmed without introducing evidence to show the due execution of the will and the testator's soundness of mind at the time of its execution.

The appellant presents an able and ingenious argument and brief in support of his contention. We hold, however, that the position of the appellee is correct.

The contestants argument, condensed and summarized, is:

1—That he has the burden of proof on the only issue, i. e., the only point "affirmed on one side and denied on the other" (Bouvier).

But admitting this to be true still the appellee has the right to open and close if, in the first instance to secure affirmance of decree, he has to prove "anything" (*Johnson* v. *Josephs*, supra) though not in issue according to the above definition. *Dorr* v. *Tremont Savings Bank*, 128 Mass., 359.

2—That the probate decree is not vacated by, but continues in force after the appeal. "Further proceedings in pursuance of the matter appealed from cease." R. S., Chap. 67, Sec. 35. But the decree, the contestant says, remains in force, not indeed justifying "further proceedings" such as appointment of executor, but in respect to findings not challenged by reasons of appeal, making a prima facie case for affirmation. Thus the contestant argues. But the status of a probate decree after appeal is not defined by the statute. It is left to judicial interpretation and courts generally, including our own, hold that an appeal vacates the decree. *Gilman* v. *Gilman*, 53 Maine, 188; *Tarbox* v. *Fisher*, 50 Maine, 237; *Milliken* v. *Morey*, 85 Maine, 342; *Williams* v. *Robinson*, 42 Vt., 658; *Crowningshield* v. *Crowningshield*, 68 Mass., 528; *Boynton* v. *Dyer*, 18 Pick., 4.

3—That the appellant is confined to his reasons of appeal. *Burpee* v. *Burpee*, 109 Maine, 383, and cases cited. That this being true due execution and legal capacity not being specified in the reasons of appeal are impliedly admitted and need not be proved.

The answer is that even if the admission were express and assented to by the appellee it would not, without the consent of court, relieve the proponent of the primary duty of proving the will.

Our reasoning relates to will cases. The law of wills is sui generis. It may well be that in other probate appeals findings not specified in the reasons of appeal are to be treated as admitted. *Patrick* v. *Cowles*, 45 N. H., 553. In most other cases courts order any judgment or make any decree within the scope of the pleadings that the parties agree upon; but no court would even by consent of all parties allow a will on its face invalid.

"Such transactions (agreements between parties in respect to wills) in fact, stand upon the footing of general dispositions by the rightful owners of property, and cannot operate to entitle to probate what was not, in the legal sense, a will." Schouler on Executors, Section 72.

In ordinary cases the court does not take the initiative, but "it is said that the Judge may ex-officio, or at the instance of anyone, cite the executor to prove the will." *Stebbins* v. *Lothrop*, 4 Pick., 42. See R. S., Chap. 68, Sec. 4.

Generally in litigation the parties before the court are alone interested. Not so in the case of wills. The rights of creditors of heirs and legatees, the interests of persons unborn or unascertained and the purpose of the testator are all to be guarded by the court.

"There is a distinction between an ordinary suit at law and a proceeding in the probate of a will. In the former the courts act upon the concessions of the parties of record, they being the only parties in interest; in the latter there are usually other persons interested who will be concluded by the result besides the proponent and contestant and their rights are not to be conceded away by the parties of record. If the contestant takes issue upon a single point only he does not thereby admit the other facts necessary to be established and thus relieve the proponent from his obligation to prove them. This he cannot do by his pleadings or otherwise." *Williams* v. *Robinson*, 42 Vt., 658.

There are other illustrations that might be cited showing the radical difference between proceedings involving the probate of a will and other litigation, including other probate appeals.

The appellant relies with confidence upon the case of *Patten* v. *Cilley*, 46 Fed., 892.

The opinion in that case admits that "at preliminary stages . . . the true rule is to require all the statutory essentials to be affirmatively shown. . . . These provisions are for the prevention of fraud and the protection of all persons interested in the estate." But not so on appeal.

In other words, the case holds that the Probate Court may not, but the Supreme Court of Probate may, base a decree allowing or disallowing a will, upon admissions. The reason given, or suggested, is that in the preliminary stages "all interested parties may not be present," while on appeal the only interested parties are the appellants and appellees and they are present. We think this reasoning is not sound. In a case involving the validity of a will the interested parties are the same on appeal as in the preliminary stages. If in the Probate Court whose decrees are subject to appeal as a matter of right parties interested need to be protected by the court's inquisition from improper and possibly collusive admissions, a fortiori they need such protection in a court whose decrees may be final.

While not destroying the force of *Patten* v. *Cilley* as a precedent, it is significant to note that the case was subsequently remanded to the State Court "distinctly upon the ground that the Federal Court had no jurisdiction of the subject matter involved." *In re Cilley*, 58 Fed., 977.

The decree of the Judge of Probate in the case at bar was vacated by the appeal. The omission to challenge in the reasons of appeal due execution and legal capacity does not relieve the proponent of the will from the primary burden of proving such execution and capacity. Having this primary burden the appellee had the right to open and close.

Exceptions overruled.

MAGGIE L. THOMPSON, Appellant
From Decree of Judge of Probate.

Lincoln. Opinion April 9, 1919.

General rule of Procedure governing probate appeals. Supreme Court of Probate. Powers of sitting Justice of Supreme Court of Probate. Rule governing verdict of jury upon issues submitted by presiding Justice. Supreme Court of Probate as distinguished from Law Court. Distinction between cases going to Law Court upon motion and cases going on report. Right of appeal when court sitting as Justice of Supreme Court. Right of appeal when sitting as Supreme Court of Probate.

This is a probate appeal. On the fourth day of September, 1917, the Judge of Probate of Lincoln County by proper decree allowed the last will and testament of M. Amanda Ford. From that decree an appeal was taken to the Supreme Court of Probate for Lincoln County. At the October term, 1917, the appeal was heard, and two questions of fact were submitted to the jury, one, whether at the time of execution of the will the testatrix was of sound and disposing mind and memory, and the other whether said instrument was her voluntary act uncontrolled and uninfluenced by others. To each question, an affirmative answer was returned. Counsel for appellant filed thereupon a simple motion for new trial addressed to the Law Court, without any decree being made by the Supreme Court of Probate.

Held:

1. As a matter of strict statutory construction, it may well be doubted whether this course of procedure is correct; but in view of the fact that such a practice has been of long standing, a majority of the court do not feel compelled to dismiss the motion on this ground without considering the merits of the case. If the customary procedure is to be changed or modified, it had best be done by rule of court.

A careful examination of the record to determine the merits of the controversy leads irresistibly to the conclusion that the findings of the jury were in strict accord with the testimony, and that the decree of the Judge of Probate in allowing the will was without error.

Appeal from the findings of a jury, in the matter of will of M. Amanda Ford, upon certain questions submitted to them at the Supreme Court of Probate. Judgment in accordance with opinion.

Case stated in opinion.

Percie D. Jordan, and George A. Cowan, for appellant.

H. E. Hall, and Weston M. Hilton, for proponent.

SITTING: CORNISH, C. J., SPEAR, HANSON, PHILBROOK, DUNN, MORRILL, WILSON, DEASY, JJ.

CORNISH, C. J. This is a probate appeal. On the fourth day of September 1917, the Judge of Probate of Lincoln County by proper decree allowed the last will and testament of M. Amanda Ford. From that decree an appeal was taken to the Supreme Court of Probate for Lincoln County. At the October term, 1917, the appeal was heard, and two questions of fact were submitted to the jury, one, whether at the time of execution of the will the testatrix was of sound and disposing mind and memory, and the other whether said instrument was her voluntary act uncontrolled and uninfluenced by others. To each question, an affirmative answer was returned. Counsel for appellant filed thereupon a simple motion for new trial addressed to the Law Court, without any decree being made by the Supreme Court of Probate.

As a matter of strict statutory construction, it may well be doubted whether this course of procedure is correct; but in view of the fact that such a practice has been of long standing, a majority of the court do not feel compelled to dismiss the motion on this ground without considering the merits of the case. If the customary procedure is to be changed or modified, it had best be done by rule of court.

A careful examination of the record to determine the merits of the controversy leads irresistibly to the conclusion that the findings of the jury were in strict accord with the testimony, and that the decree of the Judge of Probate in allowing the will was without error.

The entry will therefore be,

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

SPEAR, J. I concur in the result, but arrive at it in a way different from that of the majority. The following opinion sets forth more fully the corrections that apparently should be made in the procedure in this class of cases, which the majority opinion perhaps wisely suggests should be made by a rule of court, rather than by a declaration of law.

But this opinion will at least have the merit of calling the attention of the profession to an examination of the statutes and the preferable mode of procedure to be pursued thereunder.

On the fourth Tuesday of October, 1917, the will of M. Amanda Ford of Bristol in the County of Lincoln, was proved and allowed by the Judge of Probate.

From the decree of allowance an appeal was taken, assigning as reasons, undue influence and unsound mind. In the Supreme Court of Probate the appeal was heard by a jury upon questions properly framed to submit each of these reasons.

Upon each, under proper instructions, the jury found for the proponent. Without any decree by the Supreme Court of Probate, adopting or disregarding the verdict, the appellant came directly to the Law Court upon motion for a new trial, on the usual grounds. This case presents an irregularity in practice which we think should be corrected. It will be observed by the preceding statement, that the probate appeal here involved was submitted directly to the jury, upon questions framed by the court; that a verdict was rendered; and that the motion for a new trial is addressed directly to the Law Court.

But we find no statute that provides authority or sanction for this method of procedure. R. S., Chap. 67, Sec. 36, prescribes the proceeding for disposing of a probate appeal, namely:—"Such appeal shall be cognizable at the next term of the Supreme Court, held after the expiration of thirty-four days from the date of the proceeding appealed from, and said appellate court may reverse or affirm, in whole or in part, the sentence or act appealed from, pass such decree thereon as the judge of probate ought to have passed, remit the case to the Probate Court for further proceedings, or take any order therein, that law and justice require and if, upon such hearing, any question of fact occurs proper for a trial by jury, an issue may be framed for that purpose under the direction of the court, and so tried."

The verdict of the jury under this clause is merely advisory, to inform the conscience of the court. Under the precise language of this present statute the court held in *Bradstreet* v. *Bradstreet*, 64 Maine, 204, as follows: "Courts of Probate are of special and limited jurisdiction. Their proceedings are not according to the course of the common law. They have no juries. Neither party, upon appeal, can claim as a matter of right, a trial by jury. The judge of the

Appellate Court may form an issue when, in his judgment, any question of fact occurs proper for a trial by jury, and not otherwise. The issue is to be formed and tried at law, but as in equity, to inform the conscience of the court, and under its direction."

It accordingly follows that a verdict of the jury may be disregarded or adopted by the Supreme Court of Probate, without right of appeal or exception to the act of that court. An exception may be taken to his decree, which simply raises the legal question, whether there is any evidence to support it, but not because either party had obtained any legal rights by virtue of the verdict. It further follows, a verdict being only advisory, that it has no effect one way or the other, without a decree, as the decree may be the one way or the other, it often happening that the court does not follow the advice of the jury. It is interlocutory, so to speak. Hence this verdict cannot get past the sitting Justice, to go anywhere, either to the Law Court above or to the Probate Court below, without a decree of the sitting Justice.

But in the present proceeding, the verdict is brought directly to the Law Court, not to sustain or overrule the motion, but for a final decree upon the facts, and the court have several times said that this is proper practice. *Carvill* v. *Carvill*, 73 Maine, 136; *McKenney* v. *Alvord*, Id. 221; *Backus* v. *Cheney*, 80 Maine, 17. We are of the opinion that these cases are not based upon the provision, express or implied, of any statute. The Law Court is a statutory court, and derives its jurisdiction and powers from the statute. The Probate Court and Supreme Court of Probate are statutory courts, and in like manner derive all their powers from the statute. None of these courts can exercise any common law jurisdiction, nor any powers not conferred by statute. Under no statute is the Law Court authorized to perform any of the functions of the Probate Court, either original or appellate. R. S., Chap. 82, Sec. 46, defines the jurisdiction of the Law Court, and the only clause under which the present case could come is this: "Cases in which there are motions for new trials upon evidence reported by the Justice." But under this clause the court has never gone beyond the function of deciding whether the verdict shall stand or be set aside. No case can be found, except in the cases cited, where the Law Court has ever undertaken to perform the statutory duties of any other court, by

issuing judgments and decrees, except by express statutory authority. It may be here noted that R. S., 1871 is referred to in the opinions here discussed.

In *Carvill* v. *Carvill*, the court do not undertake to analyze the statute, but, ex cathedra, assume that a statute applies that has no relation whatever to the Law Court. We find this language in the opinion, at the bottom of page 138: "It has been argued that the case is not properly before us. By R. S., Chap. 53, Sec. 26, an appeal may be taken from the Probate Court to this court, and this court may reverse and affirm the proceedings of the Probate Court," and so on. But what does the phrase "this court" mean as used in this opinion? The Law Court was speaking. But this statute, invoked as authority, lacks the remotest reference to the Law Court. The statute, instead of supporting, contravenes the very basis upon which the opinion is founded. Sec. 26 provides for an appeal to the "next term of the Supreme Court," sitting at nisi. Sec. 21, same chapter, declares that the Supreme Judicial Court is made the Supreme Court of Probate. Hence "this court," as used in the opinion, was not the Law Court at all, but the sitting Justice, whoever he may be, at a nisi prius term, who acts in all probate appeals at such term, as the Supreme Court of Probate. There is no other Appellate Court known to the statute, authorized to finally pass upon any matter originating in the Probate Court, nor does the opinion attempt to point out any other.

But the Law Court passed fully upon the merits of that case. Accordingly the phrase "this court" must have been intended to mean, to give any force to the reasoning, that the Law Court and the Supreme Court of Probate are one and the same, in their jurisdiction and power over probate appeals whereas, as has been shown, the Supreme Court of Probate is a single member of the Supreme Judicial Court, whose appellate jurisdiction is entirely limited to a nisi prius term, that is, whose powers are absolute over all probate proceedings, including the verdict of a jury, and whose decrees are final, without appeal, and subject to exceptions only upon matters of law. It would therefore seem clear that "this court" is not any part of the Law Court as such.

But it was further said "The trial by jury was had. All the incidents of such trial follow. A foreman must be chosen, unanimity required. The verdict may be wrong. A motion may be filed for a

new trial. The rulings of the presiding justice may be erroneous. exceptions may be alleged. This must so be for the furtherance of justice, for wrong verdicts, whether from the mistaken judgment of the jury, or induced by the erroneous instructions on the part of the judge should be corrected." This is a very specious argument, and in its application to ordinary actions at law is well founded. But the answer already appears in the reference to the statutes, conferring and defining the powers of the Supreme Court of Probate. Not one of the privileges enumerated in the above paragraph accrues to either side in a probate appeal, as a matter of legal right. Even the jury trial does not. If, therefore, a motion is filed, it need not be treated even with the dignity of being overruled. It may be ignored by the Appellate judge. A bill of exceptions may be treated in the same way. "A motion or exceptions for the correction of errors, whether by the court or jury," may be peremptorily overruled without reasons therefor, by a decree of the Appellate Court from which there is no appeal. The Appellate Court is what the statute says it is, Supreme, and there are only two ways in which the court itself can send any matter of fact to the Law Court, except through its decree, and that is upon report or upon an agreed statement of facts, and both must be by consent of the parties. This has been frequently done, as in *Stilphen, Appellant*, 110 Maine, 146.

That opinion, moreover, in discussing the motion, entirely ignores the statute and its interpretation, that a trial by jury in probate appeals is discretionary and when rendered, only advisory, and undertakes to remove these impediments by holding that another statute, Chap. 82, Sec. 33, authorizes a motion for a new trial, "and it matters little in what class of cases the jury trials are had." But it will hereafter be seen that this motion applies to a common law verdict, and has no relation to a verdict in a probate appeal.

It should be observed that the legislature authorized the single Justice, sitting at the Supreme Court of Probate, to direct a jury trial, at his discretion, that the trial and verdict might enlighten his conscience, not that of the Law Court. And here the verdict of the jury ends. The statute does not provide for any motion on this verdict. And here the legislature intended it to end, as the force of this verdict, compared with the force of a verdict at common law, shows that it matters much in what class of cases a jury trial is had.

It already appears that the verdict in a probate appeal is advisory only, and has no binding force upon the court. If he ignores it, there is, as a matter of law, neither a right to a new trial, nor exceptions, nor appeal. Not so, however, with a verdict at law in the Supreme Court. The jury is here a constitutional tribunal. No man shall be deprived of life, liberty, property or privileges "but by a judgment of his peers or the law of the land." The jury are his peers. Whenever, therefore, a party is entitled to a jury trial as a matter of right, the verdict of such jury is not subject to the conscience of the court, but is a binding judgment, under the constitution and laws of the state, and can be reviewed by the presiding Justice or by the Law Court, and disturbed only when there is a failure of any substantial evidence to sustain it, or because of the manifest bias, prejudice, or misunderstanding of the jury. If the verdict is set aside by either the presiding Justice or the Law Court the only effect is to leave the case for another trial.

In the one case a jury trial is not a matter of right; in the other it is a most sacred right, that has come down through the common law from the days of magna charta. In the one case the sitting Justice can disregard the verdict and decide the case adversely to it without new trial, exception, motion or appeal. In the other the verdict cannot be disturbed by the Law Court or a single Justice without giving the right of a new trial. In the one case it is a statutory verdict; in the other a common law verdict.

It is therefore evident that the legislature in the provision that a verdict may be set aside on report of the evidence to the full court, R. S., Chap. 82, Sec. 33, intended a verdict rendered in a court of common law. The language of the section so indicates. "When a motion is made in the Supreme Judicial Court to have a verdict set aside as against law or evidence, a report of the whole evidence shall be signed by the presiding Judge," undoubtedly means the presiding Justice sitting at nisi in the Supreme Judicial Court, and not a single Justice sitting as the Supreme Court of Probate. This suggestion will be again referred to.

The constitution of the Supreme Court of Probate confirms this interpretation. While the personnel of the court remains the same, a justice, sitting at nisi, by the presentation of a probate appeal is automatically converted into a Supreme Court of Probate, with a different jurisdiction and different powers as already noted. But a

marked difference may be pointed out in this particular, that at a nisi trial the sitting Justice is inhibited by statute from expressing any opinion upon any question of fact, while, as appellate judge, he has power to finally decide every question of fact, even to the extent of reversing by his decree, the verdict of the jury.

It seems to us, therefore, that it matters "not a little," but that it matters much, in what class of cases a jury trial is had, when we are considering the procedure by which such trial is regulated.

In *McKenney* v. *Alvord*, 73 Maine, 22, the court affirms *Carvill* v. *Carvill*, and bases its decision upon an interpretation of the statutes, in pari materia, relating to this subject matter. Paragraph 2 of the opinion, on page 224, reads as follows: "We have no doubt of the power of this Court to consider and pass upon the motion. By R. S., Chap. 63, Sec. 21, the Supreme Judicial Court, which, according to R. S., Chap. 77, Sec. 1, consists of a Chief Justice and seven associate justices, is made the Supreme Court of Probate, and has appellate jurisdiction in all matters determinable by the several judges of probate, and while appeals from the Probate Courts are cognizable in the first instance at a nisi prius term held by one member of the Appellate Court, and his decision may in some cases be final, in very many cases his doings are subject to revision, according to the ordinary course of proceeding by the Law Court, and any errors in law, into which he may fall, may be corrected, or any questions which he may see fit to present by report to the Law Court are cognizable by it upon proper proceedings to bring them before it." We are not quite able to comprehend the meaning of this paragraph. But it seems to be based upon the assumption, that, since the statute says the Supreme Judicial Court shall consist of a Chief Justice and seven associate justices; and that the Supreme Judicial Court is the Supreme Court of Probate; that therefore the Chief Justice and seven associates, as a whole or sitting in banc, is the Supreme Court of Probate.

But the construction of these two sections together, R. S., 1871, Chap. 63, Sec. 21, and Chap. 27, Sec. 1, is illogical and forced. They do not go together. Chap. 77, Sec. 1, merely defines the composition and qualifications of the court, and has nothing whatever to do with assigning its powers or jurisdiction. And, that Sec. 21 of Chap. 63 refers to the Chief Justice and seven associates as an Appellate Court, is contradicted by the section, itself, in which it is specifically

provided that an appeal shall be to the "Supreme Court in and for the same county;" and this Supreme Court is the Supreme Court of Probate, with a single Justice sitting at nisi; and this Supreme Court of Probate is the same Supreme Judicial Court which the opinion says, by construction, in pari materia, refers to the Chief Justice and seven associate Justices. Section 26 of Chap. 63 also negatives such construction, which provides that "probate appeals shall be cognizable at the next term of the Supreme Court," a nisi prius term. These statutes so clearly prove that Sec. 21 of Chap. 63, and Sec. 1 of Chap. 77 have no relation to each other that further discussion of this point would be mere surplusage. This reasoning, however, seems to be intended by the further remark that "appeals are cognizable in the first instance at a nisi prius term held by one member of the Appellate Court."

But it should here be noted that the sitting Justice is not a member of the Appellate Court. He is the Appellate Court, and he alone, and is so specifically denominated by the very statute invoked. The statutes are so plain that he who runs may read. "The Supreme Judicial Court is the Supreme Court of Probate" means the Supreme Judicial Court sitting at nisi, held by a single Justice hearing a probate appeal, as every statute relating to the subject matter, not by implication, but by express provision, clearly prescribes. As before seen, the personnel of the two courts is the same.

That opinion, however, rests wholly on the interpretation of the first specification of R. S., 1871, Chap. 77, Sec. 13, which provides for a motion to set aside a verdict, as the following quotation shows, "The present case is one which falls directly under the first specification in Sec. 13, Chap. 77 (R. S., 1871), of cases that come before the Court as a court of Law," viz: "Cases in which there are motions for a new trial upon evidence reported by the Judge." This is the only statute referred to under which jurisdiction of the motion, and a full decree thereon, is assumed. But it should be observed that this statute, like the clause in the Federal Constitution which provides that "The judicial power shall extend to all cases in law and in equity" is not self executing. It merely defines the subject matter of jurisdiction. It is the machinery provided to put this jurisdiction into operation, that determines its purpose. Accordingly it is not Sec. 13 of Chap. 77 at all that we must consider in determining the jurisdiction of the Law Court, but an entirely different chapter, R. S.,

1871, Chap. 82, Sec. 33, which provides what this jurisdiction shall embrace, what motions shall go up and how they shall go, viz: "When a motion is made to the Supreme Judicial Court to set aside a verdict as against law or evidence, a report of the whole evidence shall be signed by the presiding Judge."

This statute was amended in 1913, Public Laws, Chap. 103, so that as incorporated in the revision of 1916, Chap. 87, Sec. 57, it reads as follows: "When a motion is made to the Supreme Judicial Court to have a verdict set aside, as against law or evidence, a report of the whole evidence shall be signed by the presiding (Judge) justice, *or authenticated by the certificate of the official court stenographer.*" The underscored phrase is the amendment.

In its bearing upon the contention in the opinion that the presiding Justice, sitting as the Supreme Court of Probate, is invested by this statute with authority to "Report the whole case to this court for determination, as is his right under Sec. 13," this amendment seems conclusive. As seen, this section, by itself, confers no powers whatever. Without Sec. 33, Chap. 82, it would lie dormant. But let us assume that the opinion had in mind the jurisdiction conferred by Chap. 83, Sec. 33, 1871, over a motion. Then, by the interpretation found in the opinion, this statute must be held to have conferred judicial powers upon the Justice in the act of certifying the motion.

Note, however, that the wording, scope and effect of this section of the statute was precisely the same before the amendment as after, so far as the powers of the Justice are concerned. He could send up a motion before just as he can now. If he had judicial powers before he has them now.

But by the amendment, the court stenographer can certify the report of the evidence on a motion without the knowledge and consent of the presiding Justice. Yet it can not be conceived that this amendment was intended to confer judicial powers upon the court stenographer. But, by it, the court and the stenographer have equal powers. If then, there was ever any doubt as to the precise meaning of this statute, the amendment removes it and clearly reveals that the only purpose of requiring the Justice to "sign" a report of the evidence on motion, was to officially certify it to the Law Court. This amendment, giving the stenographer equal power with the Justice to certify, is convincing that the "signing" of the report was, and is, regarded as a ministerial act involving the exercise of neither

judicial nor discretionary powers over the transfer of a case to the Law Court on motion nor of the action of the Law Court thereon.

Therefore, the claim, that the Appellate Court of Probate can report "any question which he may see fit" to the Law Court for solution, is erroneous. We are unable to find any statute that enables him to submit a single question to the Law Court, except by agreement of parties. He is, while sitting, supreme. His duty is to consider all questions properly submitted to his jurisdiction, and by proper decrees certify his findings to the court below.

His court is a creature of the statute, and we repeat, we are unable to find any statute that authorizes him to make even an official inquiry of the Supreme Court, as a whole, as individuals, or as a Law Court.

It is, therefore, apparent that the signing of the evidence is not reporting the case to the Law Court, under any rule of law. But the language of the court as applied to this proceeding seems to imply that it should be treated as a report upon an agreed statement of facts.

To clarify the interpretation of these statutes, in view of the theory upon which these opinions seem to be predicated, the distinction between a case going to the Law Court upon motion and upon report, should be noted. The opinions proceed upon the presumption of reported cases.

But a report and a motion represent two distinct methods of procedure. "On motion" when printed on the cover of the case always means a motion to set aside the verdict of the jury. "On Report," is equally expressive and always means a report of the evidence without a verdict sent up by consent, or on an agreed statement of facts, for the decision of the Law Court acting in the capacity of a jury. The same statute (Sec. 13, 1871) giving jurisdiction over a motion gives jurisdiction over report, but there is no separate statute providing how jurisdiction shall be taken as in case of a motion. The Law Court gets jurisdiction over questions of facts only by consent of the parties. A motion is a matter of legal right; a report, a matter of agreement. It is accordingly evident that "a motion" so set aside a verdict cannot be treated in any case as a report."

By the process of elimination we fail to find any statute that warrants the practice recognized in these two cases.

If, then, we are correct in our conclusion that the Law Court has no jurisdiction over the merits of the case on motion from the

Supreme Court of Probate the futility of such practice at once appears and negatives the legislative intent to ever have inaugurated it. We have already seen that upon motion the Law Court cannot render a decree on the merits of the case. They can only send it back for a new trial. But how futile it might be for the Law Court to either sustain or set aside a verdict, coming over the head of and without any decree of the Supreme Court of Probate. Suppose, for instance, the Law Court sustains the verdict, and remits the case to the Supreme Court of Probate. Non constat, the appellate judge will agree, as he may by his final decree disregard the verdict and come to an entirely different conclusion.

Neither the policy nor enactment of the legislature could have intended any such inconsistent methods of procedure. We therefore conclude that a motion to set aside a verdict applies only to a common law verdict.

If, however, the parties in any of these proceedings had sent to the Law Court a report or an agreed statement of facts, the Law Court would have been authorized to act in place of the Appellate Court, and could then have rendered any judgment or decree the Appellate Court could have rendered. In no other way known to the statute could the Law Court render a decision on the merits of the case over the head of the Appellate Court.

Again, in no event can the Law Court render a final judgment upon a question of fact upon a motion for a new trial. Their mandate is "Motion sustained," or "overruled," as the case may be. They cannot even pass a binding judgment upon the amount of damages, when they desire to sustain the verdict and reduce the damages. They can only use the coercive phrase, "a remittitur of damages to such an amount or new trial granted." We know of no final judgment they can render upon a mere motion for a new trial.

But the Law Court in these cases on motion only, rendered final decrees; in the Carvill case as follows, "Motion overruled. Judgment on the verdict. The decree of the Probate Court reversed. The instrument purporting to be the last will and testament of James Carville disallowed and rejected, and he be decreed to have died intestate, and the case remanded to the Probate Court for further proceedings. Costs of both parties to be paid out of the estate." In the McKenna case the decree is as follows: "Motion overruled. Decree approving and allowing the will dated January 5, 1878, and

rejecting and disallowing the codicil thereto dated August 6, 1879, to be signed; and case remanded to Probate Court for further proceedings in conformity with this decree."

From the analysis and reasons given for the decision in this last case, we think it not an entirely improbable conclusion that the court might have confused a report of the evidence on motion with a report of the evidence on an agreed statement.

There is one other consideration which we think important. We believe the legislature had an express purpose in view in enacting these statutes, and leaving them just as they did. It will be seen that in probate appeals it left the submission of a case to the jury, not as a matter of right, but as a matter of discretion in the sitting Justice, and made such verdict, not binding, but merely advisory.

We feel that the plain purpose of the legislature, in making the decree of the Appellate Court necessary and final, even over the verdict of a jury, was to prevent protracted and expensive litigation, over questions of fact in the settlement of estates, and at the same time authorize a method of procedure which would enable the Appellate Justice sitting as a Supreme Court of Probate, to avail himself of the advantage of a jury trial and verdict, upon such questions of fact as he might see fit to submit, and might deem of assistance to himself in making his final decree. He would also have the benefit of an observation of the parties and witnesses, which would further enable him personally to determine whether the verdict should be adopted or disregarded in his final decree.

The omission of the statute to provide any appeal from the decree of the Appellate Court confirms the soundness of this interpretation. Only questions of law on exceptions, are left open. In *Thompson, Appellant,* 116 Maine, page 477, involving exceptions to a decree of Supreme Court of Probate, it is said: "Under these exceptions the only question open for determination in this court are questions of law. The findings of fact by a Justice presiding in the Supreme Court of Probate are conclusive and not reviewed by the Law Court, if the record shows any evidence to support them. It is the finding of facts without evidence that can be challenged by exceptions."

Statutes are not made haphazard. They are based upon the rules of experience, and intended to accomplish results based upon these rules. The statutes we are considering are no exception. The purpose of the statute in regard to verdicts in probate appeals is

obvious. A moment's reflection reveals the fact that the questions which may be answered by a verdict may constitute but a portion of the matters necessary to be considered in the making of a final decree that shall be broad enough to cover the whole case. Many questions may arise, besides the questions of fact, which are the only questions that can be submitted to the jury. Important legal questions may be involved, to be applied to the facts as found by the jury.

This view of the case is fully supported and admirably expressed in *Withee* v. *Rowe*, 45 Maine, page 585. After stating, as has been repeatedly held, that the verdict of a jury in this class of cases is advisory only, the court go on to say: "But whether the facts in dispute shall be settled by the jury or not, is subject to the discretion of the court, in the exercise of its discretion. Notwithstanding certain issues of fact may be tried and determined by a jury in probate proceedings, other questions of grave import, of law, and even of fact, may be suffered to remain, to be settled by the court, and which may materially influence the final decree. Something in the will itself, aside from anything involved in the issues of fact, tried by the jury, may bear upon the question whether the will shall be approved or not. The jurisdiction of the Court of Probate in the county, where the decree from which the appeal was taken, may be denied. Another will, claimed to have been executed subsequently to the one in controversy, may be introduced, in relation to which no issue of fact has been made up.

The great question involved, where a will is offered for probate, is whether it is the last will and testament of the person purporting upon its face to be the testator. Answers to the questions, in proper form, was it, or not, executed in a legal sense, by the person whose name is affixed thereto? Was he, or not, at the time of the execution, of a sound and disposing mind and memory? and, was the will attested according to the requirements of law? are all material elements in this general inquiry. All these may be answered in favor of the party praying that the will may be approved and allowed; and other questions may still demand the attention of the Court, before a final decree can be pronounced."

Yet in the opinions herein discussed, the Law Court takes jurisdiction of a motion to set aside one of these verdicts, and enters decrees, itself, not remitting it to the Supreme Court of Probate, but disposing of the whole case upon the evidence taken out upon one or two questions of fact only.

It is unnecessary to review *Backus* v. *Cheney*, which, without any reasons, affirms *Carvill* v. *Carvill*.

Were the questions here those of practice merely, we should hesitate to disturb the rule followed in the cases discussed. But as the legislature, by express statute, or necessary implication, never intended to authorize such practice, and as reason and authority both show the inadequacy of facts and data, upon a mere motion, upon which to found a final decree, the question becomes one of substantial importance to the rights of property, and should no longer be permitted to obtain against the plain provisions of the statute, and manifest intention of the legislature.

We would further say that we in no sense intend to criticise the profession for pursuing at times, this mode of procedure. They were fully justified in doing so. But as the present case brings the question of practice sharply before the court, we had either to approve a procedure for which we could find no warrant in the statutes, or overrule the opinions discussed, and give an interpretation which we believe both reason and authority approve. It is also a satisfaction to note that the result of this opinion will work in strict accord with a just determination of the case before us. The decree of the Probate Court is supported by the evidence.

Our conclusion accordingly is that the Law Court has no jurisdiction in a mere motion for a new trial on the verdict of a jury rendered in a probate appeal; that the practice required by the statute is that the Supreme Court of Probate shall make a decree upon all appellate matters, including questions submitted to the consideration of a jury, by adopting, reversing or modifying the verdict, as, in his discretion, he may deem fair and just upon the law and evidence involved; and that the only probate case that can reach the jurisdiction of the Law Court without such decree, is upon a report or upon an agreed statement of facts.

JULIAN A. SPROUL *vs.* HENRY F. CUMMINGS.

Kennebec. Opinion April 22, 1919.

Action of trover. Who may maintain same. Proof necessary to maintain action.

Action of trover to recover the value of certain lumber, and involving the location of the division line of lots of land situate in the town of Washington.

Title in defendant was not claimed until after this suit was brought, when the defendant secured quitclaim deeds to the premises from heirs of one Levi Turner, father of Merrill Turner the first grantor in plaintiff's chain of title. There is no record of a deed from Levi Turner to Merrill Turner. The break in title, if there was one, occurred prior to August 5, 1879. Since that date it appears that the plaintiff and his grantors have been in possession under recorded deeds of the same, a period of more than thirty-five years, had operated on the lot as they desired, without interruption, and had paid the taxes thereon.

Held:

1. In the absence of a record of a previous deed from Levi Turner to his son Merrill Turner prior to 1879, we think the long and uninterrupted possession of the property by the plaintiff and his grantors creates a presumption that formal instruments of title once existed even if they cannot now be found.
2. The testimony and circumstances surrounding the case justified the jury in presuming existence of a deed. The conduct of all the parties can be explained only upon that theory. No other explanation appears, and the defendant having the burden of such duty has not been able to rebut the presumption of the existence of such deed.
3. Ownership was not necessary. One in possession of land may maintain trover against another taking the products of the soil, the gist of the action being the invasion of the plaintiff's possession.
4. The plaintiff and his predecessors in title claiming under recorded deeds having paid all taxes for a period of more than twenty years are protected by the provision of R. S., Chap. 110, Sec. 18, against the claim herein set up under the after acquired deeds from the heirs of Levi Turner.

Action of trover. Defendant filed plea of general issue. Verdict for plaintiff in the sum of $476.26. Defendant filed motion for new trial. Motion overruled.

Case stated in opinion.

Williamson, Burleigh & McLean, for plaintiff.

Andrews & Nelson, for defendant.

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

HANSON, J. Action of trover to recover the value of certain lumber, and involving the location of the division line of lots of land situate in the town of Washington.

The jury returned a verdict for the plaintiff for $476.26, and the case comes up on the defendant's general motion.

The case shows that the line in dispute is known as the Ballard line, evidently an ancient base line running for miles through the Kennebec valley. The defendant claimed:—

1st. That his immediate predecessor, Whitney, did not cut over the line on land of the plaintiff.

2nd. That if Whitney did cut over the so-called Ballard line, plaintiff did not own the land on which Whitney cut the logs and so cannot recover.

3rd. What logs or lumber defendant bought of Whitney, were not cut over the line and were never the property of the plaintiff.

4th. But even if the jury were right in finding that Whitney did cut over the line on land of plaintiff, still defendant did not receive any such amount of lumber so cut as plaintiff claims.

The principal question and one deemed most vital to the case was, where is the Ballard line on the face of the earth?

It will serve no useful purpose to restate the evidence, and it is sufficient to say that it is clearly proved that the line claimed by the plaintiff to be the easterly line of his lot, is the Ballard line, and that the cutting complained of was made on the westerly side of that line, on land owned by the plaintiff.

It was also contended by the defendant that the plaintiff had neither title, nor possession of the premises, and could not therefore maintain this action.

Title in defendant was not claimed until after this suit was brought, when the defendant secured quitclaim deeds to the premises from heirs of one Levi Turner, father of Merrill Turner the first grantor in plaintiff's chain of title. There is no record of a deed from Levi Turner to Merrill Turner. The break in title, if there was one, occurred prior to August 5, 1879. Since that date it appears that the plaintiff and his grantors have been in possession under recorded

deeds of the same, a period of more than thirty-five years, had operated on the lot as they desired, without interruption, and had paid the taxes thereon.

In the absence of a record of a previous deed from Levi Turner to his son Merrill Turner prior to 1879, we think the long and uninterrupted possession of the property by the plaintiff and his grantors creates a presumption that formal instruments of title once existed even if they cannot now be found. *United States* v. *Clasey*, 175 U. S., 509; *Perry* v. *Central Coal & Coke Co.*, 138 F., 769; *Gage* v. *Eddy*, 179 Ill., 492.

The testimony and circumstances surrrounding the case justified the jury in presuming existence of a deed. The conduct of all the parties can be explained only upon that theory. No other explanation appears, and the defendant having the burden of such duty has not been able to rebut the presumption of the existence of such deed. *Farrar et al.* v. *Merrill*, 1 Maine, 17; *Nelson* v. *Butterfield*, 21 Maine, 234.

But ownership was not necessary. One in possession of land may maintain trover against another taking the products of the soil. 38 Cyc., 2026. *Stevens* v. *Gordon*, 87 Maine, 504. In *Webber* v. *McAvoy*, 117 Maine, 326, this court held: "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. 38 Cyc., 2049, citing a number of cases. *Smith* v. *Sawyer*, 108 Maine, 485.

The plaintiff and his predecessors in title claiming under recorded deeds having paid all taxes for a period of more than twenty years are protected by the provision of R. S., Chap. 110, Sec. 18, against the claim herein set up under the after acquired deeds from the heirs of Levi Turner. The Statute is here quoted:

Section 18. "No real or mixed action, for the recovery of uncultivated lands or of any individual fractional part thereof, situated in any place incorporated for any purpose, shall be commenced or maintained against any person, or entry made thereon, when such person or those under whom he claims have, continuously for the twenty years next prior to the commencement of such action, or the making

of such entry, claimed said lands or said undivided fractional part thereof under recorded deeds; and have, during said twenty years, paid all taxes assessed on said lands, or on such undivided fractional part thereof, however said tax may have been assessed whether on an undivided fractional part of said lands or on a certain number of acres thereof equal approximately to the acreage of said lands or of said fractional part thereof; and have during said twenty years, held such exclusive, peaceable, continuous and adverse possession thereof as comports with the ordinary management of such lands or of undivided fractional parts of such lands, in this state. This section shall not apply to actions pending in court on the twenty-seventh day of April nineteen hundred and seven, nor to those commenced before the first day of January nineteen hundred and twelve."

Defendant's counsel urges that even if the jury were right in finding that Whitney did cut over the line on land of the plaintiff, still the defendant did not receive any such amount of lumber so cut as the plaintiff claims.

As with other issues involved, we have examined the record upon the question of the value of the lumber taken, and we find no sufficient basis for interfering with the finding of the jury.

The entry will be,

Motion overruled.
Judgment on the verdict.

WESTMAN'S CASE

Cumberland. Opinion April 30, 1919.

Necessary element of proof in claims under Compensation Act. Burden of proof. Rule of law to be applied where the deceased or injured party might at different times be engaged in different duties, some that come within the Act and some that are excluded by the Act. Interpretation of phrases "injury arising in the course of employment" and "Injury arising out of employment." Rule as to there being a presumption that death was caused by accident rather than by foul means. Weight of evidence upon which commissioner may make his findings.

This is a proceeding instituted by the dependent widow of Fred G. Westman to recover compensation under the terms and conditions of the statute commonly known as the Workman's Compensation Act.

At the time of his fatal accident the deceased was employed by the defendant towboat company as a cook on its towboat Portland. By the terms of his employment he performed all the duties of cook on the boat, had full authority to buy, and was charged with the duty of buying all supplies necessary to that work, and, when required, assisted around the deck. The accident occurred at about noon, on the sixteenth day of February, nineteen hundred eighteen, when the Portland was lying in a dock. On that day, having served dinner to the crew and partaken of his own midday meal, Westman went to a neighboring store to buy supplies. Taking two or three purchases under his arm he started to return to the boat, being observed to pass along the dock toward his destination, and thus, for the last time, was seen alive. A witness in the case heard a splash as if one fell in the water, and upon investigation, the unconscious body of Westman was discovered in the dock. The same was promptly removed, resuscitation was attempted but without avail.

The record discloses that the towboat Portland, on which Westman was employed as we have stated, was duly registered at the proper United States Customs House; that the range of her license was from Eastport to Cape Cod; that her towing duties consisted in going wherever her orders called her to go, within the range of her license; that the greater part of her work was in Portland harbor; that at the time of the accident she was not engaged on any job, but was lying at the dock.

Held:

1. The burden of proof rests upon the claimant to prove the facts necessary to establish the right to compensation under the Workman's Compensation Act.
2. That Westman at the time of his fatal accident was not a seaman on a vessel engaged in interstate or foreign commerce.
3. That the injury suffered by Westman was accidental.
4. That Westman, at the time of his death, was doing, at a time, at a place, and of a nature, the duties which his employment reasonably called him to perform; hence the injury was received in the course of his employment.
5. Westman's accident was a natural incident of his work, the risk was one occasioned by the nature of his employment, the injury was traceable to the nature of his work and to the risks which his employer's work exposed him; hence, the injury arose out of the employment.

Appeal from findings of single Justice under Workmen's Compensation Act. Judgment in accordance with opinion.

Case stated in opinion.

Frederick J. Laughlin, for applicant.

H. S. Avery, for defendant.

Carroll B. Skillin, and Edward H. Wilson, for London Guarantee & Accident Co., Ltd.

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

PHILBROOK, J. This is a proceeding instituted by the dependent widow of Fred G. Westman to recover compensation under the terms and conditions of the statute commonly known as the Workmen's Compensation Act.

At the time of his fatal accident the deceased was employed by the defendant towboat company as a cook on its towboat Portland. By the terms of his employment he performed all the duties of cook on the boat, had full authority to buy, and was charged with the duty of buying all supplies necessary to that work, and, when required, assisted around the deck. The accident occurred at about noon, on the sixteenth day of February, nineteen hundred eighteen, when the Portland was lying in a dock. The boat was moored to a coal lighter which, in turn, was moored to the wharf. Between these two crafts and the head of the dock was lying another lighter which was also moored to the dock. This lighter was in charge of

A. P. Bennett, a witness in the case. On the outside of the second lighter was moored another towboat, and outside the latter was moored still another towboat. The distance from the edge of the wharf to the surface of the water was estimated to be nine or ten feet. On the fatal day, having served dinner to the crew and partaken of his own midday meal, Westman went to a neighboring store to buy supplies. Taking two or three purchases under his arm he started to return to the boat, being observed to pass along the dock toward his destination, and thus, for the last time, was seen alive. Mr. Bennett, who was on board his lighter, says he heard a thump thereon, followed by a splash. Upon making investigation he saw the unconscious body of Westman in the water between the ends of the two lighters, called for assistance, and the body was taken to the dock. Resuscitation was attempted but without avail. Westman was dead.

Proper steps were taken to present the claim of the plaintiff to the chairman of the Industrial Accident Commission. He sustained the claim and ordered payment of the compensation provided by statute. This finding and order, following the practice provided in such cases, was presented to a Justice of the Supreme Court, who rendered a decree in accordance therewith, and from that decree the defendants bring the case before us by appeal.

DEFENDANT'S CONTENTIONS:

1. That the deceased employee was a seaman on a vessel engaged in interstate and foreign commerce, and, therefore his dependent widow is not entitled to the benefits of the Workmen's Compensation Act.

2. That the burden of proof is upon the petitioner to show by the preponderance of the evidence that the injury arose out of and in the course of the employment, and that failing to establish the burden of proof the petitioner cannot recover.

3. That there is no evidence on which the Commissioner was warranted in finding as a fact that the injury arose out of and in the course of the employment. That such a finding of fact on the evidence presented could be mere conjecture only, and that the evidence most favorable to the plaintiff was as consistent with the injury arising in such a manner as not to be compensatable as to be in such a manner as to be compensatable.

FIRST CONTENTION:

As the basis of their first contention the defendants call attention to R. S., Chap. 50, Sec. 1, Par. 2, which provides that "masters of and seamen on vessels engaged in interstate or foreign commerce" are excluded from the classes of employees who are entitled to the benefits arising under the Compensation Act. The reasons for this statutory exclusion, evidently growing out of the maritime law and the jurisdiction of admiralty courts over maritime torts, are not in issue, so that a discussion of this most interesting subject would be without justification or merit at this time. Nor is the jurisdiction of the state tribunal over the instant case denied, a jurisdiction which the Judicial Code, U. S., Stat. Chap. 11, Sec. 1233, as amended by Act of Congress October 6, 1917, confers in behalf of those who claim "the rights and remedies under the workmen's compensation law of any State." But the defendants read the excluding clause literally and thereunder claim immunity from liability. Therefore the first question presented to us is whether, at the time of his fatal accident, the deceased was a seaman on a vessel engaged in interstate or foreign commerce, under the terms of the Compensation Act, when properly construed.

The record discloses that the towboat Portland, on which Westman was employed as we have stated, was duly registered at the proper United States Customs House; that the range of her license was from Eastport to Cape Cod; that her towing duties consisted in going wherever her orders called her to go, within the range of her license; that the greater part of her work was in Portland harbor; that at the time of the accident she was not engaged on any job, but was lying at the dock.

Defendants contend that under these conditions of registry, license, and breadth of duties, this towboat is to be regarded in general terms as a vessel engaged in interstate and foreign commerce. They even claim that her principal business was aiding and facilitating such commerce, although we cannot concede that the record substantiates this claim. They urge that the true question for determination is whether this vessel was one generally engaged in interstate and foreign commerce, and not whether she was so engaged at the time of the accident. They say that without the more permanent classification as to the character of the vessel's employment there would

arise frequent confusion and uncertainty as to the rule applicable under the Compensation Act, because the employee might at one moment be engaged in interstate and foreign commerce and otherwise at another moment. According to the great weight of authority, however, the test must be applied to the conditions actually existing at the time when the accident occurred.

In *N. Y. C. & H. R. R. Co.*, v. *Carr*, 238 U. S., 260; 59 L. ed., 1298, Mr. Justice Lanmar said: "Owing to the fact that during the same day railroad employees often and rapidly pass from one class of employment to another, the courts are constantly called upon to decide those close questions where it is difficult to define the line which divides the state from the interstate business. . . . Each case must be decided in the light of the particular facts, with a view of determining whether, at the time of the injury, the employee is engaged in interstate business, or an act which is so directly and immediately connected with such business as substantially to form a part or a necessary incident thereof." This opinion, it should be observed, was given in an action brought under the Federal Employers' Liability Act, and not under a Workmen's Compensation Act, but we hold that the same rule should apply to actions brought under either act. Other cases in which the same rule is applied are *Shanks* v. *Delaware, Lackawanna & Western Railroad*, 239 U. S., 556; 60 L. ed. 436; *Erie Railroad Co.* v. *Jacobus*, 221 Fed. Rep., 335; *Illinois Central Railroad Co.* v. *Behrens*, 233 U. S., 473; 58 L. ed., 1051, and cases cited in Ann. Cas. 1914 C. 163.

In *Morrison* v. *Commercial Towboat Co.*, 227 Mass., 237, a case arising under the Massachusetts' Workmen's Compensation Act, the court was considering the claim of a master of a towboat, and discussed the same excluding clause as that now before us. In that case sometimes the boat was engaged in towing barges from Boston docks to a point down the harbor where ocean-going tugs took them and towed them to ports in other states. Sometimes the boat was employed in work wholly within the harbor and in no way connected with or similar to that just above described. When engaged in moving barges as the initial part of their interstate voyage the court held that the exclusion of the statute applied, but further said, "As the towboat on which the plaintiff was master, plied only within the limits of Boston Harbor, it may be assumed that at times it was engaged in work that plainly was of intrastate character. The deci-

sive question in this case is, was the towboat Hersey engaged in interstate commerce, within the meaning of the statute, at the time when the plaintiff was injured." So it will be seen, in the case just referred to, that the decision turned upon the nature of the work in which the towboat was engaged at the very time when the employee was injured, and not upon the general character of the work done by the towboat, or whether a greater or smaller part of that work was interstate or intrastate.

Under the facts of the case at bar, hereinbefore briefly stated, and more fully set forth in the record, we have no hesitation in declaring that Westman, at the time of his fatal accident, was not a seaman on a vessel engaged in interstate or foreign commerce and it must follow that the first contention of the defendant fails.

SECOND CONTENTION:

It is undoubtedly true, and has been frequently so held, that the burden of proof rests upon the claimant to prove the facts necessary to establish a right to compensation under a Workmen's Compensation Act. *Sponatski's Case*, 220 Mass., 526; *Von Ette's Case*, 223 Mass., 56; *Sanderson's Case*, 224 Mass., 558. By the same authorities, and many others, the claimant must go further than simply to show a state of facts which is as equally consistent with no right to compensation as it is with such right. Surmise, conjecture, guess or speculation are not sufficient to sustain the burden and justify a finding in behalf of the claimant. But on the other hand "if the evidence upon the questions involved is slender but is sufficient to satisfy a reasonable man, a case has been made out in favor of the claimant. *Von Ette's Case*, supra. "The Industrial Accident Board, in the determination of questions of fact, is permitted to draw such inferences from the evidence and all the circumstances as a reasonable man could draw." *Sanderson's Case*, supra. "If the evidence, though slight, is yet sufficient to make a reasonable man conclude in his (the claimant's) favor on the vital points, then his case is proved." *Sponatski's Case*, supra. These rules undoubtedly apply to the burden resting upon the claimant to show that the injury which caused death arose out of and in the course of the employment of the deceased. They are in harmony with defendant's second contention, although, perhaps, the defendants would desire to limit the extent of these rules to some degree. The second contention is sound.

THIRD CONTENTION:

The third contention directly challenges the findings of fact, made by the Commissioner, upon the question whether the injury actually arose out of and in the course of the employment. Section thirty-four of the act now under consideration provides that in the absence of fraud the decision of the Commissioner "upon all questions of fact shall be final." This provision has been recognized in the somewhat recent case, *Hight* v. *York Manf. Co.*, 116 Maine, 81. The same section also provides for an appeal, by any party in interest, to the Supreme Judicial Court, where a justice thereof ministerially renders a decree in accordance with the findings of the Commissioner. "Such decree," says the statute, "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." If any party in interest desires to appeal from this ministerial decree then the statute provides that "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." It follows that in order to make his challenge successful the defendant must rely upon a favorable answer to the query, as a question of law only, whether or not there was any evidence before the Commissioner upon which his decision may so firmly stand as to make it final.

This naturally leads to the inquiry as to what must be proved and how the burden of proof must or may be satisfied. Under the terms of our statute, and the rules of evidence above referred to, it must be conceded that to insure recovery of compensation the burden of proof rests upon the claimant to establish that Westman's death was caused (a) by accident; (b) that the accident arose out of the employment; (c) that the accident arose in the course of the employment. "Even though the injury arose out of and in the course of the employment, if it be not an accident within the purview of the act, there can be no recovery. Even if there be an accident which occurred in the course of the employment, if it did not arise out of the employment, there can be no recovery; and even though there be an accident which arose out of the employment, if it did not

arise in the course of the employment, there can be no recovery." *Bryant* v. *Fissell*, 84 N. J., Law, 72; 86 Atl. Rep., 458.

As to sustaining the burden of proof we have just seen, when discussing the second contention of the defendant, that even slender evidence may be sufficient if it would satisfy a reasonable man, and that reasonable inferences may be drawn from the evidence. But it is also true that in attempting to prove accidental death it is not necessary to negative every other possibility of death except that by accidental means. *Rideout Co.* v. *Pillsbury*, 159 Pac. Rep., 435. Nor must the proof be necessarily direct and positive, it may be by circumstances; *Heileman Brewing Co.* v. *Shaw*, 161 Wis., 443; 154 N. W., 631. Moreover there are legal presumptions which may be properly considered. "In human experience it is the common desire and effort to preserve life, rather than destroy it, and hence the law, where a person is found dead, imputes to the circumstances the prima facie significance that death was caused by accident rather than suicide, and that presumption persists in its legal force to negative the fact of suicide until overcome by evidence." *Milwaukee Western Fuel Co.* v. *Industrial Commission of Wisconsin*, 150 N. W., 998. Under this rule of presumption it was held in *Steers* v. *Dunnewald*, 85 N. J. Law, 449, that the death under consideration must have arisen from either accident, suicide or murder, and added "Suicide and murder involve criminal acts and crime is not to be presumed. The only other alternative is accident." In short, the amount of evidence, circumstantial as well as direct evidence, together with proper legal presumptions, are all to be taken into consideration when investigating the question whether any evidence was before the Commissioner upon which he might properly find a verdict.

ACCIDENT:

Recurring to the three essentials which the claimant must prove we first enquire, what is an accident, as the term is used in the statute, and has this essential been proved.

The Michigan Compensation Act does not award compensation for all personal injuries suffered by an employee, but for accidental injuries only, and the court of that state, in *Robbins* v. *Gas Engine Co.*, 157 N. W., 437, said that the words "accident" and "accidental," in their act, were used in their popular and ordinary meaning, as happen-

ing by chance, unexpectedly taking place, not according to the usual course of things. The Supreme Federal tribunal in *Mutual Accident Association* v. *Barry*, 131 U. S., 100, 33 L. ed., 60, said that if, in the act which precedes the injury, something unforeseen, unexpected, unusual, occurs, which produces the injury, then the injury has resulted through accidental means. The question whether or not an injury is an accident, within the purview of the act, is a mixed question of law and fact. When the facts are ascertained, are determined, it becomes a question of law. *Bryant* v. *Fissell*, supra; *Roper* v. *Greenwood*, (1900) 83 L. T., 471; *Fenton* v. *Thomley* (1903) A. C., 443; 19 T. L. R., 684.

As our statute, like many others, provides compensation only when the injury arises from accident, has this essential been proved. Before answering this question let us cite one or two cases which seem pertinent.

In *Milwaukee, etc.*, v. *Industrial Commission, etc.*, supra, a workman, in going to a toilet room, walked along a narrow passage way between the buildings and the river. The toilet room and the walk were used by the employees of the company. Another workman, hearing a splash, looked out of a window and saw his fellow workman in the water but making no struggle to save himself. Assistance was rendered as soon as possible but life could not be restored. Held, that all the circumstances warranted a finding that death resulted from accident.

In *Steers* v. *Dunnewald*, supra, a workman, employed in building a bridge over a river near its outlet, was last seen alive at his home, some miles from his work, and his dead body was later found in the bay, there being no evidence as to how he met his death. Under the presumptions regarding accident, suicide and murder, the court held that a finding of death by accident should be sustained.

Where a deck hand, on a steamboat so loaded as to make it convenient to go forward by walking along the narrow side rail, after being seen to go forward, was next seen in the water, drowning, there being no evidence of, or reason for, suicide, was held to have met death by accident. *Olsen* v. *Hale*, 2 Cal., I. A. C., Dec., 607.

In an English case, a sailor who went on deck at night to get fresh air, was found dead in the water on the following morning. Death held to be accidental. *Marshall* v. *Owners of Ship Wild Rose*, 3 B. W. C. C., 514.

In the case at bar there is no circumstance or evidence which even hints at suicide or murder. There is no evidence tending to show that Westman was other than a well, able-bodied man, with pleasant domestic environment. No financial or other trouble bore him down. To such men life is sweet and its termination would not be naturally sought by design. By the testimony, by proper inference and by legal presumptions we think the finding of the Commissioner upon the question of accidental death was correct.

INJURY ARISING IN THE COURSE OF EMPLOYMENT:

The authorities seem well agreed that the expressions "arising out of" and "in the course of" in compensation acts are not synonymous. The words " in the course of" refer to time, place, and circumstances, under which the accident takes place. *Bryant* v. *Fissell*, supra; *Fitzgerald* v. *Clarke & Son*; (1908) 2 K. B. 796. In the former case the court said "An accident arises in the course of the employment if it occurs while the employee is doing what a man so employed may reasonably do within a time during which he is employed, and at a place where he may reasonably be during that time."

In *Larke* v. *John Hancock, etc., Ins. Co.*, 90 Conn., 303, the court said, "An injury to an employee is said to arise in the course of his employment when it occurs within the period of his employment, at a place where he may reasonably be, and while he is fulfilling the duties of his employment, or engaged in doing something incidental to it."

The Massachusetts court, in *McNicol's Case*, 215 Mass., 497, tersely said, "An injury is received in the course of the employment when it comes while the workman is doing the duty which he is employed to perform."

Westman, at the time of his death, according to the record, was doing, at a time, at a place, and of a nature, the duties which his employment reasonably called him to perform. His injuries were received in the course of his employment.

INJURY ARISING OUT OF EMPLOYMENT:

This branch of the law has given rise to much discussion in the English courts, as well as in the courts of this country. It is practically impossible, in every case, to harmonize the result with that of

every other case, or to clearly understand the logic which leaves one accident within the legal zone and the other without it. Upon fundamentals the courts are substantially in harmony. The great weight of authority sustains the view that these words "arising out of" mean that there must be some causal connection between the conditions under which the employee worked, and the injury which he received. *McNicol's Case,* supra; *Coronado Beach Co.* v. *Pillsbury,* 158 Pac., 212; *Federal Rubber Co.* v. *Havolic,* 156 N. W., 143; *Fitzgerald* v. *Clarke & Son,* supra; *Mitchinson* v. *Day Bros.,* (1913) 6 B. W. C. C., 191.

"Under this test," says the court in *McNicol's case,* supra, "if the injury can be seen to have followed as a natural incident of the work, and to have been contemplated, by a reasonable person familiar with the whole situation, as a result of the exposure occasioned by the nature of the employment, then it arises out of the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing, proximate cause, and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work, and not common to the neighborhood. It must be incidental to the character of the business, and not independent of the relation of master and servant."

In *Coronada* v. *Pillsbury,* supra, the court said, "The accidents arising out of the employment of the person injured are those in which it is possible to trace the injury to the nature of the employee's work or to the risks to which the employer's business exposes the employee. The accident must be one resulting from a risk reasonably incident to the employment."

In *Mitchinson* v. *Day Bros.,* supra, a clear statement is made in this language, "To satisfy the words of the act the occurrence must be one in which there is personal injury by something arising in a manner unexpected and unforeseen, from a risk reasonably incidental to the employment. Nothing can come 'out of the employment' which has not, in some reasonable sense, its origin, its source, its causa causans, in the employment." It might with safety be said that, in order for the accident to arise out of the employment, the employment must have been the proximate cause of the accident.

Did Westman's fatal accident arise out of the employment. Again before answering this question we cite a few pertinent cases.

A watchman on construction work, while making his rounds, fell from a board scaffold into the cellar below. Held that the accident arose out of the employment. *Sorge* v. *Aldebaran Co.*, 3 N. Y. St. Dep. Rep., 390.

A cook, returning from a porch to the kitchen, there to resume his duties, fell down the cellar stairs. Held that the accident arose out of the employment. *Espy* v. *Crossman*, 2 Cal. I. A. C. Dec. 328.

A night watchman, while making his rounds, fell through an opening in the floor and was thereby killed. Held that the accident arose out of the employment. *Carter* v. *Hume-Bennett Lumber Co.*, 2 Cal. I. A. C. Dec., 42.

A ship master, who went ashore to pay a seaman his wages, on his return fell from the dock and was drowned. Held that the accident arose out of the employment. *Jones* v. *Owners of Ship Alice and Eliza*, (1910) 3 B. W. C. C., 495.

All these cases seem pertinent to the one at bar. Westman's accident was a natural incident of his work; the risk was one occasioned by the nature of his employment, the injury was traceable to the nature of his work and to the risks which his employer's work exposed him. We feel assured that the fatality arose out of the employment.

The mandate will accordingly be,

Appeal dismissed.

HARRY W. FARNUM *vs.* JOHN D. CLIFFORD.

Cumberland. Opinion April 30, 1919.

General rule of law covering liability of parent for negligent acts of his children. Rule of practice as to furnishing a transcript of all the evidence when a motion has been made for new trial on account of newly discovered evidence. Reason for same.

In an action on the case brought by the husband to recover for loss of services of his wife in consequence of injuries sustained by her in a collision between a carriage in which she was riding and an automobile owned by the defendant and operated by his son, the case being before the Law Court upon defendant's exceptions and a motion for new trial on the ground of newly discovered evidence, it is

Held:

1. That the requested instruction which forms the basis of the first exception was properly refused, because it seems to have been based upon an erroneous assumption of testimony as appears by the extracts from the evidence before this court as a part of the exception; and also because the presiding Justice in his charge carefully and fully explained to the jury the grounds upon which the defendant could be held liable, so that the refusal in any event was harmless.
2. That the instruction given, which gives rise to the second exception, was in accord with settled principles of law.
3. The motion for new trial on the ground of newly discovered evidence cannot be entertained because it is not accompanied by a full report of the evidence produced at the trial. This is necessary to enable the court to determine whether the additional facts proposed to be proved are in fact new evidence and also whether if admitted, in connection with that before in the case, a different result would have been reached.

Action on the case to recover damages for loss of services caused by the alleged negligence of defendant. Defendant filed plea of general issue. Verdict for defendant. Plaintiff filed exceptions to certain rulings of presiding Justice and also motion for new trial on the ground of newly discovered evidence. Judgment in accordance with opinion.

Case stated in opinion.

W. R. Pattangall and H. E. Locke, for plaintiff.

Andrews & Ne'son and McGillicuddy & Morey, for defendant.

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

CORNISH, C. J. This is an action on the case brought by the husband to recover for loss of services of his wife in consequence of injuries sustained by her in a collision between a carriage in which she was riding and an automobile owned by the defendant and operated by his son, John D. Clifford, Jr.

The jury returned a verdict for the defendant and the case is before the Law Court on two exceptions, one to the refusal of the presiding Justice to give an instruction requested by the plaintiff, and the other to the giving of an instruction requested by the defendant. There is also a motion for a new trial on the ground of newly discovered evidence.

EXCEPTION 1:

The instruction requested and refused was as follows: "If the automobile in question was purchased by the defendant for general use of his family, of whom John D. Clifford, Jr., was a member, and the automobile was so used, and if such use of the automobile included its use by John D. Clifford, Jr., whenever he wanted it, then the defendant would be liable for any injury caused by the negligence of John D. Clifford, Jr., in operating the automobile."

This requested instruction was properly refused. It was based upon an erroneous assumption of testimony. *Milliken* v. *Skillings*, 89 Maine, 186. It was predicated upon the assumed fact that the machine was purchased for general family use including the use by the son whenever he wanted it, while the extracts from the evidence before us as a part of the exceptions, clearly show that it was purchased for the pleasure of the family, a much less comprehensive term, and that the son had no authority or permission to take or use it in connection with his private business.

Moreover the presiding Justice in his charge carefully and fully explained the grounds upon which the defendant could be held liable for the acts of his son and adequately informed the jury upon all questions of law applicable to the facts in the case. The refusal of this requested instruction, even if it was academically correct, was harmless. The jury must have found from the testimony that the

son was using the automobile for his private business and that he had no authority so to do; and they must have had a proper understanding of the case from the whole charge. *Hunnewell* v. *Hobart*, 40 Maine, 31.

EXCEPTION 2:

The instruction given at the request of the defendant was as follows:

"Liability cannot be cast upon the defendant in this case because he owned the car, or because the driver at the time of the accident was his son, or because he permitted his son to use the car. There must be the further relation of master and servant between them, and the son at the time of the accident must have been using the car in the business of the defendant."

This instruction is clearly in accord with familiar principles of law. If under the facts of this case the plaintiff desired to have the term "business of the defendant" more fully defined, he should have asked for further instructions on that point. This he failed to do. The instruction as given is without error.

Motion for new trial on ground of newly discovered evidence.

This motion cannot be entertained because the entire report of the evidence at the trial is not before us. A general motion was not filed in the first instance, simply exceptions. The rule, and the reason therefor, have been stated as follows: "It is necessary in motions for new trials, on the ground of newly discovered evidence, not only to present the evidence alleged to have been newly discovered, but also a full report of the evidence produced on the former trial, that the Court may be able to determine whether the additional facts proposed to be proved, are in fact new evidence, and also whether if admitted, in connection with that before in the case, a different result would have been produced." *Brann* v. *Vassalboro*, 50 Maine, 64. In other words, the new evidence must be of such character and weight that considered by the Court with the other evidence, a different verdict would probably have been rendered. If that other evidence is not before the Court, that essential point cannot be determined. In the two cases cited by counsel for plaintiff, *Hill* v. *Libby*, 110 Maine, 150; and *Southard* v. *Railroad*, 112 Maine, 227, and in all other cases so far as we know, a general motion for new trial accompanied the special motion and the entire record was before the Court.

That record is wanting here. It might be added, however, that the evidence under this motion falls so far short of the plaintiff's expectations, as disclosed in the motion itself, that it could not possibly affect the merits of the controversy.

The entry must be,

Exceptions and special motion overruled.

BLAINE S. VILES *vs.* KENNEBEC LUMBER COMPANY.

Kennebec. Opinion April 30, 1919.

General rule as to plaintiff recovering under an account in quantum meruit where there has been a special contract entered into between the parties. Right of defendant to offer evidence of his damages in such an action under plea of general issue. Rule of pleading where plaintiff seeks to recover upon his special contract and defendant seeks to have recoupment on account of failure to perform contract according to terms.

This case is in the form of an action in assumpsit, upon an account annexed, and a quantum meruit, with a specification that the plaintiff would offer in proof of the latter count the items and charges enumerated in the account annexed.

The plea was the general issue. The defense offered was a special contract, and alleged breach thereof and a deduction in damages therefor. The case was tried upon the theory; (1) that no claim for a deduction in damages could be made, under the general issue; (2) that the plaintiff could recover, regardless of any breach of contract, what the logs delivered were reasonably worth; (3) that the contract was fully performed.

The plaintiff offered the contract. The defense then proceeded upon the theory that, while the plaintiff may have delivered the quantity of logs alleged, he did so by virtue of a contract with the defendant, by which he agreed to deliver a much larger quantity than was actually furnished, and that in consequence of such shortage of delivery the plaintiff was guilty of a breach of his contract, and the defendant was thereby subjected to damages.

As this case finally shaped up, but two issues are before this court. (1) Was the defendant under its plea entitled to show a breach of contract and claim a reduction of the plaintiff's verdict by reason of damage, if any, it might have sustained on account of the breach? (2) Was the jury justified under the law and evidence in finding a special verdict of performance?

Held:

(1) That the plaintiff was entitled to show a reduction of damages on account of the breach of contract, if there was one, under the pleadings as they were formulated for the trial.

(2) That the verdict of the jury was based upon an alleged modification of the special contract.

(3) That the burden of proving a modification was on the plaintiff.

(4) That the jury was not justified under the law and evidence in their verdict that the contract was performed.

(5) That the verdict should be set aside.

(6) That the question of damages was thereby left open.

(7) That the instructions upon the mode of procedure involving the measure of damages was erroneous.

Action of assumpsit with count annexed and also a general count of quantum meruit under which the plaintiff alleged that he would prove the items and charges set out in the account annexed. Defendant filed plea of general issue. Verdict for plaintiff in the sum of $13,736.23. Defendant filed exceptions to certain rulings of presiding Justice in regard to offering proof of damages caused to defendant by plaintiff's failure to carry out the terms of the special contract, which was offered in evidence and which was the basis of the action, defendant claiming proof of damages could be offered under plea of general issue. Exceptions sustained.

Case stated in opinion.

W. R. Pattangall and H. E. Locke, for plaintiff.

Williamson, Burleigh & McLean, for defendant.

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

SPEAR, J. This case is in the form of an action in assumpsit, upon an account annexed, and a quantum meruit, with a specification that the plaintiff would offer in proof of the latter count the items and charges enumerated in the account annexed.

The plea was the general issue. The defense offered was a special contract, and alleged breach thereof and a deduction in damages therefor. The case was tried upon the theory: (1) that no claim for a deduction in damages could be made, under the general issue;

(2) that the plaintiff could recover, regardless of any breach of contract, what the logs delivered were reasonably worth; (3) that the contract was fully performed.

It should be noted that a quantum meruit upon an implied contract and a quantum meruit upon a special contract originate and proceed to a judicial termination upon quite different grounds. A quantum meruit upon an implied contract is not founded upon a breach but upon conditions and circumstances which the law says implies a promise on the part of the beneficiary to pay what in equity and good conscience the services are reasonably worth. There is no fixed standard to which the value of the services may be referred for determination. On the other hand, a quantum meruit, upon a special contract, is founded upon the plaintiff's breach, and "the contract price is the standard by which the damages are to be estimated." *Jewett* v. *Weston*, 11 Maine, page 348. We must accordingly bear in mind, throughout this whole discussion, that we are dealing with a special contract.

A special finding was submitted upon the question of performance, and the jury found in favor of the plaintiff. This finding took care of the question of damages, provided the finding, upon the law and evidence, can be sustained; and of course settles the whole case. The essential part of the contract was as follows: "Memorandum of Agreement, between Boyd & Harvey Company and Blaine S. Viles, Augusta, Maine, parties of the first part and the Kennebec Lumber Company, of Augusta, Maine, party of the second part, for an amount of fir logs to be cut during the winters 1914, 1915, 1916, 1917. Said Boyd & Harvey Company and Blaine S. Viles agree to sell to the Kennebec Lumber Company, about four million (4,000,000) feet to be cut during the winter of 1914-1915, about five million (5,000,000) feet to be cut during the winter of 1915-1916, and about five million (5,000,000) feet to be cut during the winter of 1916-1917." The plaintiff's action is not based upon this contract. His declaration does not mention it. In his action he relied solely upon recovering for the quantity of logs proved to have been actually delivered.

The plaintiff offered the contract. The defense then proceeded upon the theory that, while the plaintiff may have delivered the quantity of logs alleged, he did so by virtue of a contract with the defendant, by which he agreed to deliver a much larger quantity than was actually furnished, and that in consequence of such shortage of

delivery the plaintiff was guilty of a breach of his contract, and the defendant was thereby subjected to damages. The first inquiry is, if there was a breach of contract, was the defendant entitled to show it, and claim the damages resulting therefrom under the plea of the general issue. Because if the defendant could not do this, under that plea, the only issue was the quantity of logs delivered, and their value. Furthermore, if damages could not be shown under that plea, it is evident that the contract and evidence of performance or non-performance were admissible only upon the issue of good faith. But this issue was eliminated by the verdict and we shall have no occasion to further allude to it.

The theory upon which the case was finally submitted to the jury is shown by the following extract from the judge's charge: "The defendant has stated to the court during the trial, and he has urged it to you, that in arriving at that figure of what the plaintiff reasonably deserves to have, if you come to that, he is entitled to have you deduct the damages which the defendant has sustained by reason of the non-performance of the contract. . . . I cannot give you that rule. . . . . But the question for you to decide, if you come to that, would be how much the logs furnished by Mr. Viles this last season were reasonably worth, considering that the remainder, if any, were not furnished, and considering that some saw logs, if you find such to be the fact, were taken out. To put it another way, were the logs that he actually received worth any less because some were not furnished? Were they worth any less because some large trees were taken out, provided that the logs that were left came up to the specification? Not, you see, whether the defendant was left short of logs for his mill. That is not the question; but the question is, did, or does, the plaintiff deserve to recover under that quantum meruit clause, if you come to that, for the logs which he did furnish in good faith under the circumstances disclosed in this case." By the use of the above language the defendant was denied any consideration for the shortage of logs for his mill, on account of the breach of contract and the plaintiff was permitted to recover what the logs which he delivered "were reasonably worth" without any regard to the breach. The shortage, in such a contract, might be very important.

As this case finally shaped up, it is therefore obvious that but two issues are before this court. (1) Was the defendant under its plea entitled to show a breach of contract and claim a reduction of the

plaintiff's verdict by reason of damage, if any, it might have sustained on account of the breach? (2) Was the jury justified under the law and evidence, in finding a special verdict of performance? The first issue presents a question of law. We think it should be resolved in favor of the defendant. It does not involve recoupment as a matter of pleading at all. The course of proceeding to have been pursued in the framing of the issues in the trial of this case is clearly mapped out in *Jewell* v. *Weston,* 11 Maine, page 346. The parties had entered into a special contract for the performance of certain work. The plaintiff brought an action upon quantum meruit. The court say: "Having proved the performance of the labor, they might rest until this proof should be avoided by the defense." How "should it be avoided by the defense?" This is the crucial inquiry as it vitally concerns the matter of pleading. Was it by special plea, or brief statement under the general issue, which only was pleaded? Not at all. The court states how: "It came out in the evidence that the labor was performed under a special contract." This is all that appeared. Nothing further was done or required by way of pleading. Yet the court say: "As soon as it came out in the evidence that the labor was performed under a special agreement, the defendant might securely rest, until the plaintiff had removed the obstacle (the special contract) in one or the other of the modes above suggested." The modes suggested were by proof of performance, or of "deviation" by consent.

These three moves follow in logical sequence under the general issue. No recoupment was pleaded. The contract was not mentioned in any of the pleadings. As above stated, "it came out of the evidence." Yet the contract was admitted for the purpose (1) in "showing what the agreement was;" (2) "as a standard by which the damages were to be estimated." Under the plea of the general issue the court say in regard to the defendant's right to offset his damages, or recoup his damages, or deduct his damages (what you may call the method is immaterial) that: "The contract price would be the rule in case the contract had been performed. But that not having been done, so much was to be deducted as the defendant suffered by reason of its non-performance," and cites *Hayward* v. *Leonard,* 7 Pick., 181, to which allusion will be further made. It is further said: "When a party engages to do certain work according to specification, and does not perform it as specified, what he is

entitled to is the price agreed upon, *subject to the deduction of the sum* which it would take to make it agree with the specification." In other words, the plaintiff cannot claim the benefit of his breach of contract without assuming the accompanying loss. The benefit to the plaintiff and damage to the defendant are parts of one and the same transaction, and are necessarily put in issue in the plaintiff's own pleadings.

That case is based upon the theory, and establishes the practice, that when a party is guilty of a breach of his special contract and sues on a quantum meruit, he must in his suit, make the defendant whole, for damages suffered by the breach, as he is entitled to recover only what the value of his services have been worth to the defendant. "Quantum meruit" means "what he merits." Damages are in issue, not by plea, but by the nature of the plaintiff's action. The moment he brings quantum meruit on a contract, he acknowledges a breach and admits notice that he may have damaged the defendant by such breach. *Gillis* v. *Cobe*, 177 Mass., 584. And the only object of a brief statement, under our present form of pleading, is to give notice of the defense to be made. The rules of special pleading were abolished, and superseded by the general issue and a brief statement, for the express purpose of abrogating the technical forms and permitting notice of defense regardless of form. Substance was substituted for form. Accordingly, the technical requirement being obsolete, actual notice is all that is now required. And when a party is charged with notice of the defense by his own pleadings, it would seem a useless form to require further notice, under the general issue. *McCormick* v. *Sawyer*, 108 Maine, 405.

This is also the well settled law, as will appear from an analysis of *Hayward* v. *Leonard*, 7 Pick., 180, and *Gillis* v. *Cobe*, 177 Mass., 584. Both cases were tried under the general issue, and the former was "the original case" in Massachusetts where it was held that a quantum meruit would lie in case of breach of a special contract. Parker, C. J., on page 184 says: "We think the weight of modern authority is in favor of the action and that upon the whole it is conformable to justice, that the party who has the possession of materials and labor of another shall be held to pay for them so as in all events he shall lose nothing by the breach of contract.

"And yet he (the party guilty of a breach) certainly ought not to gain by his fault in violating his contract, as he may, if he can recover

the actual value. . . . The owner is entitled to the benefit of the contract, and therefore he should be held to pay in damages only so much as will make the price good deducting the loss of damage occasioned by the variation from the contract." It should be observed that "actual value" was precisely what the plaintiff got, under the charge quoted. The court then further say: "But the case was put to the jury . . . . . merely on the question whether the house was built pursuant to the contract or not; and if not the jury were directed to consider what the house was worth to the defendant, and to give that sum in damages. We think this is not the right rule of damages. . . . They should have been instructed to deduct so much from the contract price as the house was worth less on account of these departures." A new trial was granted. Just what the logs "were worth to the defendant" was all the plaintiff had to show. We are unable to discover any material distinction between the instructions given in the case at bar and the instructions which were regarded as error in the case just cited. It should be kept in mind that the case cited was tried under the general issue, for we are now discussing the question of pleading, and that under that plea the defendant was allowed to deduct his damage on account of the breach, as we think the defendant was entitled to do in the case at bar. Otherwise the plaintiff might just as well have brought assumpsit upon an account annexed for lumber sold and delivered as upon a quantum meruit on a breach of his own contract. It would seem reasonable that a contract ought to mean something in such a transaction and impose some duty upon the plaintiff, who admits a breach, and asks to recover, not on a contract, but on account of the breach of the contract, for that is just what quantum meruit means in this class of cases.

Gillis v. *Cobe*, 177 Mass., 584, illustrates and confirms the doctrine of the opinion above referred to. Every issue raised in the present case was raised in that case and settled in favor of the practice that the defendant was entitled to have his damages deducted from the recovery of the plaintiff, under the plea of the general issue. That was a case of quantum meruit under a special contract. The court referred to the case of *Hayward* v. *Leonard* as the principle of justice upon which such form of action can be sustained. It clearly differentiates between an action on a contract and a quantum meruit on account of breach of the same contract. The first is based upon a strictly legal procedure and requires a special plea in recoupment, or

the equivalent by way of brief statement, or at least notice of what the nature of the defense may be, as held in *McCormick* v. *Sawyer*, 108 Maine, page 406. The second, however, is purely an equitable procedure introduced into Massachusetts practice in "the original case of *Hayward* v. *Leonard*, 7 Pick., 181." Accordingly, prior to 1829 this equitable right was not attainable in Massachusetts. Since then this equitable rule has prevailed upon the principle of equity, under special rules of law.

The Gillis case held that quantum meruit is founded upon the theory, that the action per se is an admission on the part of the plaintiff, that he is guilty of a breach of his contract, and that he seeks to recover, not the contract price, but for whatever benefit he may be able to show his services or his material have been to the defendant. On page 592 it is said: "If he resorts to recovery under the rule of *Hayward* v. *Leonard*, because, being in default in the performance of the contract . . . . he has no rights under it, he has not the same right to recover for the value of the work done and materials furnished by him that a person has who has done work and furnished materials as he has been requested to do. In the latter case it is immaterial whether the result of his work is of any value to defendant or not . . . but one who has done work under a special contract and resorts to a recovery under the principle of *Hayward* v. *Leonard* recovers on the ground, and only on the ground, that the result of his work is of some benefit to the defendant; he comes into court admitting that he has not done what he agreed to do and that he cannot hold the defendant on his promise to pay him the contract price; more than that, he admits that the part, which he has failed to perform, is one, that so far goes to the essence of the contract, that it is a condition precedent to a recovery by him on the contract; for, if the part which he agreed to perform, and did not perform, was of so slight importance, it is not a condition precedent; he can recover the contract price without performing it, and the only advantage which the defendant can take of it is by way of recoupment, or by a cross-action in which the burden was on him, the defendant, to prove the damages he has suffered from its non performance."

It should be noted that the court specifically states what the rule of pleading would require if the action was upon the contract. Then the court proceed: "The only ground, on which a plaintiff, who resorts to a recovery under the principle of *Hayward* v. *Leonard*, is

entitled to recover anything is, that, though, so far as his contract rights are concerned, he is entirely out of court, yet it is not fair that the defendant should go out of the transaction as a whole with a profit at his, the plaintiff's expense, and therefore if the structure, which, for the purposes of a recovery on this ground, he necessarily admits does not come up to the contract requirements in essential particulars, is, nevertheless, a thing of some value, the defendant ought to make him compensation therefor. That such is the ground in which a recovery can be had in such a case was laid down in the original case of *Hayward* v. *Leonard*, 7 Pick., 181, and has been repeated in the subsequent decisions." To this point many cases are here cited. It is then stated that 12 years before *Hayward* v. *Leonard* it was decided that there could be no recovery on the doctrine afterwards stated at length in that case, if the result of the plaintiff's misdirected work was not a thing of value. In view of this last statement the court then further say: "It is plain, therefore, that the plaintiff who seeks a recovery under the principle of *Hayward* v. *Leonard* for work done under a special contract, does not recover on the same ground as that on which a plaintiff recovers, who has done work, as he has been requested to do. So far as his case travels on that ground, he is out of court; his sole claim to be paid anything is that, if he is not paid, the defendant will profit at his expense; until he has proved that the defendant will in that case profit at his expense, he has not made out a prima facie case to be paid anything, and until he has proved how much that profit will be, his prima facie case is not complete." The court then state that he cannot make out a prima facie case in the regular way by proving the value of his work and materials but "to make out a case for recovery for such work and materials so furnished he must prove how much the result of his work had benefited the defendant, he must prove what the fair market value of the thing produced by his misdirected work is, and, until he has done that, he has not made out even a prima facie case on which he is entitled to recover anything." The court then go on to say with reference to the pleading that "it is immaterial at what stage of the trial the fact appears that the work for which a recovery is sought in a quantum meruit was done under a special contract, which the plaintiffs have failed to prove was performed; when that fact does appear, the contractor who seeks to recover by reason of such work has the burden of proving what the fair market value of the result of his

misdirected work is and unless, and until, he proves that, he does not show himself to be entitled to anything. In such a case, as in all cases where a plaintiff sues on a quantum meruit, there is no question of recoupment; the only question is, How much does the plaintiff deserve, under all the circumstances, and this arises under the general issue." Upon this point several cases are cited. The last quotation, however, concisely settles the question of pleading in this class of cases, and is entirely consistent with the equitable theory upon which quantum meruit is based. Finally the court says the contention of the plaintiffs in this connection comes to this: "While a plaintiff who has done work under a special contract, when suing on a contract, has the burden of proving that he has complied with its requirements, yet, on his failing to sustain that burden he can, by resorting to a count of quantum meruit, and by proving the value of the work done by him (which he failed to prove was a performance of what he agreed to perform), shift the burden of proof and throw on the defendant the burden of proving that he committed a breach of the contract; and that, in this way, he can entitle himself to the value of that work to the same extent as he would have been entitled had that work been done in the manner in which the defendant requested to have it done; and to recover that value unless the defendant goes forward and, by way of recoupment, cuts that amount down by proving that he, the plaintiff, committed a breach of the contract under which the work was done, and that he, the defendant, has suffered damages from that breach and proves the amount of those damages." These contentions were specifically denied in the opinion.

It would appear from this summary that in the Gillis case were made precisely the contentions which were made in the case before us, and especially, that the defendant by way of recoupment must assume the burden of cutting down the amount proved by the plaintiff. This contention, as above seen, was overruled by the court. We have cited this case thus fully because, as before stated, it discusses fully the very foundation upon which quantum meruit is based, the ground upon which the action can be maintained, the procedure which the plaintiff must folllow, the amount to which he is entitled and the pleadings upon which the defendant is authorized to present his side of the case. It will now be seen by comparison that *Jewett* v. *Weston*, decided in the 11th Maine in 1834, was based upon

Hayward v. *Leonard* and is in perfect accord with the principles and procedure in this form of action found in the well reasoned opinion just discussed. We have not yet discovered a single opinion which contravenes the reasons, the procedure or the form of pleadings so fully and carefully laid down in the Gillis case.

If we now recur to the ground upon which this phase of the case was put to the jury, we find it to be this, as taken from the final word upon this point from the charge of the presiding Justice, leaving out the intervening and immaterial clauses: "But the question is, Does the plaintiff deserve to recover for the logs which he had furnished in good faith under the circumstances discussed in this case." Yet the court stated the contention of the defendant in this way: "The defendant has stated to the court during the trial and he has urged to you that in arriving at that figure at what the plaintiff reasonably deserves to have, if you come to that, he is entitled to have you deduct the damages which the defendant has sustained by reason of the non-performance of the contract. I say to you, and I have already stated to him that, in my view of the law, under the issue as it is framed here, I cannot give you that rule." The court then states that the reason for not giving the rule is because under the general issue the plaintiff was not entitled to have the issue as to the damages he had suffered on account of breach of the contract considered in connection with the plaintiff's action of quantum meruit. "Not, you see, whether the defendant was left short of logs for his mill; that is not the question." But as before seen, this very question was put in issue by the form of the plaintiff's action.

We therefore conclude that the defendant's contention that he was entitled to claim and show damages for breach, and to have those damages deducted from what the plaintiff was entitled to recover for the logs he actually delivered, was correct and should be sustained. If the case stopped here, exceptions should be sustained and a new trial granted. But while the plaintiff brought his action in the form of quantum meruit, he was permitted to offer evidence upon the question of damages, that the contract was substantially performed, and that no damages followed. The latter question was submitted to the jury for a special verdict and they found in favor of the plaintiff.

While the defendant should have been allowed to reduce the value of the logs actually delivered, by way of damages for breach of con-

tract, yet, if the jury were justified in finding that the plaintiff fulfilled his contract, then, no damages could follow. This question is one of law and fact. The interpretation of the contract we think is a question of law; whether modified, a question of fact. Its language is clear and unequivocal, as to the quantity of logs to be furnished each season. We repeat the paragraph on this question: "Said Boyd & Harvey Company and Blaine S. Viles agree to sell the Kennebec Lumber Company about four million (4,000,000) feet to be cut during the winter of 1914-1915, about five million (5,000,000) feet to be cut during the winter of 1915-1916, and about five million (5,000,000) during the winter of 1916-1917." The word "about" should be understood as limiting all feetage herein considered. We think it was conceded that this was a divisible contract. However this may be, we have no doubt about it. The language makes each season's cut as distinct as though there was a separate contract for each cut, the first 4,000,000 was to be cut during the winter of 1914-1915. The phrase "during the winter" limits the cut and the amount to this particular season. Under the first clause of this contract the defendant was entitled to about 4,000,000 feet. If he got this quantity this clause of the contract was completed. If he got less it was a matter of adjustment. If he got more that also was a matter of adjustment concerning this first season's cut. To cut less or cut more would be a breach by the plaintiff. The plaintiff did cut more. The defendant was not obliged to take it. It did, however, adjust the matter, and left the first clause of the contract satisfied and ended. It agreed to carry the surplus of the first season to the credit of the next season and take 3,800,000 instead of the 5,000,000 specified in the second clause of the contract. This arrangement was mutually agreed upon between the plaintiff and defendant, as the undisputed evidence shows. This settlement included pine as well as fir. The season's operation was closed. All the logs of the 1914-1915 cut were paid for in full, some at a special price, as testified by the plaintiff. This settlement, so far as we can see, resulted in a completed transaction so far as the first clause of the contract was concerned, involving the 1914-1915 cut. The second clause of the contract was precisely like the first except the cut was to be 5,000,000, and "during the winter" of 1915-1916.

As before seen, this quantity was by mutual agreement reduced to 3,800,000, by reason of the surplus of the previous year. "About"

3,800,000 feet was the quantity the defendant was entitled to under this second clause, and second season, of the contract. If it got less it was a matter of adjustment. If he got more it was likewise a matter of adjustment. It was not obliged to take more or less. If the plaintiff gave it more or less he violated his contract. He did furnish more, by 895,643 feet. But this excess was adjusted between the plaintiff and defendant. The defendant took the timber, paid for it and ended this season's transaction. It was a completed matter. That is, if there had not been another season's operation involved, the first and second season's operations would have been mutually and completely settled and ended, except the possible payment of some notes, which of course were rather evidence of a settlement, than otherwise, as the logs had all been delivered, and many at least manufactured. There was no agreement upon this second settlement that any of the surplus logs for the winter of 1915-1916 should be carried over to reduce the cut of the winter of 1916-1917, as had been done in 1914-1915. In the above figures we have regarded the pine as a part of the contract as claimed by the plaintiff. It would therefore appear from the undisputed evidence that the first and second clauses of the contract were carried out and executed as above stated. And that is the way matters stood when the time approached for the performance of the last clause. The third clause called for about 5,000,000 feet to be cut during the winter of 1916-1917. But the plaintiff instead of furnishing about 5,000,000 feet supplied the defendant with only 2,934,855 feet,—a shortage of 2,065,145. But notwithstanding the settlements for the seasons of 1914-1915 and 1915-1916, the plaintiff claims that the contract was so modified that it was made entire instead of divisible, and that instead of regarding the feetage of the first and second operations as separate and completed transactions, the surplus of these operations should be applied to the contract as a whole and reckoned as a part of the total 14,000,000 feet, thereby leaving a shortage on the total feetage of about 1,000,000 feet instead of over 2,000,000 on the last season's cut, as claimed by the defendant. Whether the word "about" ought to take care of a shortage of one million feet in fourteen million, quere?

However this may be, the word "about" cannot take care of a shortage of two million feet in five million. This brings us to the question of fact. The burden is on the plaintiff to show the modification of the contract, as claimed by him. We think the case will

show that the only evidence by which he seeks to assume this burden is a letter from the defendant company to him dated Nov. 28, 1916, just prior to the time of proceeding to the third operation under the terms of the original contract. The letter is as follows: "Mr. Blaine S. Viles, Augusta, Maine. Dear Sir: I trust that you expect to finish up our contract deliveries during the coming year. We are counting on receiving from you next summer the balance of fir to make up the total quantity called for by the contract. Nothing has been said about pine tops this year. Last year there seemed to be some misunderstanding relative to these pine tops. You insisted in settlement that the price should be one dollar above the fir, where my recollection was that the pine were to go in at the same price as the fir and be considered as a part of your contract. As we paid you one dollar per thousand for the pine more than for the fir, it would appear that the pine was an entirely separate trade exclusive of the contract, both with regard to total feetage and deliveries and with regard to price. The pine tops which we had did not work out very satisfactorily, and we would not care for more of them during the coming year, but would like the full quantity of fir due us under contract. I understood Mr. Boyd to say that they should have approximately one million feet of this. Will you please advise how many you are planning on cutting for us? I would also call your attention to the fact that our contract calls for no saw logs to be taken from the fir which we have. Yours truly, Kennebec Lumber Company, S. H. Boardman, Treas." The claim in the letter which the plaintiff says should be construed as a modification is this: "We are counting on receiving from you next summer the balance of fir to make up the total quantity called for in the contract."

Upon cross-examination Mr. Boardman, agent of the defendant company, repeatedly said the surplus of the previous seasons' cut was not meant to be reckoned on the last operation. But finally this question and answer were obtained. Q. The only way you could get the balance on the total quantity was to subtract what had hitherto been furnished? A. Yes. This was correct as a mathematical problem, of course. Then folllowed this question and answer: "Don't you think that is what you meant when you wrote them to give you the balance? A. That might have been in my mind. These answers were obtained after a long and somewhat grilling cross-examination in regard to the interpretation of the above quoted

clause. Just prior to these questions and answers when the specific question was put, Mr. Boardman answered as follows: "Q. To get the balance you had to find out how much you had? A. Yes. (Another mathematical deduction). A. Wasn't that just what you meant, for him to subtract from the total, what you had had, and furnish you the balance? A. "Not from the total of what he had furnished, Mr. Pattangall." Up to the time of this letter not a word had ever been said between these parties about applying the surplus cut of the two previous seasons to the cut of the last season, nor to the entire contract. Nor was a word in regard to it ever said after the letter until the parties met in court, when the plaintiff raised the question. We do not think that a fair interpretation of this letter, in the light of the circumstances and the testimony, bears out the interpretation the plaintiff seeks to put upon it. In the first place, there was no occasion for the defendant to write at all about the feetage of the contract. The two previous operations had been completed and settled without a word about it and the contract called for about five million. But in the two previous operations a certain amount of pine had been cut which the defendant was not obliged to take, but he had taken it and settled for it. This season the defendant did not want this pine, as a part of his supply.

It is therefore apparent, from reading this whole letter, that the sole occasion and motive for writing was to differentiate between fir which his contract called for and pine which his contract did not call for and which he did not want. The wording "balance of fir to make up," etc., is an awkward way of stating the claim, but read with the rest of the letter its meaning seems clear that the defendant in substance says I want "fir" instead of any "pine" to make up the balance of my contract or to make up the total quantity called for by the contract.

The very next sentence is: "Nothing has been said about pine tops this year" . . . "We would not care for any more during the coming year, but would like the full quantity of fir due us under contract." "Fir" instead of "pine" was the object of this letter. That the plaintiff so understood it both as to "fir" and feetage for 1916-1917, clearly appears from his own testimony. Before he received the letter he was cutting pine as usual for the defendant. Q. Will you tell us about the pine, why you got so little? A. The reason I stopped, on receipt of the letter, or as soon as I could get

up river, I stopped my operation cutting the small pine and put it into this fir mark. This shows what the letter meant. But if there was any doubt, that the plaintiff understood the letter to make no modification, his own testimony, as to the quantity he intended to cut, removes it. Q. What arrangement did you make to get Mr. Boardman fir that winter? (1916-1917) A. Why, I planned to cut Mr. Boardman—how much fir? Q. Yes. A. I planned to cut him about 2,000,000 of fir myself. I talked with Boyd & Harvey, and they expected to cut a million or more, and as I learned that they were getting more I figured they would probably get about 2,000,000. They cut a million of pine, that is, with the pine they cut that winter, and I figured that would fill the contract of 5,000,000.

It is very evident that the plaintiff at this time did not regard this letter as a modification of this contract in regard to the five million feet for 1916-1917, but planned and expected to cut this quantity this season. It is equally evident that Mr. Boardman never intended it as such. Consequently the parties neither understood nor consented to any modification. So far as we are able to determine, the question was first raised in court, after the parties had engaged in a legal controversy. Hence there was no ratification.

We are of the opinion that the plaintiff has not presented any competent evidence, showing a modification of his original contract. The special verdict, based upon such modification, should be set aside. The question of damages was thereby left open. The instructions upon the mode of procedure involving the measure of damages was erroneous.

Exceptions sustained.

STATE OF MAINE *vs.* WALTER S. BROWN,

By Indictment.

Cumberland. Opinion April 30, 1919.

Superior Courts. General rule covering right of appeal to Law Court from Superior Courts.

Indictment brought under Revised Statutes, Chap. 126, Sec. 2, Superior Court, Cumberland County.

Held:

That an appeal lies from the Superior Court to the Law Court under R. S., Chap. 136, Sec. 28.

Indictment brought under R. S., Chap. 126, Sec. 2, tried at Superior Court, Cumberland County, State of Maine. Verdict of guilty was returned and respondent filed exceptions, also an appeal to Law Court. Judgment in accordance with opinion.

Case stated in opinion.

Carroll L. Beady , and Clement F. Robinson, for the State.

W. C. Whelden, and Arthur Chapman, for respondent.

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

SPEAR, J. This case comes up on exceptions to the admission of testimony; to the refusal of the presiding Justice to order a verdict after the evidence was all in; to overruling a motion in arrest of judgment; and on appeal from the decision of the presiding Justice denying a motion to set aside the verdict.

The exceptions to the admission of testimony are not in such form as to admit of consideration. *Dunn* v. *Packing Company,* 113 Maine, 159. The exception to the overruling of the motion in arrest of judgment is without merit. No defect appears upon the face of the papers. The motion for a directed verdict is in the nature of a

demurrer to the evidence and brings the case up on the evidence. This exception may be considered with the appeal. The appeal brings the case up on its merits, with the verdict of the jury to overcome.

The question of the right of appeal from the Superior Court is raised by the State. An analysis of the statutes hereto appended shows that an appeal lies. We therefore come directly to a consideration of the merits of the case, under the appeal, where a concurrence of a majority of the Justices shall be sufficient to grant a new trial.

The offence charged in the indictment is most revolting. Yet the jury, after a patient and exhaustive trial, with opportunity to see, hear and judge the parties and witnesses, found the defendant guilty.

The defense argues the improbability of the story upon which the verdict is founded. It is legitimate argument. Yet, if the acts charged were improbable, the manufacture of the prosecution was well nigh impossible. There is no judicial ground upon which to disturb the verdict.

Analysis of the Statutes.

In this case a motion for a new trial was presented to the Justice who heard the cause, and denied. An appeal under R. S., 1916, Chap. 136, Sec. 28, was taken from this decision. The first clause in this section provides, without limitation as to the court in which the cause may be pending, that a motion to the sitting Justice, for a new trial, in any case involving imprisonment for life, is a subject of appeal. Hence there is no doubt that an appeal, involving life imprisonment, lies from an adverse decision of a Justice of the Superior Court.

The last clause then proceeds to read that "in all other cases amounting to a felony where a like motion is filed an appeal may be taken to the Law Court."

Revised Statutes, Chap. 82, Sec. 100, provides that "motions for a new trial in criminal cases tried in either of the Superior Courts shall be heard and finally determined, by the justice thereof." This provision must be construed, in pari materia, since in the history of the legislation touching the right of appeal, capital cases evidently do not fall within the limitation of Sec. 100, Chap. 82, as appears from the following comparison.

Chapter 151, Public Laws of 1868 established a Superior Court in Cumberland County and Chapter 216, 1868 gave it full criminal

jurisdiction. At that time no statute provided for an appeal in any class of criminal cases. Chapter 216 expressly provided that the decision of the Justice should be final.

This was no more than a declaration of the common law right of the Justice. *State* v. *Hill*, 48 Maine, 241; *Powers* v. *Moore*, 79 Maine, 216; *State* v. *Perry*, 115 Maine, 204.

By Chapter 207, Public Laws of 1880 the following statute was enacted: "The Supreme Judicial Court or any Superior Court before which any person has been convicted for an offence capital, or formerly capital, or may be convicted for an offense formerly capital may either in term time or vacation . . . . grant a new trial, for any cause for which a new trial may or should be granted." This statute did not provide for appeal from the decision of the presiding Justice in either court.

By the Public Laws of 1883, Chap. 205, Sec. 8, the respondent was granted the right of appeal from an adverse decision upon his motion, to the next law term, and the concurrence of but three Justices was necessary to grant such motion. This chapter restored the death penalty and Section 8 applied to both the Supreme and Superior Courts.

That section appears in R. S., 1883, Chap. 134, as Sec. 27. By the Public Laws of 1889, Chap. 152, Sec. 27 of Chap. 134 was made to apply to "murder or to any offence for which the punishment may be imprisonment for life" instead of to a "capital case." This change in phraseology was required by the repeal of the death penalty which abolished "a capital case." The appeal, however, remained precisely the same as in R. S., 1883, Chap. 134, Sec. 27, and applied to both the Supreme and Superior Courts.

Revised Statutes, 1883, Chap. 134, Sec. 27 as amended became Chap. 135, Sec. 27 in the revision of 1903. Consequently an appeal for any life offense under the latter section could be taken from each court. The Public Laws of 1909, Chap. 184, amended Sec. 27, Chap. 135, R. S., 1903, by adding the following: "But in all other criminal cases amounting to a felony where like motion is filed and appeal taken to the Law Court the concurrence of a majority of the Justices shall be necessary to grant such motion and sentence shall be imposed upon conviction either by verdict or demurrer." This addition it will be seen does not in any way differentiate between the Supreme and Superior Courts with reference to the right to pass upon "such

motion," or upon the right of appeal. The only change is that it requires a concurrence of the majority of the Justices instead of three to grant the motion. In the language of the section "where like motion is filed and appeal taken to the law court" the word "like" would indicate that both the motion and the appeal should be based upon the same jurisdiction as the motion and appeal in case of punishment or imprisonment for life. It would therefore follow, that an appeal in case of a felony, upon the denial of a motion for a new trial, by the presiding Justice, could be taken from either court.

By Chap. 18, Public Laws of 1913, R. S., Chap. 135, Sec. 27, as above amended, was again amended, so that, to sustain an appeal in offenses punishable by imprisonment for life, it required a majority of the Justices instead of three. No other amendment was made. This did not affect the right of appeal from either court.

Neither R. S., 1883, Chap. 77, Sec. 82, nor R. S., 1916, Chap. 82, Sec. 100, identically the same, inhibit an appeal in a murder case, in the Superior Courts, although the language is broad enough to deny an appeal in all criminal cases.

In view of the history of these statutes, and of the fact that the Superior Court of Cumberland County has always had jurisdiction of murder cases, a class of criminal cases which certainly does not fall within the purview of Chap. 82, Sec. 100; and that an appeal in case of felonies has been coupled with, and is an amendment of, the section of the statute which has always applied to capital or murder offenses, we think that felonies, the penalty for which in some cases may be very severe, were intended, so far as the right of motion for new trial and appeal is concerned, to be placed in the category of offenses which were formerly capital or for which the punishment might be imprisonment for life.

Exceptions overruled.
Appeal denied.

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

Lincoln. Opinion May 6, 1919.

Rule of practice as to making and filing exceptions. Effect of record showing "exceptions filed and allowed." Rule as to allowance of exceptions where presiding Justice has become incapacitated. R. S., Chap. 82, Sec. 56, interpreted. General rule of practice as to facts in prior proceedings being considered res judicata where new trial has been granted for any cause.

Where an entry of "exceptions filed and allowed" is made before the close of a term by consent of parties, the presentation of the bill of exceptions to the presiding Justice for his approval after the adjournment of the term will be considered as done as of the date of the entry.

Where an entry of "exceptions filed and allowed" has been made before the close of the term by consent of parties, and a bill of exceptions has been duly made up and presented to the presiding Justice, though after the adjournment of the term at which they were allowed, and before allowance the presiding Justice has become incapacitated for allowing them for any of the reasons assigned in Sec. 56 of Chap. 82, R. S., any Justice may upon motion and hearing allow them.

When a new trial is granted for any cause, the proceedings begin *de novo*, and no facts determined in the prior proceedings can be considered *res judicata*.

Action of trespass quare clausum. Defendant filed plea of general issue. To the ruling of presiding Justice directing verdict for defendant, plaintiff filed exceptions. Judgment in accordance with opinion.

Case stated in opinion.

M. A. Johnson, for plaintiff.

A. S. Littlefield, for defendant.

SITTING: SPEAR, HANSON, PHILBROOK, WILSON, DEASY, JJ.

WILSON, J. This case as now before this court presents two questions, first, whether the bill of exceptions of the plaintiffs to the ruling of the presiding Justice directing a verdict for the defendants is properly before this court, and second, whether it should be sustained.

The action was first tried at the April term, 1915, and resulted in a verdict for the plaintiffs against certain of the defendants. It was then taken to this court on motion for a new trial on the usual grounds, and a new trial was granted. 116 Maine, 76. A new trial was begun on the first day of the October term, 1917.

At the close of the second trial the presiding Justice, upon the ground that he felt his hands bound by the previous decision of this court above referred to, *pro forma*, as it were, ordered a verdict for the defendants.

To this ruling the plaintiffs seasonably excepted and before the close of the term, and presumably with the consent of all parties, to comply with the statute, Sec. 55, Chap. 82, R. S., an entry was made upon the docket of the court, "Exceptions filed and allowed." The effect of this entry under our practice and the decisions of this court must be construed to be that the presentation of a bill of exceptions after the close of the term shall by consent of parties be considered as presented as of the date of the docket entry. We think, therefore, the presentation of the bill of exceptions to the presiding Justice must be held in this case as having been duly made on the eighth day of the October term, 1917. *Dunn* v. *Motor Co.*, 92 Maine, 165; *Field* v. *Gellerson*, 80 Maine, 270.

When a bill of exceptions has been duly presented for allowance, but before allowance the Justice presiding at the trial becomes incapacitated for allowing them for any of the reasons assigned in Sec. 56, Chap. 82, R. S., any Justice may upon motion and hearing allow them. The bill of exceptions of the plaintiffs having been duly presented,—and it was in fact presented to the Justice presiding though not allowed by him owing to his death,—it was, we think, properly allowed by the Chief Justice under Sec. 56 of Chap. 82 above referred to, and is now before this court for consideration.

After consideration of the evidence now in the case we must sustain the exception. The presiding Justice at *nisi prius* evidently viewed the findings of fact by this court in the opinion handed down in the former case, 116 Maine, 76, as conclusive and binding. The finding as to the town line between Waldoboro and Warren, at least, so far as the same forms the county line between Lincoln and Knox County may be conclusive, *State* v. *Thompson*, 85 Maine, 194; but unless the facts fall under the head of those of which the court takes judicial notice, no findings of fact by the Law Court based upon evi-

dence in a case in which it sets aside the verdict can be considered *res judicata*. *Case* v. *Hoffman*, 100 Wis., 314. No issue of fact can be considered settled in a legal proceeding until a judgment is rendered thereon. *Lord* v. *Chadbourne*, 42 Maine, 429, 443.

A new trial being granted, the proceedings begin *de novo* so far as the determination of the facts are concerned. *State* v. *Verrill*, 54 Maine, 581, 583.

Considerable new evidence, at the second trial was introduced by the plaintiffs, and the contention of the plaintiffs now is, in effect: not that the so-called "old town line" between Waldoboro and Warren is the true town line, but that it was the point of starting when the deed was given from Waterman Thomas to Geoffrey Hoffses in 1779, and that by the long acquiescence at least of the abutting owners the so-called "old town line" has ever since been regarded as and is the easterly boundary of this property; that the westerly line of this property, which is the real issue in this case, was originally fixed by a birch tree and though said birch tree has disappeared through the ravages of time the western boundary has continued certain and fixed by long occupation and acquiescence of the owners on each side.

Evidence was introduced in the former case of a copy of an ancient plan of this section of the town of Waldoboro indicating that the property of John Labe next adjoining the line in dispute on the west extended no farther east than the adjoining property on the north, and the report and plan of the division of the property of Geoffrey Hoffses in 1811, which included the plaintiffs' property and the land now of one Payson adjoining on the north, the western line of which seems undisputed, and which plan tends to show that the distance across the property from east to west was the same from the north to the south boundaries, the property being divided into strips extending the entire length east and west, and the area in each case being in unvarying proportion to the width of each strip given in the report and on the plan. In addition to this and the other evidence of the former trial the plaintiffs in support of their contentions introduced at the last trial deeds of property lying easterly of the so-called "old town line" which tended to show an entirely different source of title from that of Geoffrey Hoffses. There was also evidence that the westerly line as claimed by the plaintiffs had been acquiesced in by the abutting owners for many years; Corpus Juris, Vol. 9, pages 244,

245; *Knowles* v. *Toothaker*, 58 Maine, 172; and also evidence that the land of the predecessors in title of the defendants originally began much farther to the west than the defendants' surveyor began to measure according to his testimony in the first trial, and that the distance named in the defendant Scott's deed along its northerly boundary was the distance along the original northerly line of the property known as the Jacob Labe property. With such other new evidence as was introduced by the plaintiffs at the last trial, additional weight is given to some of the evidence introduced at the first trial. We think the presiding Justice erred in not submitting all the evidence to the jury.

Entry should be:

Motion to dismiss bill of exceptions overruled.
Exception sustained.

HELEN B. MAILMAN'S CASE.

Androscoggin. Opinion May 27, 1919.

Revised Statutes, Chap. 50, Sec. 34, interpreted. Burden of proof in claims arising under Workman's Compensation Act. Necessary elements to be proven. General rule as to admissibility of statements made by deceased or injured person as to the manner of receiving the injuries. Rule as to admissibility of statements showing physical condition. Findings of fact by Chairman of Industrial Accident Commission as compared with findings of fact by Justice in equity proceedings. Rule as to invoking fraud to defeat commissioner's findings of facts. Rule where the natural and reasonable inference from the facts proven is that the accident happened while the deceased was engaged in his employment and employer disputes same upon whom is the burden of proof. Rule as to employee dying at his post of duty being presumed to be at the time of his death in the performance of his duty and engaged in the work for which he was employed.

Proceeding under the Workman's Compensation Act.

William Mailman, a night watchman in a foundry, began work as usual on the evening of April 18, 1917. The following morning he was discovered at the foundry in a state of collapse. To the man who found him he exclaimed "I got hurt." The Chairman of the Industrial Accident Commission permitted the introduction of testimony showing that Mailman afterward told that and how he was accidentally injured while doing his work at the foundry during the night. The Chairman, however, in his decree certifies that in making his finding of fact he wholly disregarded this hearsay evidence.

Mailman developed peritonitis and pneumonia and died on April 27, 1917.

It was contended and, on the other hand, denied that Mr. Mailman's pneumonia was traumatic, i. e., that it was superinduced by trauma, or injury. There was testimony that a red mark was found on his chest which turned black when blood poisoning set in. There was some medical testimony to the effect that the sequence of symptoms was more consistent with traumatic pneumonia than with illness otherwise caused.

The Chairman found Mailman's fatal illness was traumatic and that it was the result of an accident arising out of and in the course of his employment by the defendant and made an award to the dependent widow.

From a formal decree of a single Justice in accordance with the Chairman's finding the case comes up on appeal.

Held:

In the hearing before the Commission the plaintiff has the burden of proof. To sustain the decree it must appear that there was produced at the trial of facts competent legal evidence of three things, to wit: that the deceased died, or was disabled, as the result of (1) an accident arising (2) out of, and (3) in the course of his employment by the defendant.

In the absence of fraud the Chairman of the Industrial Accident Commission is under the statute final Judge of the facts. When the evidence is direct the court will not review the Commissioner's finding in respect to the credibility and weight of testimony.

The decree of the Commissioner is analogous to a finding of a Judge who by consent determines facts or (as indeed it is) an award by a referee agreed upon by the parties. That such a finding or award cannot be impeached by showing errors of judgment, however gross, as to the weight and credibility of testimony, is settled by so many authorities that citation is unnecessary.

In a case proved wholly, or in part, circumstantially, where there is a dispute as to what the circumstances are, the determination of such dispute by the Commissioner is final. It is for the trier of facts, who sees and hears witnesses, to weigh their testimony and without appeal to determine their trustworthiness.

When the evidence is circumstantial and a state of facts is shown more consistent with the Commissioner's finding than with any other theory and the finding is supported by rational and natural inferences from facts proved or admitted, an appeal cannot be sustained.

The Workman's Compensation law is not violative of the Constitution in respect to the method by it provided for the exclusive determination of issues of fact. Being elective it does not deny or abridge the right of jury trial.

The admission by the Commissioner of plainly incompetent hearsay testimony does not require the court to disturb the decree unless such decree was in whole, or in part, based on such inadmissible testimony.

The spontaneous exclamation of the helpless man "I got hurt" was properly admitted. But only as tending to show the physical condition of the deceased at the time.

Evidence was produced both in support of and in denial of the proposition that Mailman's illness was traumatic, i. e., caused by injury. The weight and credibility of this testimony was entirely for the Commissioner.

The Chairman found and determined that Mailman's fatal illness was traumatic and was due to an accident arising out of and in the course of his employment by the Record Foundry & Machine Company. This inference is not unnatural or irrational and is more consistent with the proved or admitted facts than is any other theory.

Appeal from the decision of the Chairman of the Industrial Accident Commission. Judgment in accordance with opinion.

Case stated in opinion.

McGillicuddy & Morey, for claimant.

Andrews & Nelson, for respondents.

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

DEASY, J. Proceeding under The Workman's Compensation Act. Helen B. Mailman, widow and dependent of William Mailman, alleges that her husband died from an "accident arising out of and in the course of his employment" by the Record Foundry and Machine Company.

William Mailman, a night watchman, went to work as usual on April 18, 1917. The following morning he was discovered at the foundry in a state of collapse. He developed pneumonia and peritonitis and after a few days died. His dependent claimed that his pneumonia was traumatic, i. e., the result of an injury and that the injury was due to an accident sustained by the deceased while alone at the foundry on the night of the 18th. The chairman of the Industrial Accident Commission found in favor of the dependent. From the formal decree of a single Justice rendered in accordance with such finding the defendants appeal. To avoid confusion we shall refer to the dependent as the plaintiff.

JURISDICTION.

"His (chairman of Industrial Accident Commission) decision in the absence of fraud upon all questions of fact shall be final. . . . . Such decree (decree of single justice in accordance with finding of chairman) 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." R. S., Chap. 50, Sec. 34.

In the absence of fraud this court is precluded by positive law from acting as a trier of facts. It does not review the facts. Another tribunal has final jurisdiction for this purpose. The Supreme Judicial

Court finally determines questions of law. For this purpose its members, or a majority of them, sit as a court of law. It possesses this power whether sitting as a court of common law or of equity, or to decide probate appeals, or appeals from quasi judicial tribunals like the Industrial Accident Commission. The constitution does not and the legislature cannot abridge this power.

But it does not in all cases finally determine questions of fact.

In equity causes the court sitting in banc speaks the final word both as to law and fact. So in actions at common law reported by consent of parties. But in other common law causes, with immaterial exceptions, the constitution guarantees trials of fact by a jury; in probate appeals under a system sanctioned by long usage and repeated decisions, a single Judge passes finally on facts and in causes arising under The Workman's Compensation Act the chairman of the Industrial Accident Commission is by statute made the trier of facts and his decrees are, in the absence of fraud, final.

The constitutionality of a law vesting such a power in a tribunal not a court with a jury and which is partly and perhaps primarily administrative has been questioned.

The Maine Workman's Compensation Act is elective. No employer or employee is bound to submit to it without his assent, actively or passively manifested. Substantially similar statutory provisions have been upheld generally by courts. *State* v. *Creamer*, (Ohio) 97 N. E., 602; *Cunningham* v. *N. W. Imp. Co.*, (Mont.), 119 Pac., 554; *Borgnis* v. *Falk Co.*, (Wis.), 133 N. W., 209; *Hawkins* v. *Bleakley*, 243 U. S., 210, 61 L. Ed., 678; *Sexton* v. *Newark Co.*, (N. J.), 86 At., 451; *Hunter* v. *Colfax Consol. Coal Co.*, (Iowa), 154 N. W., 1037, 157 N. W., 145; *Young* v. *Duncan*, 218 Mass., 346; *Deibeikes* v. *Link-Belt Co.*, (Ill.), 104 N. E., 211; *Sayles* v. *Foley*, (R. I.), 96 At., 340. For reasons which are in these cases mobilized in compelling force, we hold that the Maine Compensation Act is not violative of the constitution in respect to the method by it provided for the exclusive determination of issues of fact.

BURDEN OF PROOF.

In the hearing before the Commission the plaintiff has the burden of proof. *Von Ette's Case*, 223 Mass., 59. *Sanderson's Case*, 224 Mass., 562.

For this reason a finding in favor of the plaintiff of any essential fact without proper evidence is an error of law. To sustain the decree it must appear that there was produced at the trial of facts competent legal evidence of three things, to wit, that the deceased died or was disabled as the result of (1) an accident arising (2) out of and (3) in the course of his employment by the defendant. R. S., Chap. 50, Sec. 11.

QUESTIONS OF LAW INVOLVED.

The defendants contend that the Commissioner fell into errors of law in the following respects: (1) That he admitted incompetent, to wit, hearsay, testimony and based his decree wholly or partly upon it, and (2) that he made his decree in favor of the plaintiff with no competent evidence supporting certain essentials of her case.

HEARSAY TESTIMONY.

The commissioner permitted witnesses to rehearse the story of the accident as told by the deceased. This was hearsay testimony, plainly inadmissible. But the allowance of hearsay evidence by the commissioner does not require this court to reverse his decree unless such decree was in whole, or in part, based upon such incompetent testimony. *Pigeon's Case*, 216 Mass., 55; *Derinza's Case*, 229 Mass., 444; *Reck* v. *Whittlesberger* (Mich.), 148 N. W., 249; *Kinney* v. *Cadillac Motor Co.*, 199 Mich., 435, 165 N. W., 651.

Were the court convinced that hearsay influenced the decree it would be required to sustain the appeal. We perceive, however, no sufficient reason for questioning the commissioner's statement that he made his finding of fact "wholly disregarding the hearsay evidence."

The commissioner permitted the introduction of testimony that when the deceased was discovered on the morning of April 19th, 1917, he said "I got hurt" and then or afterward indicated where he was hurt. Counsel for plaintiff urges that this testimony was admissible as a part of the res gestae. This contention is sound. It is admissible but only as tending to show the physical condition of the deceased at the time.

If the man had been groaning or screaming no law would forbid proof of such fact. The rule remains the same where pain finds

articulate expression. *Heald* v. *Thing*, 45 Maine, 394; *Hutchins* v. *Ford*, 82 Maine, 378; *Barber* v. *Merriam*, 11 Allen, 322.

But the effect of this testimony is limited by its purpose. It must be treated as an expression of present condition and not as an abbreviated narrative of an occurrence in even the immediate past. *Asbury Insurance Co.* v. *Warren*, 66 Maine, 529; *Gosser* v. *Ohio Valley Water Co.* (Pa.), 90 At., 540; *Peoria Cordage Co.* v. *Ind. Board* (Ill.), 119 N. E., 996; Boyd on Workman's Compensation, 1123; Bradbury on Workman's Compensation, 2nd Ed., 800.

EVIDENCE REQUIRED TO SUPPORT DECREE.

There must be some competent evidence. It may be "slender." It must be evidence, however, and not speculation, surmise, or conjecture. *Von Ette's Case*, 223 Mass., 60. *Sponatski's Case*, 220 Mass., 528. While no general rule can be established applicable to all cases, certain principles are clear:

If there is direct testimony which, standing alone and uncontradicted, would justify the decree there is some evidence, notwithstanding its contradiction by other evidence of much greater weight.

If the case must be proved wholly or in part circumstantially and there is a dispute as to what the circumstances are the determination of such dispute by the commissioner is final. It is for the trier of facts who sees and hears witnesses to weigh their testimony and without appeal to determine their trustworthiness.

But the inferences which the commissioner draws from proved or admitted circumstances must needs be weighed and tested by this court. Otherwise it cannot determine whether the decree is based on evidence or conjecture.

In other words, the court will review the commissioner's reasoning but will not, in the absence of fraud, review his findings as to the credibility and weight of testimony.

"In cases of this class the Supreme Court is not authorized to determine the preponderance or weight of testimony." *Nevich* v. *Delaware L. & W. R. Co.* (N. J.), 100 At., 234.

"On a review of the findings of the Industrial Board the court does not pass on the weight of the evidence as to controverted facts." *Albaugh-Dover Co.* v. *Ind. Board* (Ill.), 115 N. E., 834.

"Its conclusion (the commission's conclusion in matters of fact) is not subject to review by the courts, unless palpably contrary to the undisputed evidence." *Frankfort Ins. Co.* v. *Pillsbury*, (Cal.), 159 Pac., 150:

"We have said so often, the real question is whether there is evidence in the record to support the finding and that we are not concerned with the weight of evidence that we shall not discuss the matter." *Onizi* v. *Studebaker Corp.* (Mich.), 163 N. W., 23. See also: *Drtina* v. *Charles Tea Co.*, (Ill.), 118 N. E., 69; *Larke* v. *Ins. Co.*, (Conn.), 97 At., 320; *Linsteadt* v. *Lumber Co.* (Mich.), 157 N.W. 64; *Bell* v. *Hayes Ionia Co.*, (Mich), 158 N. W., 179; *Commonwealth Edison Co.* v. *Industrial Board* (Ill.), 115 N. E., 158; *Interstate Co.* v. *Szot* (Ind.), 115 N. E., 599; *Lefens* v. *Ind. Comm.*, (Ill.), 121 N. E., 182; *Bergstrom* v. *Ind. Comm.*, (Ill.), 121 N. E., 195; *Schanning* v. *Standard Co.*, (Mich.), 169 N. W. 879; *Poluskiewicz* v. *Philadelphia Co.*, (Pa.), 101 At., 638; *Davis* v. *Smith*, (Pa.), 105 At., 559; *Fitzgibbons Case*, (Mass.), 119 N. E., 1020; *Ginsberg* v. *Burroughs*, (Mich.), 170 N. W., 15.

The Massachusetts court seems to claim a larger power of review over decrees of the Industrial Accident Commission.

"It (the court) has jurisdiction over the case in the same way and to the same extent that it has, for example, in a suit in equity where the facts have been found by a master." *Brown's Case*, 228 Mass., 38.

But no law makes a master's finding final in the absence of fraud. While the report of a master "has every reasonable presumption in its favor" (*Dean* v. *Emerson*, 102 Mass., 482) it may be set aside if the court, upon weighing the evidence, deems such report clearly wrong. But this is to finally judge the facts. As a court of chancery the court has and exercises this power. Under The Workman's Compensation Act it has, in the absence of fraud, no jurisdiction to decide questions of fact.

Other cases hold that,

"The finding (of the Industrial Accident Commission) stands upon the same footing as the finding of a judge or the verdict of a jury." *Pigeon's Case*, 216 Mass., 52; *Diaz's Case*, 217 Mass., 36; *McCarthy's Case* (Mass.), 120 N. E., 852; *Simmon's Case*, (117 Maine), 103 Atl., 68.

This statement is not entirely accurate. A jury verdict may be set aside if the court finds it influenced by sympathy, passion or prejudice, or manifestly against the weight of evidence. But under the explicit language of the Workman's Compensation Act fraud and fraud only can be invoked to defeat a Commission's finding of facts.

The decree of the commissioner is indeed analogous to a finding of a judge who by consent determines facts or (as indeed it is) an award by a referee agreed upon by the parties. That such a finding or award cannot be impeached by showing errors of judgment, however gross, as to the weight and credibility of testimony, is settled by so many authorities that citation is unnecessary.

In any event, the weight and credibility of testimony must be finally determined by finite and fallible men. By assenting to the act the parties under sanction of statute have selected for this purpose The Industrial Accident Commission. With this selection we have no right to interfere.

In cases wherein the evidence is circumstantial and not direct the line between inference and conjecture is sometimes obscure. The Massachusetts court has said:

"The dependent must go further than simply to show a state of facts which is equally consistent with no right to compensation as it is with such right." *Sponatski's Case*, 220 Mass., 528; *Sanderson's Case*, 224 Mass., 562.

If, however, a state of facts is shown more consistent with the commissioner's finding than with any other theory and the finding is supported by rational and natural inferences from facts proved or admitted an appeal cannot be sustained. *Papinaw* v. *Railway Co.*, 189 Mich., 441, 155 N. W., 545; In re *Myers* (Ind.), 116 N. E., 314.

EVIDENCE OF ACCIDENT.

The defendants deny that the illness and death of Mailman was due to an injury, accidental or otherwise. They argue that when he began work on the evening of April 18th he was "coming down" with pneumonia. This is disputed. If true it is not decisive. Evidence that an existing disorder reaches the point of disablement during employment, of course does not prove accidental or other injury arising out of such employment. It is sufficient, however, (assuming other elements proved) if by weakening resistance or otherwise an

accident so influences the progress of an existing disease as to cause death or disablement. *Voorhees* v. *Smith,* (N. J.), 92 At., 280; *Trodden* v. *McLennard,* 4 B. W. C. C., 190; *Doughten* v. *Hickman,* 6 B. W. C. C., 77; *Puritan* v. *Wolfe,* (Ind.), 120 N. E., 417.

In a recent Michigan case the point is clearly stated:

"The testimony cannot be harmonized. We find ground for saying that the board had before it some evidence tending to prove that the fall which Mr. Gaffney had, set up a train of physical disturbances, affecting an existing pathological condition in such way as to cause his death. We therefore decline to set aside the award." *Gaffney* v. *Goodwillie,* (Mich.), 169 N. W., 849.

In the case before us was the disease caused by or was its fatal result due to trauma or injury? If this court had been the trier of facts it might have decided this issue in favor of the defendant. But the commissioner found the issue for the plaintiff. Is this finding sustained by any competent testimony?

There is some evidence that upon the body of the deceased a mark, or marks, were observed which turned black when blood poisoning set in. There is some medical testimony to the effect that the symptoms were more consistent with traumatic pneumonia than with illness otherwise caused. The spontaneous exclamation of the suffering man "I got hurt," clearly admissible for this purpose, shows that what he sensed and felt was the shock of a hurt rather than the prostration of illness. In view of these circumstances it cannot be reasonably said that there was no evidence that the illness of the deceased was traumatic.

There being no evidence, suggestion or presumption that any injury sustained by the deceased was occasioned by his willful intention or that it resulted from his intoxication while on duty, we think it is an almost necessary inference that if he were injured the injury was accidental.

EVIDENCE THAT THE INJURY AROSE OUT OF AND IN THE COURSE OF THE EMPLOYMENT.

Both of these elements must appear. The accident must have arisen out of and in the course of the employment. In other words, it must have been due to a risk to which the deceased was exposed while employed and because employed by the defendant. There is

evidence that Mailman on the night of the 18th was in good health. He was left performing his duties at the foundry "laughing and joshing." The following morning he was found, still at his post of duty, stricken and helpless. The deceased might have left the foundry in the night in pursuit of his own affairs, received an injury and found his way back. He might have been injured in the foundry while doing something for his own personal pleasure, entirely independent of his employment. These unsupported hypotheses are so improbable as to be almost negligible. From all the circumstances the commissioner drew the inference that Mailman's injury was received while employed at the defendant's foundry and arose out of such employment. This inference is neither unnatural nor irrational.

The authorities with substantial uniformity support this conclusion.

"If in such a case facts are proved the natural and reasonable inference from which is that the accident happened while the deceased was engaged in his employment, I think it falls on the employer, if he disputes the claim, to prove that the contrary was the case." *Papinaw* v. *Grand Trunk etc. Co.*, (Mich.), 155 N. W., 577. *Wishcallis* v. *Hammond*, (Mich.), 166 N. W., 995.

"If there are facts and circumstances proven in the case from which the essential ultimate facts may reasonably be inferred and the court or board whose duty it is to pass upon such facts has drawn therefrom the essential ultimate facts this court will not disturb such finding, though other and different facts might be inferred therefrom by other minds, equally as fair and reasonable." *Binel, etc., Co.* v. *Loper*, (Ind.), 117 N. E., 527.

"When the employee dies at his post of duty a presumption may reasonably be entertained that he was then performing his duty and engaged in the work for which he was employed, from which a causal relation between his employment and the accident may be inferred." *Hills* v. *Blair*, 182 Mich., 22-28, 148 N. W., 243.

In the following cases the cause and character of the accident were shown solely or chiefly by circumstances below outlined. In each case the trier of facts awarded compensation to the dependent. In every case the finding was upheld.

A butcher's canvasser was in the habit of riding a bicycle on his rounds and came back one day lame, covered with mud and in pain. *Haward* v. *Rowsell & Matthews*, 7 Butterworth's Compensation Cases, 552 (Eng. cases).

The employment of a collier was such that scratches were often caused on his arms or legs. He went to work perfectly sound in the morning and later required help with his work (which was unusual), limped and rubbed his knee and was later found to have an abraded knee and eventually died from septic poisoning. *Hayward* v. *Westleigh Colliery Company*, 8 B. W. C. C., 278.

A mason's laborer sustained an abrasion on the thumb of the hand which held the chisel. Two weeks later an abscess appeared in the arm pit and the man died. The circumstances were consistent with the entry of a microbe into his thumb causing blood poisoning on the day of the accident. *Fleet* v. *Johnson & Sons*, 6 B. W. C. C., 60.

A repairer beginning work at a colliery in the evening uninjured went home next morning with one of his fingers crushed and finally died of blood poisoning. *Mitchell* v. *Glamorgan Coal Co.*, 9 B. W. C. C. 16.

A man in good health, working in the hold of a ship, came up out of the hold in great pain, went home where it was found he had marks on his ribs. He died of pneumonia. *Lovelady* v. *Berrie*, 2 B. W. C. C. 62.

Deceased, an elevator man in a factory, disappeared. His body was found in elevator pit. *Wishcalles* v. *Hammond*, (Mich.), 166 N. W., 993.

Geo. C. Von Ette was a compositor. He went out on a roof adjoining the composing room. Workmen were accustomed to go upon this roof for fresh air, though there was an obsolete office rule against it. In some unexplained way he fell from the roof and was killed. *Von Ette's Case*, 223 Mass., 56.

Deceased was section foreman. He went in the evening to mail his report. Sometime afterward his mangled body was found on the railroad track over which he had to pass on his return. *Papinaw* v. *Grand Trunk Railway Co.*, (Mich.), 155 N. W., 545.

Decedent was employed in an automobile factory. Shortly before quitting time he came to the foreman and exhibited his left thumb which had been injured. The foreman sent him to the Company's doctor. His thumb having been bandaged he went home. Blood poisoning followed and he died. No testimony of the doctor appears. *Kinney* v. *Cadillac Motor Car Co.*, 199 Mich., 435, 165 N. W., 651.

Deceased was a locomotive fireman. About one o'clock he went to the round house where his engine was. About two o'clock his dead

body was found on the cement floor of the round house beside the engine. The physician found that he died from concussion of the brain. *Meyers* v. *Michigan Central Railroad Co.*, (Mich.), 165 N. W., 703.

The decedent was night watchman in a warehouse on a water front. He began his duties at ten o'clock at night on November 12, 1914. In the mornng he had disappeared and has never been seen since. There were indications of a struggle in the warehouse. Blood and the decedent's torn cap were found. There were marks where some heavy body had been dragged to the water. *Western, etc., Co.* v. *Pillsbury*, (Cal.), 159 Pac., 423.

Deceased was night watchman in a brewery. His duties consisted mainly in cleaning up after the day force had left and after midnight to turn on steam. Between eight and nine o'clock at night he was discovered unconscious in the brewery basement. He died the following morning. There was an abrasion on the back of his head and one shoulder was bruised. The finger nails of one of his hands were turned back. The evidence showed an opening in the floor through which he might have fallen. *Helleman Brewing Company* v. *Shaw*, (Wis.), 154 N. W., 631.

The learned counsel for the defendants in their able and exhaustive brief cite several Massachusetts cases. Upon examination some of these authorities will be found in harmony with our conclusion and others clearly distinguishable on facts. Even *Sanderson's Case*, 224 Mass., 562, upon which the defendants confidently rely is not in conflict. . . . In that case a driver fell from his wagon and died from cerebral hemorrhage. Whether the fall was the cause or the consequence of the hemorrhage was the dispute. The court held that the two hypotheses were equally consistent with the circumstances proved and that the selection of one supposition as the basis for a decree was mere conjecture. But in the case at bar we have held that a state of facts is shown more consistent with the commissioner's finding than with any other theory and that the finding is supported, not indeed by the only possible or even reasonable inference, but by inferences which are not unnatural and not irrational.

Appeal denied.
Decree affirmed.

JENNIE M. WALLACE *vs.* UNITED ORDER OF THE GOLDEN CROSS.

Sagadahoc. Opinion June 5, 1919.

Insurance contracts. General rule as to the beneficiary having a vested interest in same. Rule as to constitution and by-laws of a fraternal beneficiary association being part of the contract. Right of association to change its by-laws so as to affect the rights of person already insured. General rule in respect to liability of insurance companies where the insured has committed suicide.

The constitution and by-laws of a fraternal beneficiary association, in respect to which the beneficiary contract of insurance was entered into, so far as applicable, form a part of the contract itself.

Where the by-laws of a fraternal beneficiary association provide that the member may, in accordance with such by-laws, change the beneficiary named in the benefit certificate without the latter's consent, the beneficiary has no vested interest either in the certificate or the money to be paid under it. Such beneficiary has during the lifetime of the member, a mere expectancy; this expectancy is not property.

When in an action by the widow of a member to recover the amount of the death benefit named in the benefit certificate expressly made payable to her, it appears that the member committed suicide, but the case is silent as to his sanity or insanity at the time, the presumption of sanity must be entertained, and for the purposes of the case, the member must be considered as sane at the time of his suicide.

Where the by-laws in force when the original benefit certificate was issued, contained the following provisions only relating to suicide of a member, viz: "No benefit shall be paid on account of the death of any member who within three years next after becoming a beneficiary member voluntarily takes his own life, and, provided further, that any member who within three years after changing his Benefit Certificate from a lower to a higher rate, voluntarily takes his own life, shall thereby forfeit all right to participate in the Benefit Fund beyond the amount named in the Benefit Certificate issued for such lower rate;" and later the by-laws were duly amended by providing "that after three years from the date of initiation or transfer to a higher rate, death by suicide, whether the member be sane or insane, and whether the act be voluntary or involuntary, shall constitute a hazard not assumed under the

ordinary condition of the certificate of membership and the constitution and General Laws; but in all such cases the liability of the Order shall be limited to an amount equal to the total of the sums paid into the benefit fund by any such member; but in no case shall the sum so paid exceed the amount named in the benefit certificate;" it is held that it was undoubtedly the intention of the members of the order in adopting the amendment, that it should apply to the existing as well as future membership, and to certificates of membership then outstanding as well as those thereafter issued; it did not apply to death claims then pending.

When, in an action by the widow of a member upon a benefit certificate expressly made payable to her, issued when such original by-law was in force "and upon condition that the said Member complies in the future with the laws, rules and regulations now governing the said Commandery and Fund, or that may hereafter be enacted by the Supreme Commandery to govern said Commandery and Fund,"—it appears that the by-laws further provide that the member may in accordance with such by-laws, change the beneficiary named in the benefit certificate without the latter's consent, and it further appears that the member committed suicide when sane after three years from date of becoming a member, and after such amendment to the by-laws became effective, it is held that the plaintiff did not obtain a vested interest in the certificate in question at the time the same was issued or in the money to be paid thereon, which could not be defeated by a change in the terms upon which the death benefit should be payable, made in accordance with the constitution and by-laws of the Order, although without her actual knowledge and consent; that she had during the lifetime of her husband a mere expectancy dependent upon the terms of the contract existing at the time of his death and that the amended by-law is applicable to the certificate in suit.

Action of assumpsit upon a policy of insurance issued by defendant company, in which policy plaintiff was named as beneficiary. 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.

Walter S. Glidden, for plaintiff.

Wilbur H. Powers, of Boston, Mass., for defendant.

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

MORRILL, J. The defendant is a fraternal beneficiary organization, having its principal place of business at Knoxville, in the State of Tennessee, and having subordinate lodges, or commanderies,

in this State. On or before the twenty-seventh day of November, 1906, one Charles E. Wallace became a member of a subordinate commandery located at Bath, Maine, and a benefit certificate was issued to him by the defendant, bearing that date. This certificate was issued, as stated therein, "upon evidence received from said commandery that he is a contributor to the Benefit Fund of this Order . . . . and upon condition that the said Member complies in the future with the laws, rules and regulations now governing the said Commandery and Fund, or that may hereafter be enacted by the Supreme Commandery to govern said Commandery and Fund." These conditions being complied with the defendant promised and bound itself to pay out of its Benefit Fund to the plaintiff, Jennie M. Wallace, wife of said Charles E. Wallace, "in accordance with and under the provisions of the law governing said Benefit Fund, and upon satisfactory evidence of the death of said member, and upon surrender of this certificate, the sum of One Thousand Dollars, ... provided that said member is in good standing in this order at the time of his death; that this certificate shall not have been surrendered by said member and another certificate issued at his request, in accordance with the laws of this Order." Charles E. Wallace signed an acceptance of the certificate upon the conditions named therein.

The benefit certificate was held by said Charles E. Wallace, without surrender or change, until the date of his death. He committed suicide by hanging July 23, 1917; the case is silent as to whether he was sane or insane at the time of suicide.

Except so far as his membership status and the rights of his beneficiary, the plaintiff, may have been affected by the act of suicide, it is agreed that he was in good standing in the defendant Order at the time of his death, that he had complied with all its laws, rules and regulations, and that satisfactory proofs of death were furnished to the defendant Order. In short, neither party raises any formal or material objection as to any act or omission of either the plaintiff, the defendant or the deceased Charles E. Wallace, under the terms of the Benefit Certificate or under the laws, rules and regulations of the defendant Order, except on the one question of Charles E. Wallace's suicide, and its effect, under the facts here stated, upon the legal rights of the plaintiff, under the said Benefit Certificate.

It is familiar law that the constitution and by-laws of a fraternal beneficiary association, in respect to which the beneficiary contract of insurance was entered into, so far as applicable, form a part of the contract itself. *Grand Lodge, A. O. U. W.*, v. *Edwards*, 111 Maine, 359. *Same* v. *Conner*, 116 Maine, 224.

The case as reported does not show any provision of the by-laws in force when the certificate was issued, relating to suicide; but we have been furnished with a printed pamphlet purporting to contain the Charter, Constitution and General Laws of the Order, from which it appears that when the certificate was issued, the by-laws contained the following, and only the following provision relating to suicide of a member, viz:

"No benefit shall be paid on account of the death of any member who within three years next after becoming a beneficiary member voluntarily takes his own life, and, provided further, that any member who within three years after changing his Benefit Certificate from a lower to a higher rate voluntarily takes his own life, shall thereby forfeit all right to participate in the Benefit Fund beyond the amount named in the Benefit Certificate issued for such lower rate."

In May, 1917, the by-laws were amended by providing "that after three years from the date of initiation or transfer to a higher rate, death by suicide, whether the member be sane or insane, and whether the act be voluntary or involuntary, shall constitute a hazard not assumed under the ordinary condition of the certificate of membership and the Constitution and General Laws; but in all such cases the liability of the Order shall be limited to an amount equal to the total of the sums paid into the benefit fund by any such member; but in no case shall the sum so paid exceed the amount named in the benefit certificate." This amendment became effective July 1, 1917.

Under this provision the defendant claims that its liability is limited to $223.73; the plaintiff claims that the amendment is not applicable in this case and that she is entitled to recover $1000.

The case has been exhaustively argued by counsel for both parties, and the broad question of the effect of subsequent amendments of the by-laws upon existing beneficiary membership has been fully presented. We are not called upon to consider the effect upon the contract of insurance, of suicide while insane, or involuntary suicide,

either under the original by-laws, or under the amendment. The case finds that Charles E. Wallace "committed suicide by hanging," but is silent as to his sanity or insanity at the time, whether the act was voluntary or involuntary. The presumption of sanity must be entertained in the absence of proof, and where the record is silent. This presumption is not overthrown by the act of committing suicide. Suicide may be used as evidence of insanity, but standing alone, it is insufficient to establish it. Insanity cannot be predicated simply upon the act of self destruction, for human experience has shown that sane men have taken their own lives. *Ritter* v. *Insurance Co.*, 169 U. S., 139; 42 Law Ed., 693. *Shipman* v. *Protected Home Circle*, 174 N. Y., 398, 405. We understand that the plaintiff's counsel concedes that such is the law, and that for the purposes of this case Charles E. Wallace must be considered as sane at the time of his suicide.

Nor are we considering the effect of the amendment upon any rights of Wallace, or upon the rights of his legal representatives, seeking to recover the amount of the benefit provided in the contract. In the instant case the death benefit was payable to the plaintiff; she takes the insurance money, if at all, directly by the terms of the contract and not derivatively, as in the capacity of heir or legal representative of the member. In the view which we take of the case it is not material whether the policy is to be construed as silent in relation to suicide occurring after three years following the date when Wallace became a beneficiary member, or as assuming, by implication, the hazard of suicide after said three years, as claimed by plaintiff's counsel.

It was undoubtedly the intention of the members of the Order in adopting this amendment, that it should apply to the existing as well as future membership, and to certificates of membership then outstanding as well as those thereafter issued; it could not apply to death claims then pending; but it must have been intended to apply to future claims for death benefits, upon certificates issued to present as well as future members; its language clearly so indicates, and a more limited construction would thwart in large measure the object of the Order in its adoption.

It seems to be settled by the great weight of authority that Mrs. Wallace did not take a vested interest at the time the certficate was issued, either in the certificate itself or in the money to be paid

under it, of which she could not be deprived by any change of beneficiary or in terms of payment, made in accordance with the constitution and by-laws of the Order, although without her actual knowledge or consent.

In certain cases upon ordinary life insurance policies taken out by the insured for the benefit of third persons, it has been held that while the beneficiary would be bound by the representations of the insured or any fraud he may have committed in taking out the policy, the policy having been obtained through his agency, yet the beneficiary is not bound by any acts or declarations done or made by him after the issue of the policy unless such acts were in violation of some condition of the policy; and under such circumstances it is held—the policy being silent as to suicide—that intentional self-destruction, while sane, is not a defense to an action on the policy. *Fitch* v. *Amer. Popular Life Ins. Co.*, 59 N. Y., 557; 17 Am. Rep., 372, 383. *Morris* v. *State Mut. Life Ass. Co.*, 183 Pa., 563. *Seiler* v. *Economic Life Association*, 105 Iowa, 87. *Contra*, *Hopkins* v. *Northwestern Life Ass. Co.*, (U. S. Dist. Ct.), 94 Fed., 729; and it has been questioned elsewhere whether some of the cases have not gone too far in holding ordinary life insurance companies liable to beneficiaries for death by suicide when the policy was silent on that subject. *Davis* v. *Royal Arcanum*, 195 Mass., 402, at page 409.

These cases are said to rest upon the principle that a vested interest is created in the beneficiary by the terms of the policy, a principle which is fully recognized by this Court. *National Life Ins. Co.* v. *Haley*, 78 Maine, 268. *Laughlin* v. *Norcross*, 97 Maine, 33. *Tremblay* v. *Etna Life Ins. Co.*, 97 Maine, 547, 553.

But in *Hopkins* v. *Northwestern Life Assur. Co.*, (C. C. A.) 99 Fed., 200, it was held that the beneficiary does not take a vested interest, where the policy and by-laws, permit a change of beneficiary by agreement between the insured and the company, without the knowledge or consent of the plaintiff. Such is the law in this State. *McManus* v. *Peerless Casualty Co.*, 114 Maine, 98; and in Massachusetts, *Marsh* v. *American Legion of Honor*, 149 Mass., 512, 515; and in New York, *Shipman* v. *Protected Home Circle*, 174 N. Y., 398, 409; in the case last cited and in *Davis* v. *Royal Arcanum*, supra, it was expressly decided that in a beneficiary association of this kind, the beneficiary takes the certificate subject to change without his consent, in accordance with the constitution and by-laws of the

association, and has no vested interest either in the certificate or the money to be paid under it. She has during the lifetime of the member, a mere expectancy; this expectancy is not property. *Masonic Mut. Ben. Soc.* v. *Burkhart,* 110 Ind., 189; 10 N. E., 79; affirmed 11 N. E., 449.

By the certificate issued to Charles E. Wallace the benefit was payable to the plaintiff provided "that this certificate shall not have been surrendered by said member and another certificate issued at his request, in accordance with the laws of this Order;" the case finds that this "Benefit Certificate was held by said Charles E. Wallace, without surrender or change, until the date of his death." Nothing further appears in the reported case as to the right of the member to change the beneficiary without the latter's consent.

But in the printed copy of the Charter, Constitution and General Laws of the Order furnished us, which we understand we are to regard as a part of the case although not mentioned in the report, we find that by section four of Law XV: "A member may, at any time when in good standing, surrender his Benefit Certificate and have a new one issued to him by paying a fee of fifty cents. Should a Benefit Certificate be in possession or under the control of parties who refuse to turn it over so that the member can surrender it, the member may make affidavit in writing, stating the facts and waiving all rights thereunder, and shall thereupon receive a new certificate in its place, payable to such beneficiaries as he may desire within the class allowed by law."

It is therefore the opinion of the Court that the plaintiff did not obtain a vested interest in the certificate in question at the time the same was issued, or in the money to be paid thereon, which could not be defeated by a change in the terms upon which the death benefit should be payable, made in accordance with the constitution and by-laws of the Order, although without her actual knowledge and consent; that she had during the lifetime of her husband a mere expectancy dependent upon the terms of the contract existing at the time of his death, and that the by-law which became effective July 1, 1917, is applicable to the certificate in suit.

In accordance with the terms of the report the entry must be,

Judgment for plaintiff for $223.73 without costs.

HARRY B. BRADBURY

vs.

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA.

Knox. Opinion June 5, 1919.

Contract of fire insurance. Rule as to reference under policy. Rule as to referees being disinterested. Burden of showing that referees are not disinterested. How same may be proven. Necessity of showing knowledge of parties selecting the referees. Effect on policy where hearing has not been by disinterested referees.

This case involves a common law action on an insurance policy of the standard form. The gravamen of the action is founded upon the allegation that the insurance company, in presenting three men from whom one was to be selected by the insured, did not offer three disinterested men, and by reason thereof the hearing was unfair, biased and prejudicial, on the part of the defendant's referees, and the award of the referees therefore void.

The real issue raised by the demurrer, and the one upon which we think the defendant relies, is whether the allegation the truth of which is admitted by the demurrer, that the defendant company offered three interested men for choice of a referee, without alleging scienter by the company, will sustain the action.

The plaintiff's declaration contains the following averments with regard to the conduct of two of the referees, one of whom was chosen by the defendant, namely: "The plaintiff further avers that it was the duty of the defendant in presenting the names of parties from which the plaintiff was to select a referee, to present men disinterested, and it was also the duty of the two referees to select a disinterested third referee; but the plaintiff avers that the defendant, forgetful of its legal duty, did not present the names of disinterested men, as required by the policy and by the law; but did present names of parties filled with bias and partizanship, in favor of the defendant. The declaration then proceeds to set out in detail the acts of the two referees complained of, which are averred as tending to show their incompetency, their bias, their prejudice and their unfairness.

In *Young* v. *Insurance Company*, 101 Maine, 294, it is *held:* That "the spirit of the statute requires that the three referees shall be as free from pecuniary interest and relationship as judges and juries are required to be, and also be as free from bias, prejudice, sympathy and partizanship, as judges and jurors are presumed to be.

Held, under the rule in the Fisher case, that, if "the arbitration failed by reason of the defendant's fault," the other party "is not bound to enter into a new arbitration agreement."

Action of assumpsit to recover upon a policy of insurance issued by defendant company. The plaintiff claimed that on account of interest, prejudice and bias on the part of the alleged referee nominated by the defendant, and on the part of the alleged third referee, the alleged award was void. The defendant seasonably filed a general and special demurrer to the plaintiff's declaration, which was joined in by the plaintiff. The presiding Justice overruled the defendant's demurrers and allowed the defendant to plead over in the event the Law Court should overrule the defendant's exceptions; to which ruling the defendant filed exceptions. Exceptions overruled.

Case stated in opinion.

M. A. Johnson, and A. S. Littlefield, for plaintiff.

William H. Gulliver, for defendant.

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

SPEAR, J. This case involves a common law action on an insurance policy of the standard form. The gravamen of the action is founded upon the allegation that the insurance company, in presenting three men from whom one was to be selected by the insured, did not offer three disinterested men, and by reason thereof the hearing was unfair, biased and prejudicial, on the part of the defendant's referees, and the award of the referees therefore void.

The case comes up on special demurrer, assigning eleven causes of error, but upon an examination of the declaration in the light and intention of R. S., Chap. 87, Sec. 38, which provides that a simple action of assumpsit may be brought on an account annexed, upon an insurance policy, we are of the opinion that the questions raised by the demurrer are matters of defense rather than of pleading.

The real issue raised by the demurrer, and the one upon which we think the defendant relies, is whether the allegation, the truth of which is admitted by the demurrer, that the defendant company offered three interested men for choice of a referee, without alleging scienter by the company, will sustain the action. The defendant relies upon *Fisher* v. *Insurance Co.*, 95 Maine, 485, as quoted in *Mowry* v. *Insurance Co.*, 106 Maine, 309. This was an action based upon the allegation "that the award was invalid because of

misconduct on the part of the referees. . . . There was neither allegation nor proof, however, that such misconduct was caused or participated in by the defendant, and it was accordingly held that if the award was invoked without the fault of the defendant, it was the duty of the defendant to seek a new determination in the manner provided by the contract."

A reference to the Fisher case will clearly show that it is not pertinent to the present issue. On page 488 the court say: "The declaration as amended contained no averment to the effect that the alleged failure of arbitration was through any fault upon the part of the defendant." On page 490 follows a statement of the result if the fault had been chargeable to the defendant, namely: "If the arbitration had failed by reason of the defendant's fault, the result, upon principles of natural justice, would be different. Under such a clause in the policy of insurance it is the duty of the parties to act in good faith, and if either act in bad faith, so as to defeat the real object of the clause, the other is absolved from compliance therewith and is not bound to enter into a new arbitration agreement." The only question is whether the plaintiff's allegation is sufficient in phraseology to aver the fault of presenting men not "disinterested," upon the defendant. The language is as follows: "The plaintiff further avers that it was the duty of the defendant in presenting the names of parties from which the plaintiff was to select a referee to present men disinterested. . . . . but the plaintiff avers that the defendant, forgetful of its legal duty, did not present the names of disinterested men as required by the policy and by the law." The declaration then proceeds to give the details of the defendant's alleged fault.

We think the above averment sufficient to charge the defendant with fault. The phrase "forgetful of its legal duty" is tantamount to a charge of negligence, and negligence is a fault, upon which parties are holden in nearly every activity in life. The phrase "forgetful of its legal duty" is a common form of declaring in nearly all actions of tort. It is an expression common to our form of pleading to aver the want of due care and negligence, by declaring that the defendant was neglectful of its duty to the plaintiff, or of its legal duty, but on the contrary did certain things in contravention of that duty. This is precisely the manner in which the phrase is used in the case before us, and then the declaration proceeds in the

usual form to set forth the facts which constitute the alleged violation of legal duty. Moreover, forgetfulness has been defined as tantamount to negligence. *Nye* v. *Schor*, 92 Wis., 40; 53 Am. St. Rep., 897, is a case involving a judgment, in which the defendants alleged or proved that they "forgot" about the case and asked to have it reopened upon that ground. That was also a case where the court say the judgment was inequitable and that the original plaintiff "had no cause of action against the plaintiffs the original defendants in the present case." The court say: "Failure to remember, entire forgetfulness to act as duty of interest requires, is so closely allied to laches or negligence that it is difficult, if not impossible, in a case like the present to distinguish between them. Indeed, "forgetfulness" is defined as negligence—careless omission: Century Dictionary." 19 Cyc., 1430, "Forgetfulness—Negligence, careless omission." In *Tasker* v. *Farmingdale*, 85 Maine, 523 "thoughtless, inattention" is defined as "the very essence of negligence." We cannot avoid the conclusion that the averment that the defendant was "forgetful of its legal duty" in naming men "not disinterested" is a sufficient allegation of negligence on the part of the defendant in this regard to make it a fault on its part, if proven. We think this pleading brings this case within the rule of the Fisher case. It will be observed that the Fisher case does not go so far as to require an allegation of scienter on the part of the defendant. The reason for this is perfectly obvious. If either the insured or the company were held to be immune from fault except upon averment and proof of knowledge, such rule would tend to close the door of honesty and throw wide open the door of fraud. Under such a rule either side could tamper with the referees, with little hazard of detection. Secret agreements could be carried out with impunity by either side. All parties to such a fraud would be equally culpable, and interested to cover their guilty conduct. Nor does the statute require proof of such knowledge to vitiate an award, but on the other hand, demands the action of an absolutely fair, honest, disinterested tribunal to sustain it. It is difficult, indeed, to prove negatively that the "men offered," for choice of referees, are men "not interested," but the interpretation of the insurance law upon this phase of the case, points out the method by which this requirement may be tested, and opens a wide avenue to the field of inquiry, that may be pursued to prove affirmatively, that the men offered are interested. *Young*

v. *Insurance Co.*, 101 Maine, 294, points the way. It is held in this case that each party's freedom of choice of referees is materially abridged; that the plaintiff is obliged to make the stipulation for referees or go without insurance; that "the spirit of the statute requires that the three referees shall be as free from pecuniary interest and relationship as judges and juries are required to be, and also be as free from bias, prejudice, sympathy and partizanship, as judges and jurors are presumed to be. If there is no other restriction as to the men to be nominated for the other party to choose from, or as to the third man, however appointed, than that they shall not be relatives and have no pecuniary interest, then either party may have forced upon him as referee, at least one violent partizan of the other party, or at least men incompetent, opinionated or biased. The purpose of the statute might thus be wholly defeated and made to work an injustice."

We have quoted at length from this opinion, in order to make clear the inferences to be drawn therefrom, as to the nature of the evidence admissible, to prove any or all of the various faults there enumerated, which operate as a disqualification of a referee. It is evident, as a deduction, that this evidence cannot be limited to what may take place in the selection of the referees. It could not be anticipated, for instance, that a man offered would be a "violent partizan" or "incompetent"; and consequently these faults could be shown only by evidence of his conduct, while acting as a chosen referee. It would at least be difficult to prove in any other way, that a referee was "opinionated" or "biased." Therefore evidence of the conduct of the referees, from the time they are proposed, until they have completed their award, including what they say and do, which tends to prove any one of the disqualifications enumerated in the foregoing quotations from the Young case, is competent, and if sufficient to prove "violent partizanship," "incompetency", or that they are not as free from bias, prejudice, sympathy and partizanship as judges and jurors are presumed to be", vitiates the award.

The plaintiff's declaration contains the following averments with regard to the conduct of two of the referees, one of whom was chosen by the defendant, namely: "The plaintiff further avers that it was the duty of the defendant in presenting the names of parties from which the plaintiff was to select a referee, to present men

disinterested, and it was also the duty of the two referees to select a disinterested third referee; but the plaintiff avers that the defendant, forgetful of its legal duty, did not present the names of disinterested men, as required by the policy and by the law; but did present names of parties filled with bias and partizanship, in favor of the defendant, and that said John B. Kehoe, presented by the defendant and innocently selected by the plaintiff, was absolutely incompetent, biased, prejudiced and unfair in his actions, and that said Lehan, selected on said Kehoe's recommendation, was also biased, and full of partizanship, in favor of the defendant, and both were unfair, biased and unjust in their actions and interest between the parties, so that at a hearing held by said referees on the thirtieth day of July, 1918, to honestly adjust said losses, said John B. Kehoe and J. Harold Lehan closed the hearing peremptorily, without notice to the plaintiff, after having made arrangements with the plaintiff and their associate referee to continue the hearing to the next day." The declaration then proceeds to set out in detail the acts of the two referees complained of, which are avered as tending to show their incompetency, their bias, their prejudice and their unfairness. Among other things it is averred that the plaintiff submitted an inventory, check book, bank book and other documentary evidence tending to prove his loss; that he also introduced a witness to testify as to the value of the property in the plaintiff's store and repair shop; that the plaintiff and his clerk also testified as to the goods, stock and fixtures in the store and repair shop at the time of the fire; that he offered to produce other evidence as to values but that he was not asked nor permitted to produce any further evidence; that the defendant offered no evidence openly or in hearing of the plaintiff or of his counsel at any time; that the referees continued the hearing at 5.30 P. M. to the next day; that they did not hold any further hearing; that the two referees named on the next day without notice to the plaintiff informed their associate referee that the hearing was closed; that they gave the plaintiff's counsel no oportunity to put in further evidence or to even argue the case as then put in; that the next day while the matter was under discussion the two referees against the protest of referee Hunt refused to consider the inventory or any of the evidence introduced by the plaintiff; that against the protests of referee Hunt they declared that the only evidence admissible of proof of value

was duplicate bills of goods purchased by the plaintiff, shippers' receipts and receipts for freight bills paid on all goods from all purchases, in order to show that the goods went into the store; that the referees named told referee Hunt that he did not understand the Jews and that the Jews were all trickey; that referee Hunt refused to sign or act in any such arbitrary manner; and that consequently the award of said referees is void.

Under the justly stringent rules laid down in the Young case regarding the selection, qualification and conduct of referees, we are of the opinion that the above declaration sets out a cause of action, as a matter of pleading, without alleging scienter on the part of the defendant.

The statute contemplates a fair and honest hearing, and not one unfair and dishonest, because not known to be unfair and dishonest by either of the parties. As the bias, prejudice or sympathy of a jury is inferred from their deliberations in the jury room, translated into a verdict, so may the partizanship, incompetency, bias, prejudice or sympathy of the referrees in an insurance case be inferred from their conduct and award.

Under the rule in the Fisher case, that, if "the arbitration failed by reason of the defendant's fault," the other party "is not bound to enter into a new arbitration agreement" the entry must be,

Exceptions overruled.

STATE OF MAINE

vs.

INTOXICATING LIQUORS AND VESSELS,

DOLAN & FURNIVAL CO., Claimant.

Cumberland. Opinion June 5, 1919.

Intoxicating Liquors. Revised Statutes, Chap. 127, Sec. 21 interpreted. Rule to be applied in determining whether certain extracts or preparations are intoxicating liquors within the meaning of the statute.

Complaint and warrant and libel of certain extracts, liquors or compounds known as Jamaica ginger. The liquors libeled consist of a quantity of each of three different grades of Jamaica ginger, seized at claimant's extract manufacturing plant in Portland. The three grades are represented by State's Exhibit 1, which is claimed to be a medicinal preparation made in accordance with the formula prescribed by the United States Pharmacopeia, and containing 93 per cent. of alcohol, and State's Exhibits 2 and 3, claimed to be flavoring extracts, and containing respectively 28 and 55 per cent. of alcohol.

The question presented is whether any or all of the different grades of extracts represented by said exhibits are intoxicating liquors within the meaning of Revised Statutes, Chap. 127, Sec. 21.

Held:

1. The intent of the claimant that the Jamaica ginger should be used only as a medicine or for household purposes, and not as a beverage, does not control in this case.
2. If its composition is such that it is practicable to commonly and ordinarily drink it as a beverage and drink it in such quantities as to produce intoxication, then it is intoxicating liquor within the meaning of the statute. It is immaterial whether the plaintiff had any knowledge for what purpose the liquors were purchased if they were in fact intoxicating liquors and intended by the purchasers for illegal sale in this State.
3. It is the opinion of the court that the Jamaica ginger now held in this case is an intoxicating liquor within the meaning of Sec. 21, of Chap. 127, R. S., It therefore follows that any sale thereof is an unlawful sale, and any possession for the purpose of sale is an unlawful possession under R. S., Chap. 127, Secs. 27 and 28.

Complaint and warrant under which certain quantities of Jamaica ginger, so called, were seized. The liquors were libeled according to statute, and after hearing, the case was reported, by agreement, to the Law Court. Judgment for the State.

Case stated in opinion.

Carroll L. Beedy, and Clement F. Robinson, for the State.

William C. Eaton, and W. A. Connellan, for the respondent.

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

HANSON, J. This case is before the court on report upon the libel, monition and claim filed, the records of proceedings in the Municipal Court on said libel, monition, and claim, and the testimony taken in the Superior Court for Cumberland County at the January and May Terms, 1918, in two cases involving the same subject matter. The Law Court is to make a final determination whether the claimant is entitled to said liquors and vessels or whether they should be forfeited to the State.

There were certain stipulations accompanying the report, which in view of the agreement of counsel that but one question is before us, will need no further reference.

The liquors libeled consist of a quantity of each of three different grades of Jamaica ginger, seized at claimant's extract manufacturing plant in Portland. The three grades are represented by State's Exhibit 1, which is claimed to be a medicinal preparation, made in accordance with the formula prescribed by the United States Pharmacopeia, and containing 93 per cent. of alcohol, and State's Exhibits 2 and 3, claimed to be flavoring extracts, and containing respectively 28 and 55 per cent of alcohol.

The question presented is whether any or all of the different grades of extracts represented by said exhibits are intioxicating liquors within the meaning of R. S., Chap. 127, Sec. 21. That Section reads as follows;

"No person shall at any time, by himself, his clerk, servant or agent, directly or indirectly, sell any intoxicating liquors, of whatever origin; wine, ale, porter, strong beer, lager beer, and all other malt liquors, and cider when kept or deposited with intent to sell the same for tippling purposes, or as a beverage, as well as all dis-

tilled spirits, are declared intoxicating within the meaning of this chapter; but this enumeration shall not prevent any other pure or mixed liquors from being considered intoxicating."

The claimant's counsel urges the application of the doctrine that a liquid primarily useful and intended for a legitimate use, does not come within the meaning of the term "intoxicating liquor", unless sold to be used as a beverage, even though it may contain a large percentage of alcohol. Counsel cities at length *State* v. *Costa*, 78 Vermont, 195; *King* v. *State*, 58 Miss., 739; In *Intoxicating Liquor Cases*, 25 Kansas, 751; *Russell* v. *Sloan*, 33 Vermont, 659; *U. S.* v. *Wilson*, 69 Fed., 144, *Mason* v. *State*, 1 Ga. App., 535; *Holcome* v. *People*, 49 Ill. App., 73, as sustaining his contention, the last cited only referring specifically to the sale of ginger in any form, and this the essence of ginger.

In *State* v. *Costa*, supra, the court say, in a case involving extracts, tinctures, essences, etc.: "In respect to such articles the inquiry is not simply whether they contain more than one per cent of alcohol, but that there is the further inquiry, whether or not the articles are sold to be used as a beverage. In respect to the sale of *such preparations the intent governs.* If there is no intent to sell these preparations for other than legitimate uses there is no offense. If, however, the preparation is capable of being used as a beverage and is sold or kept for sale with the purpose, intent or understanding that it is to be used as a beverage, then if it contains more than one per cent of alcohol, an offense is committed." Here it will be seen the intent governs. To the same effect are all the other cases cited and the court in each instance emphasized its conclusions by defining the difference between a druggist having for sale liquors or mixtures for medicinal, culinary or toilet purposes, and a law breaker who, under the guise of an honest, harmless salesman, deals out intoxicating liquors of all descriptions to all would be purchasers who will protect him by their silence, or perjure themselves if he is tried for his offenses. Each court in the order of the citations has put the stamp of condemnation upon the latter class, has drawn the line between the practice of reputable physicians, and the prescriptions they write, and the medicine they regularly use, and the numerous storekeepers, and others, who sell without prescription any liquor, alcoholic or otherwise, upon request of any person. But in *State of Vermont* v. *Eddio Barr*, 84 Vermont, 38, 77 Atlantic, 914, L. R. A., 48 N. S.,

302, a case very much later than any Vermont case cited by the claimant's attorney, the court say: "The words 'intoxicating liquor' as used in our statute, include spirituous or intoxicating liquor, malt liquors, lager beer, fermented wine, fermented cider, and distilled spirits, and any beverage which contained more than 1 per cent of alcohol by volume at 60 degrees Fahrenheit. Vt. Pub. Stat. 5101." It will be observed that in all the earlier cases cited, the courts were not dealing with Jamaica ginger as known and unlawfully used in this jurisdiction.

But the intent of the claimant that the Jamaica ginger should be used only as a medicine or for household purposes, and not as a beverage, does not control in this case. It is conceded that the Jamaica ginger was in claimant's possession, that claimant owned it, and that it was taken by an officer of the law. Claimant's business was that of making and selling Jamaica ginger, and this lot was there for sale. 'Was the Jamaica ginger intoxicating liquor within the meaning of the statute' The Statute is directed in the first instance against the sale of all intoxicating liquor of whatever origin. It then enumerates the malt liquors, cider when kept or deposited with intent to sell for tippling purposes or as a beverage, as well as all distilled spirits, and finally includes within its scope and meaning any and all kinds of liqour capable of producing intoxication, the section concluding—"but this enumeration shall not prevent any other pure or mixed liquors from being considered intoxicating."

Without the aid of the Statute, we would find no difficulty in holding that the Jamaica ginger involved in this case is and was at the date of seizure intoxicating liquor. With the Statute before us we must add our conviction that Jamaica ginger is included in its terms, and was intended to be included by the legislature, and with it all similar compounds capable of being used for tippling purposes, or as a beverage, having alcohol as a constituent, and capable of producing intoxication. There can be no other reasonable, defendable conclusion. It is a matter of common knowledge in which all courts share, a knowledge antedating recent legislation or agitation, that for years Jamaica ginger, whatever its merits may be, has been used as a substitute for other intoxicants. This knowledge in the last few years has increased, and in recent terms of our own court has come home to us in repeated instances where Jamaica ginger is used as a base, and, mixed with the so called, and almost equally

harmful, "near beers," produces cases of intoxication with which courts have to deal, together with unnumbered cases known only to the immediate friends of the unfortunate tippler. In *Heintz* v. *Lepage,* 100 Maine, 542, an action to recover the price of intoxicating liquor sold, it was held "that any liquor containing alcohol, which is based on such other ingredients or by reason of the absence of certain ingredients that it may be drunk by an ordinary person as a beverage and in such quantities as to produce intoxication, is intoxicating liquor. If its composition is such that it is practicable to commonly and ordinarily drink it as a beverage and drink it in such quantities as to produce intoxication, then it is intoxicating liquor within the meaning of the statute. . . . It is immaterial whether the plaintiff had any knowledge for what purpose the liquors were purchased if they were in fact intoxicating liquors and intended by the purchasers for illegal sale in this state."

The testimony in the case is ample to bring it within the purview and scope of *Heintz* v. *Lepage,* supra. The evidence shows that the Jamaica ginger could be and was used by ordinary persons as a beverage and in such quantities as to produce intoxication and did in fact produce intoxication. See *State* v. *Frederickson,* 101 Maine, 37.

In *Mitchell* v. *Com.,* 106 Ky., 602, the defendant was charged with selling Jamaica ginger, and there was evidence that it contained about 96 per cent. of alcohol. The court said: "Moreover, we think that without the druggist's evidence it is a matter of common knowledge that Jamaica ginger is an intoxicant and a spirituous liquor, and it is hardly more necessary to introduce testimony of that fact than it would be of whiskey. 15 R. C. L., 377; *State* v. *Miller,* 92 Kansas, 994 (1917)."

It is the opinion of the court that the Jamaica ginger now held in this case is an intoxicating liquor within the meaning of Sec. 21 of Chap. 127, R. S. It therefore follows that any sale thereof is an unlawful sale, and any possession for the purpose of sale is an unlawful possession. R. S., Chap. 127, Secs. 27 and 28. The mandate will be,

Judgment for the State.
The liquors and vessels are declared forfeited to the State.

STATE OF MAINE *vs.* JOHN C. SLORAH.

York. Opinion June 5, 1919.

Right of court to discharge jury and continue capita' case under certain conditions. What constitutes being placed in jeopardy. Rule as to what conditions may operate as a bar to a plea of former jeopardy. Right of respondent or accused to be present when jury are taking a view of the premises. May the right to be present be waived by accused. Weight of authority as to purpose of a view. Right of jury to receive testimony of witnesses or evidence in any form during a view.

1. Where a respondent, charged with an offense punishable by imprisonment for life, does not demand a trial at the "first term" after the finding of the indictment, Sec. 25 of Chap. 136, R. S., does not by implication preclude the continuance of the case by order of court to a later term, but leaves it subject to the common law and the discretion of the presiding Justice, as modified by the provisions of Sec. 11, Chap. 136, R. S., and Sec. 6, Article 1 of the Constitution of Maine.
2. Sec. 11, Chap. 136, R. S., was designed to carry out the provisions of Sec. 6, of Article 1 of the Constitution in guaranteeing a "speedy trial," but silence on the part of the respondent cannot be constructed as a demand for trial. Where no demand for trial at the "first term" is made by the respondent, a trial at the "second term" is a compliance with Sec. 6 of Article I of the Constitution; and where no demand for trial is made by the respondent at the "first term," an exception to the order of the court continuing the case to the "second term" cannot be sustained. The "first" and "second" terms within the meaning of Sec. 11, Chap. 136, are the first and second terms respectively after the term at which the indictment was found.
3. Where at the "second term" after the finding of the indictment, the case is not in order for trial owing to the voluntary act of the respondent in prematurely causing the case to be transferred to the Law docket, he must be held by such act to have waived his right of trial at the "second term," and a motion to quash the indictment on the sole ground that he was not placed on trial at the "second term" according to the provisions of Sec. 11, Chap. 136, was properly overruled.
4. Jeopardy in a criminal case begins when a jury has been impanelled and sworn. A respondent once in jeopardy is entitled to a verdict of guilty or acquittal, unless the case is withdrawn from the jury by the court with his consent, or by reason of some manifest, urgent necessity in order that the ends of justice may not be defeated.

5. A manifest or urgent necessity may arise from purely moral or legal grounds as well as from physical. The knowledge that a jury does not stand indifferent or has been subjected to influences, whether for or against the accused, that might render it impossible for them to stand indifferent between the state and the respondent, creates such an urgent, manifest necessity as to warrant the court in withdrawing the case from the jury.

6. (1) The consent of the accused; (2) the illness of the court, a member of the panel or of the respondent; (3) the absence of a member of the panel or the respondent; (4) the end of the term before verdict when the term is fixed in duration; (5) or where the jury cannot agree, are all recognized as constituting that "manifest necessity" warranting the court withdrawing the case from the jury.

7. To create such a "necessity" due to outside influences upon a jury, it is not necessary for it to appear that the jury was actually prejudiced or biased thereby. It is sufficient, if the incident or influence was of such a nature that it may have produced such a bias or prejudice that they would not stand indifferent, whether it be in favor of the state or the accused.

8. The purpose of a view in a criminal case is not to procure evidence on which to base the verdict, but to enable the jury to better understand and appreciate the evidence produced in court. Neither is it a part of the trial within the meaning of that word as used in Sec. 23, Chap. 136, R. S. A respondent in a capital case has an inherent right to be present at a view, if he demands it, but he may waive it. His right to be present, however, is not based on Sec. 6 of Article 1, of the constitution, or Sec. 23 of Chap. 136, R. S.

9. No evidence of any kind should be permitted to be presented to a jury during a view in a criminal case, whether in the presence or absence of the accused. The jury may take into consideration only such facts as appear to the eye and only for the purpose indicated above.

10. A respondent in a capital case may expressly waive all his rights, constitutional or otherwise, except matters involving jurisdiction or the anciently established forms of our judicial tribunals,—as the number of members of the panel. Unless by acts or words he expressly waives them he will not be presumed to waive anything but to stand upon all his rights. *State* v. *Oakes*, 95 Maine, 369, is not to be construed as going beyond this.

11. The absence of a respondent by his request, or unless he demands the right to attend, while a view is being taken, violates none of his rights, constitutional or otherwise, and the respondent cannot afterward take advantage of the fact under such conditions, if the jury proceeded with the view in his absence.

12. But acts and unsworn statements of the accused bearing on the issues raised by his pleadings, out of court, but in the presence of the jury, while the jury were taking a view of the premises where the crime was committed, which acts and unsworn statements are of such a nature that they might naturally affect the minds of the jury whether for or against the accused, are sufficient to warrant the presiding justice, after having the facts appear as a part of the record, in withdrawing the case from the jury.

13. The right of determining when such urgent necessity exists must be left to the legal discretion of the presiding justice, acting under his oath of office, but subject always to review by this court.

Indictment for murder. To the different rulings of the court, respondent filed exceptions. Exceptions overruled, Judgment for State.

Case stated in opinion.

Guy H. Sturgis, Attorney General of the State of Maine, and *Franklin Chesley*, County Attorney for County of York, for the State.

Emery, Waterhouse & Paquin, for the respondent.

SITTING: SPEAR, HANSON, DUNN, MORRILL, WILSON, DEASY, JJ.

WILSON, J. John C. Slorah was indicted for murder in York County at the September term, 1917. At the January Term, 1918, being the "next term after the finding of the indictment," he was placed on trial on his plea of not guilty with a suggestion of insanity. After the impanelling of the jury, on motion of the respondent, and with the consent of the State, a view of the locus of the alleged crime was ordered by the court. Whereupon the jury in charge of an officer, accompanied by the respondent and his counsel and the attorney for the State visited the home of the respondent where the homicide was committed. Upon reaching the premises the respondent fell or threw himself down upon the piazza as the jury were about to enter the house crying out in the presence of the jury: "My God! take me away from here or I shall be insane again." He was then at the suggestion of his counsel removed by the officer in charge of him to a nearby house, while the jury in the absence of the respondent proceeded with counsel for the respondent and for the State to view the premises. On leaving the premises they were joined by the respondent and returned to court.

The court as the record shows on account of the incidents happening during the view, as set forth above, the statement of which by counsel in open court was made a part of the record, and upon the ground that they were in the judgment of the court prejudicial to an impartial trial of the respondent before that jury withdrew the case from the jury, and deeming it inexpedient to summon a new jury for another trial of the case at the January term, ordered the

case continued to the following May term, 1918, and the respondent remanded to jail. To the order of the court continuing the case the respondent excepted and filed his bill of exceptions and the case was then transferred to the Law Docket. This court dismissed the case from the Law Docket at the June term, 1918, on the ground that the exceptions were prematurely brought before the Law Court.

At the September term, 1918, the State again moved for trial, and the respondent then filed a motion to quash the indictment on the ground that under Sec. 11 of Chap. 136, R. S., he should have been tried at the second term after the finding of the indictment. His motion to quash was overruled and the respondent thereupon excepted. The respondent then filed a plea of former jeopardy, which was replied to by the State. The court overruled this plea, to which ruling exceptions were also taken by the respondent.

The case now comes before this court upon the respondent's exceptions: (1) to the order of the court at the January term, 1918, continuing the case to the May term following; (2) to the ruling of the court at the September term denying the motion to quash the indictment; (3) to the ruling of the court finding against the respondent on his plea of former jeopardy.

We will consider the exceptions in their order. We must overrule the respondent's exception to the order of the court continuing the case to the May term. The respondent relies, in support of this exception, on Sec. 6 of Art. 1 of the Constitution of our State entitling him to a speedy trial; on Sec. 11 of Chap. 136, R. S., which provides that any person in prison under indictment shall be tried or bailed at the "next term after the finding thereof, if he demands it," and on Sec. 25, Chap. 136, R. S., which provides that the trial of any criminal case, except for a crime punishable by imprisonment for life, may be postponed by the court to a future day of the same term, or the jury discharged therefrom and the case continued if justice will thereby be promoted.

The exception of capital cases from the provisions of Sec. 25, Chap. 136, simply leaves such cases, we think, subject to the common law as to continuances, and does not, as contended by respondent, preclude by implication a continuance in any event of cases, in which the offence charged is punishable by imprisonment for life. Such cases may be continued in the discretion of the court subject to

the provisions of Sec. 11 of Chap. 136, and Sec. 6 of Art. 1 of the constitution. *Com.* v. *Drake*, 124 Mass., 21; *Com.* v. *Donovan*, 99 Mass., 425; 12 Cyc., 898, and cases cited.

Section 11 of Chap. 136, R. S., was designed to carry out the general provisions of the constitution guaranteeing a "speedy trial." Since it must be inferred, we think, from the language of the statute, that a trial at the second term after the finding of the indictment complies with the constitutional provision guaranteeing a speedy trial, unless a trial is demanded by the respondent at the first term; and since we are of the opinion that the presiding Justice was warranted in withdrawing the case from the jury,—the record disclosing no demand by the respondent for further trial at the January term, nor any request that he be admitted to bail,—we think the presiding Justice did not exceed his discretionary powers in continuing the case to the May term, which we hold to be the second term after the finding of the indictment. *Stewart* v, *State*, 13 Ark., 720; *Ochs* v. *People*, 124 Ill., 399. We cannot read into the statute that silence on the part of the respondent, even in a capital case, shall constitute a demand for trial or a request for bail.

As to the exception to the ruling of the court denying the motion to quash the indictment, we must also overrule this exception. The reason assigned as the basis for the motion is that the respondent, though indicted for a felony, was not tried at the second term after the finding of the indictment, i. e., at the May term, 1918. It appears that the reason for the failure to place the respondent on trial at that term was his own act in presenting prematurely to the Law Court his exceptions to the court's order continuing the case from the January term. The right to a speedy trial and to a trial at the second term after the finding of an indictment for a felony is a personal privilege which, we think, a respondent may be held to have waived even in a capital case. We hold that the respondent in this case by his acts in having the case transferred to the Law Docket, thereby causing the delay, must be held to have waived his rights under section 11 of Chap. 136, R. S., to a trial at the May term. The question of waiver in capital cases we shall discuss later, but see *State* v. *Steen*. 115 Mo., 474; *State* v. *Marshall*, 115 Mo., 383; *Moreland* v. *Georgia*, 51 Ga., 192; *Com.* v. *Zec*. 105 At. Rep. (Penn.) 279, 281; *Bish*. New Crim. Law, Vol. 1, Sec. 951, d; 12 Cyc., 500, f;

People v. *Fitzgerald*, 137 Cal., 546, 550, 551; *People* v. *Hawkins*, 127 Cal., 372; *State* v. *Sasse*, 72 Wis., 4; *State* v. *Suber*, 89 S. C., 100, 103; *Shular* v. *State*, 105 Ind., 289.

We now come to the exception to the ruling of the court against the respondent's plea of former jeopardy, which is by far the most important. No questions as to procedure having been raised, we assume by consent of parties, it was submitted to the court upon the facts stated in the plea and replication, and the court in overruling the plea, held as a matter of law upon the facts stated that if jeopardy had begun at the January term, it was nullified by the subsequent proceedings. *Com.* v. *McCauley*, 105 Mass., 69.

The respondent urges in support of his exceptions as a matter of law that jeopardy began when the jury was impanelled and sworn at the January term, and that when jeopardy has once attached he was entitled to a verdict from the jury of either guilty or acquittal; that if the case was withdrawn by the court from the jury without his consent, except for what has been termed by the courts, urgent, manifest or imperious necessity, he should be discharged and may plead former jeopardy, if placed on trial again on the same indictment or for the same offence. Such we hold to be the law. 1 Bish., New Crim. Law, Sec. 1016. Cooley's Cons. Lim., page 339, (6th ed.); *State* v. *Hansford*, 76 Kan., 678, 682; *Mitchell* v. *State*, 42 Ohio St., 383, 395, 396; *State* v. *Richardson*, 47 S. C., 18; *People* v. *Warden*, 202 N. Y., 138, 151.

This leads us to inquire, first, was the respondent in jeopardy at the January term, 1918; second, if so, does any such manifest necessity appear from the record as to warrant the act of the presiding Justice in withdrawing the case from the jury and thereby nullifying the jeopardy so that it formed no bar to his trial at the September term.

Of the first, there can be no question. Practically all authorities, with but few exceptions, agree that jeopardy begins when a respondent is put upon trial before a court of competent jurisdiction, upon an indictment sufficient in form and substance to sustain a conviction, and the jury has been charged with his deliverance. The jury is said to be charged with his deliverance when they have been impanelled and sworn. Cooley's Cons. Lim. (6th ed.) page 399; Bish. New Crim. Law, Vol. 1, Secs. 1014, 1015. Does the record disclose conditions creating what has been termed by the courts a manifest,

urgent necessity, such as warranted the presiding Justice in withdrawing the case from the jury and discharging them from further consideration of it. We think it does.

Anciently it is claimed that a jury once sworn in a "case of life or member" could not be discharged by the court, but must render a verdict. Coke Litt., 277. Whether ever enforced to its full limit, which as one case puts it would require "the confinement of the jury till death, if they do not agree," *Winsor* v. *Queen*, 1 L. R., Q. B. C., 1865, page 394, is of no consequence. The rigor of and strict compliance with the technicalities of the common law in safeguarding the accused in criminal cases has been much relaxed since the decrease in the number of capital offenses. As early as the time of Blackstone, at least, an exception in this respect had been introduced in practice and it was recognized that juries in criminal cases might be discharged during the trial in cases of "evident necessity." Blackstone's Com., Vol. 4, page 361.

The expression "evident necessity" has been expanded and defined in practice in the course of time as occasions have arisen until under certain conditions there is no longer any question of the right of the court to stop a trial even in a capital case, and withdraw the case from the further consideration of the jury. In attempting to define those conditions, as the court puts it in the case of *Winsor* v. *Queen*, supra, "We cannot approach nearer to precision than by describing the degree (of need) as a high degree such as in the wider sense of the word might be denoted by necessity."

Certain conditions, if arising in the trial of a case, have come to be well recognized as constituting that "urgent necessity" which will warrant the discharge of a jury, and if they appear of record will bar a plea of former jeopardy: (1) the consent of the respondent, (2) illness of the court, a member of the jury, or the respondent, (3) the absenting from the trial of a member of the panel or of the respondent, (4) where the term of court is fixed in duration and ends before verdict, (5) where the jury cannot agree. Bish. New Crim. Law, Vol. 1, Secs. 1031-1033; Cooley's Cons. Lim., page 399, 400 (6th ed.); *Com.* v. *Purchase*, 2 Pick., 520; *Com* v. *Roby*, 12 Pick., 496; *Stevens* v. *Fassett*, 27 Maine, 266, 272; *State* v. *Elden*, 41 Maine, 165, 170; *State* v. *Richardson*, 47 S. C., 166, 172; 12 Cyc., 269, 270.

It is not easy to state the principle so as to cover all conditions that may arise, and the above are only examples of the instances

first gaining recognition by the courts and illustrative of the principle. It is now equally as well recognized that there are certain other conditions that create what have been termed a moral or legal necessity, as distinguished from physical necessity such as the illness of the court or jury. *Nolan* v. *State*, 55 Ga., 521; *Andrews* v. *State*, 174 Ala., 11. The administration of justice requires that verdicts, criminal as well as civil, shall be found by impartial juries, and shall be the result of honest deliberations absolutely free from prejudice or bias. The public as well as the accused have rights which must be safeguarded. If during the progress of a trial it shall become known to the court that some of the jury do not stand indifferent whether toward the State or the accused, it would be a travesty on the administration of justice if the trial must proceed, and if acquitted by such a tribunal, the constitutional safeguard may be invoked against again placing him in jeopardy before an impartial jury. Such a trial obviously should not constitute jeopardy whether the jury be prejudiced or influenced in behalf of the accused or the State. To prevent such a perversion of justice, it is now well recognized that if it comes to the knowledge of the presiding Justice that such conditions exist, it creates that imperious, manifest necessity that will warrant a discharge of the jury and such discharge will constitute no bar to another trial on the same indictment.

Of the conditions, except as found in the decided cases, more cannot be said than that in all cases, capital or otherwise, they must be left to the sound legal discretion of the presiding Justice, acting under his oath of office, having due regard to the rights of both the accused and the State, and subject to review by this court. *Oliveros* v. *State*, 120 Ga., 237; *State* v. *Wiseman*, 68 N. C., 203, 206; *Andrews* v. *State*, 174 Ala., 11; *Com.* v. *Fells*, 9 Leigh, (Va.) 613; *Thompson* v. *United States*, 155 U. S., 271. Perhaps, the most comprehensive statement of the law is found in *United States* v. *Perez*, 9 Wheat., 579, by Justice Story, and adopted in *Thompson* v. *United States*, supra:

"Courts of justice are invested with the authority to discharge a jury from giving a verdict, whenever in their opinion taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of justice would otherwise be defeated."

Some illuminating discussions of the general principles and instances of the court acting upon a moral or legal necessity, as it is termed, may be found in *State* v. *Wiseman*, 68 N. C., 203; *State*

v. *Hansford*, 76 Kans., 678; *Oliveros* v. *State*, 120 Ga., 237; *People* v. *Goodwin*, 18 Johns., 187; *Com.* v. *Fells*, 9 Leigh (Va.) 613; *Andrews* v. *State*, 174 Ala., 11; *Com.* v. *McCormick*, 130 Mass., 61; *United States* v. *Perez*, supra; *United States* v. *Morris*, 1 Curtis C. C., 23; *Thompson* v. *United States*, *supra*; *Simmons* v. *United States*, 142 U. S., 148, 154.

The last cited case, perhaps, best indicates the extent to which the courts may go in preventing a defeat of justice by withdrawing a case from a jury. A letter published by respondent's counsel and commenting on the evidence was read by some members of the panel. The court says:

"It needs no argument to prove that the Judge upon receiving such information under the peculiar circumstances attending it, was fully justified in concluding that such publication made it impossible for that jury in considering that case to act with the independence and freedom on the part of each juror requisite to a fair trial of the issue between the parties."

To render a verdict void in civil cases it need not appear that the jury was actually prejudiced, biased. or influenced by the occurrence. If it may have affected their ability to render an impartial verdict, it is sufficient. *Bradbury* v. *Cony*, 62 Maine, 223; *Cilley* v. *Bartlett*, 19 N. H., 312; *McDaniels* v. *McDaniels*, 40 Vt., 363, 364; *Hussey* v. *Allen*, 59 Maine, 269; *Belcher* v. *Estes*, 99 Maine, 314, 315; *Heffron* v. *Gallupe*, 55 Maine, 563; *York* v. *Wyman*, 115 Maine, 353, 355. We think the same considerations should apply in criminal cases whether it might affect adversely the State or the respondent, *State* v. *Hascall*, 6 N. H., 352. Both are entitled to a fair trial.

In the case at bar it is urged on the part of the State that the court was warranted in discharging the jury from further consideration of the case, first, because the respondent was not present while the view by the jury was being taken; and, second, because statements directly bearing upon the issue raised by him in his defense were made by him in the presence of the jury while the view was being taken, and in the absence of the presiding Justice.

The question of whether the accused has a right to be present at a view of the locus of the alleged crime in a criminal case is one upon which the decided cases are not in accord. The conflicting opinions seem to arise, in part, at least, from different conceptions as to the nature and purpose of a view:—Whether for the purpose of obtain-

ing information which may be regarded as evidence, or simply to enable a jury to apply and understand the evidence submitted in court. The cases holding the right of the accused to be present do so chiefly on the ground that either it is a part of the trial, or that since the jury has a right to treat the information received during the view as evidence, and under the constitution the accused has a right to be confronted by the witnsesses, he must, therfore, be present. In some states his power to waive that right is doubted. An examination of the numerous cases upon this question discloses that the right of the accused to be present at a view, if he demands it, is very generally recognized as inherent under a proper consideration of the rights of the respondent in a criminal case, but in a very large majority of the cases it is held that he may waive that right, even in capital cases. Eminent authorities and well considered cases, however, hold that no rights of the accused are violated in taking a view of the locus of the crime in the absence of the respondent, even in capital cases, though no waiver of his rights in this respect appears from the records, on the grounds that it is not the taking of evidence and is no part of the trial.

In *Shular* v. *State,* 105 Ind., 289, 299, a leading case on this question, the court says:

"It is the duty of the jurors to view the premises, not to receive evidence, and nothing could be done by the defendant or his counsel if they were present, so that their presence could not benefit him in any way, nor their absence prejudice him." And again: "It is equally clear that the view obtained by the jury is not deemed to be evidence. . . . . In contemplation of law the place of trial is not changed."

In *People* v. *Thorn,* 156 N. Y., 286, 298:

"It appears to us that the more natural construction . . . . . is that the view is not the taking of testimony within the meaning of the Bill of Rights, but that the sole purpose and object of the view is to enable the jurors to more accurately understand and more fully appreciate the testimony of the witnesses given before them. . . . . The prisoner's counsel asked that the jurors be permitted to view the premises and waived the right of himself or the defendant to be present. If the view was not a part of the trial of the taking of evidence within the constitution and the statutes, there can be no doubt of the power of the defendants to waive his presence."

In *Chute* v. *State,* 19 Minn., 230;

"The view is not allowed for the purpose of furnishing evidence upon which a verdict is to be founded, but for the purpose of enabling the jury to understand and apply the evidence which is given in court."

In *Com.* v. *Van Horn,* 188 Pa. St., 143, citing *Schuler* v. *State,* supra, and *State* v. *Adams,* 20 Kan., 311;

"We are unable to see in what manner the mere absence of the defendant at the view worked a deprivation of any constitutional right, considering that no testimony was or could be taken during the view."

It may also be noted in passing that notwithstanding the theory of the nature of a view in civil cases held by the Massachusetts Court, in two of the most famous homicide cases ever tried in New England, *Com.* v. *Knapp,* 9 Pick., 496, 515; *Com.* v. *Webster,* 5 Cush., 295, 298, a view was had without the presence of the accused. Authorities of the same tenor may be found in Greenleaf on Evidence, Vol. 1, Sec. 162, o, 4, (6th ed.); *State* v. *Adams,* 20 Kan., 311; *State* v. *Mortensen,* 26 Utah, 312; *Blythe* v. *State,* 47 Ohio St., 234; *State* v. *Ah Lee,* 8 Or., 214, 217; *Elias* v. *Territory,* 9 Ariz., 1; *People* v. *Auerbach,* 176 Mich., 23, 46; *State* v. *Hartley,* 22 Nev., 342; *State* v. *Sasse,* 72 Wis., 4.

The cases usually cited as sustaining the contrary view are *People* v. *Burch,* 68 Cal., 619, 623; *Benton* v. *State,* 30 Ark., 328; *State* v. *Sasse,* 68 Wis., 530; *State* v. *Bertin,* 24 La. Ann., 46; *Foster* v. *State,* 70 Miss., 755; *Carroll* v. *State,* 5 Neb., 31; but even in California, Arkansas, Nebraska and Wisconsin later cases hold that the right may be waived. *People* v. *Fitzgerald,* 137 Cal., 546, 549; *People* v. *Mathews,* 139 Cal., 527; *Whitley* v. *State,* 114 Ark., 243; *Neal* v. *State,* 32 Neb., 120, 131; *State* v. *Sasse,* 72 Wis., 4. Also see *State* v. *Suber,* 89 S. C., 100, 102; *State* v. *Congdon,* 14 R. I., 458, 463; *State* v. *Buzzell,* 59 N. H., 65, 70; *Com.* v. *McCarthy,* 163 Mass., 458.

The conflicting authorities upon the nature of the view and the importance of determining for the future the rights of respondents in criminal cases in respect to their presence thereat, leads us to examine this question farther for the purpose of determining the law in our own State. Our examination of the authorities discloses, we think, that the greater number hold the purpose of a view, except possibly under Statutes in real actions and land damage cases,

Chute v. *State*, 19 Minn., 230, or in cases where it becomes necessary to examine personal property that cannot be conveniently presented in court as exhibits, that the purpose of a view is to enable the jury to more intelligently apply and understand the testimony as presented in court; and in criminal cases, at least, to receive testimony of witnesses or evidence in any form during the view is reversible error. *People* v. *Gallo*, 149 N. Y., 106, and cases cited above. The Massachusetts Court seems to have gone further than any other in holding the information received while taking the view to be evidence, at least in civil cases. *Tully* v. *Fitchburg*, 134 Mass., 499; *Hank* v. *Boston & Albany R. R.*, 147 Mass., 495; *McMahon* v. *Lynn & Boston R. R.*, 191 Mass., 295; *Com.* v. *Chance*, 174 Mass., 245; *Norcross Bros.* v. *Vose*, 199 Mass., 81.

This court in an action for damages for changing the grade of streets has held that upon a view under the Statute the jury had the right to take into consideration what they saw of the situation. *Shepherd* v. *Camden*, 82 Maine, 535, and in *Wakefield* v. *Boston & Maine R. R.*, 63 Maine, 385, also a land damage case: "In contemplation of the statute, the view is a portion of the evidence to be submitted to and considered by the jury in determining their verdict."

In *Cunningham* v. *Frankfort*, 104 Maine, 208, however, this court said:

"A view may render the testimony more intelligible and otherwise afford more valuable assistance, but it does not authorize the jury to ignore physical facts or disregard settled rules of law."

The Massachusetts Court, though it extends it farther, uses this language, in *Tully* v. *Fitchburg*, supra.

"In many cases, and perhaps, in most, except those for the assessment of damages, a view is for the purpose of enabling the jury better to understand and apply the evidence which is given in court."

We are, therefore, of the opinion, without modifying the prior views of this court in land damage cases, as laid down in *Shepherd* v. *Camden* and *Wakefield* v. *Boston & Maine R. R.*, supra, or in the case of the examination of exhibits that cannot be conveniently produced in Court, *Trafton* v. *Pitts*, 73 Maine, 408, that the theory most consonant with reason is to hold that the purpose of a view is not to receive evidence, but as the court has so frequently phrased it, to enable the jury to more intelligently apply and comprehend

the testimony presented in court; and that so far as the information received on the view can in any way be considered by the jury it must be limited to such as is obtained from an ocular examination of the premises. No testimony of any kind should be permitted to be presented to a jury while away from the presence of the court taking a view. *People* v. *Gallo,* supra. *People* v. *Fishman,* 119 N. Y. S., 89. We further hold that at a view there is no such confrontation of witnesses as requires the presence of the accused in a criminal case. Greenleaf on Ev., Sec. 162, o, 4, (6th ed.) Nor do we think it is a part of the trial in the sense in which the word is used in Sec. 23, Chap. 136, R. S.; but that the place of trial is at the court-house. The respondent does not follow the jury into the jury room at its deliberations. If he is present in court when they return, the statute is complied with. Whatever his rights are to attend, if he demands it, and we think it should not be denied him in capital cases, he may in all cases waive them, and the view properly proceed in his absence.

One other question requires consideration before disposing of the exceptions now under consideration, and that is the power of a respondent to waive any rights in a capital case. In *State* v. *Oakes,* 95 Maine, 369, this court said: "A person on trial for murder must be considered as standing upon all his legal rights and waiving nothing," adopting the language of some of the earlier Illinois cases and citing as authority *Hopt.* v. *Utah,* 110 U. S., 574; *Cancemi* v. *People,* 18 N. Y., 128; *Dempsey* v. *People,* 47 Ill., 323; *Perteet* v. *People,* 70 Ill., 171.

In the case of *Hopt* v. *Utah* the right to be present at a hearing before triers of the qualifications of jurors in a capital case under the Utah statutes held to be a jurisdictional question which the respondent could not waive. In the case of *Cancemi* v. *People* the respondent undertook to waive the right of trial by a jury of twelve members, and the court held this to be a dangerous innovation in a criminal case and could not be tolerated. In *Dempsey* v. *People* it was held to be error to allow a juror to talk to a bystander inquiring as to the truth of a statement made by a witness, and that the accused did not waive any rights by not objecting to it. In *Perteet* v. *People,* however, the last case cited, the court says, and we think that *State* v. *Oakes* cannot be construed as going any farther:

"A prisoner in a capital case is not to be presumed to waive any of his rights, but that he may by express consent admit them all away can neither be doubted nor denied."

The court in *Perteet* v. *People*, commenting further on an earlier Illinois case, *People* v. *Scates*, 3 Scam., 351, where the same language was used as in *State* v. *Oakes*, says:

"He may plead guilty and thus deprive himself of one of the most valuable rights secured to the citizen, that of trial by jury. If he can expressly admit away the whole case then it follows he may admit away any part of it, but he will not be presumed to have done so. His consent must be expressly shown, and this is the whole scope of the doctrine in the case referred to."

The above does not, of course, apply to jurisdictional questions which cannot be waived.

Applying these principles to the facts shown of record in the case. Clearly, we think, if the respondent had the right to be present at the view, he expressly waived it, and it was not a sufficient ground for withdrawing the case from the jury because it proceeded in his absence. He requested it, and his counsel without objection on his part directed that he be removed. We can conceive of situations where it might be almost inhuman to compel a respondent against his will to visit the scene of the crime in the presence of the twelve men in whose hands his life rested. We could not have allowed him to take advantage of his absence caused at his own request, if the trial had continued and a verdict of guilty had been rendered.

The exclamation by him in the presence of the jury, however, that if he was not removed he would go insane again, was in the nature of evidence improperly presented to the jury out of court,—an unsworn statement of the accused. We cannot say that it influenced the minds of the jury, but it may have. *State* v. *Hascall*, 6 N. H., 352; *Driscoll* v. *Gatcomb*, 112 Maine, 289, 290. The Court is not compelled to find as a fact that the improper proceedings actually influenced the minds of the jury. It is sufficient if it may have prejudiced them either for or against the accused. The State as well as the respondent is entitled to a trial by a jury free from all bias, or prejudice or improper influence, and to a verdict based on the sworn statements of witnesses presented in court where they may be tested by cross examination. *People* v. *Gallo*, supra, *People* v.

Fishman, supra. To permit the jury to receive statements of the accused or any witness out of court would be a most dangerous practice. We are of the opinion that the acts and statements of the accused in the presence of the jury, away from the presence of the court, under the circumstances of this case, created a manifest, urgent necessity that in order to prevent the defeat of justice warranted the court in withdrawing the case from the jury. The respondent wilfully created these conditions. We do not think he can now complain. We therefore overrule the exceptions to the ruling of the court that these facts constituted no bar under his plea of former jeopardy to his trial at the September term, 1918.

Entry must be,

Exceptions overruled.
Judgment for the State.

G. EMMA HODGMAN, Administratrix,

vs.

SANDY RIVER & RANGELEY LAKES RAILROAD.

Franklin. Opinion June 18, 1919.

Actions under Federal Employer's Liability Act. Rule as to an injured employee being held to assume the risk where defendant company has used cars or appliances contrary to the statute. Burden of proof to show that absence of appliances enumerated in Statute contributed in whole or in part to the cause of accident.

This is an action to recover damages resulting from injuries sustained by Frank R. Hodgman, the plaintiff's intestate. The jury returned a verdict for the plaintiff in the sum of six thousand six hundred and fifty dollars, and the case is before the court on the defendant's general motion.

Held:

1. The failure to equip the engine with power driving-wheel brakes was a violation of Sec. 8605 of the Federal Statutes requiring the same.
2. This fact alone does not make the defendant liable per se; the burden is still on the plaintiff to show that the absence of such brakes contributed in whole or in part to produce the accident.
3. The testimony fails to show a substantial compliance with the Act, as claimed by defendant, and we are very clear that any improvement to other parts of the engine or tender could not take the place of the power driving-wheel brakes required by law. The engine was not properly and lawfully equipped without such brakes. In our view there can be no such substantial compliance shown to relieve the defendant fron strict compliance with the statute. The law required the power driving-wheel brakes; and the plaintiff's intestate was entitled to have such brakes installed so he could use them when necessary.
4. The evidence carefully considered confines us to these inquiries, which were in their order submitted to the jury, with the question of due care of the plaintiff's intestate and the speed of the train, under proper instruction:

1. If the brakes were on the driving wheels as required by law, would they have steadied the engine?

The evidence shows they would.

2. Would the plaintiff's intestate have used the brakes?

The jury have said that he would.

3. Is there sufficient evidence upon which they could base their conclusion?

There is no positive evidence on this point, but from the inferences to be drawn from the undisputed facts, ordinary fair-minded, reasonable men might differ. It was thus clearly a question for the jury, and we find nothing in the case to indicate bias, prejudice or misunderstanding, the verdict being so reasonable in amount as to show a perfectly fair mind toward the defendant.

Action under Federal Employer's Liability Act to recover damages on account of alleged negligence of defendant company. Defendant filed plea of general issue and also brief statement. Verdict for plaintiff. Defendant filed a motion for a new trial. Motion overruled. Case stated in opinion.

McGillicuddy & Morey, for plaintiff.

Frank W. Butler, and White & Carter, for defendant.

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

HANSON, J. This is an action to recover damages resulting from injuries sustained by Frank R. Hodgman, the plaintiff's intestate. The jury returned a verdict for the plaintiff in the sum of six thousand six hundred and fifty dollars, and the case is before the court on the defendant's general motion. The question of excessive damages was not argued by the defendant's counsel.

Frank R. Hodgman was a locomotive engineer in the employment of the defendant, and on the day of the accident was in charge of Engine No. 8 belonging to and in use by the defendant company which at the time was a common carrier engaged in interstate commerce. The engine was what is known as the "Portland Type", and was built some seven or eight years prior to the accident by the Baldwin Locomotive Works. It was similar to all other narrow-gage type—the engine and tender were built all together on one frame instead of being built separately and coupled together as the broad-gage engines are. There were no power brakes on the four drive wheels, but there were power air brakes on the four wheels under the rear or tender part of the engine, and on the train. These brakes, all of them, were operated from the cab by the engineer, exactly the same as all Westinghouse Air Brakes systems are operated. Some time after the engine was purchased, the mechanical contrivances for equalizing the distributing of the weight on the springs

were changed. The engine rolled or listed when going over bad track or around curves. The levers controlling the brakes, steam and reverse levers, were all situated in the cab and in reaching distance from the engineer's seat.

The scene of the accident was a few miles out of Farmington near a flag-station called Fairbanks. The railroad running out of Farmington gradually runs up hill until the summit is reached, then slopes down into the valley, crosses a bridge, and immediately starts up a sharp grade and into a heavy curve on this up grade. It was at the beginning of this curve that the engine rolled over and was ditched, fatally injuring the driver, the plaintiff's intestate, Frank R. Hodgman.

Shortly after noon on August 11, 1917, the Sandy River and Rangeley Lakes' train pulled out of Farmington for Rangeley. Frank R. Hodgman was the engineer, and a Mr. Presby was the conductor. The air brakes were tested and reported in good order before leaving Farmington. Fairbanks is the next station. Mr. Hodgman, the engineer, started with the train in his sole control as to speed. He pulled up to the summit, then pitched over the top, going down grade at a good rate of speed, working live steam all the way down the grade and over the bridge. He also worked live steam up the grade toward the curve, keeping the speed of the train up as fast going up hill as on the down grade. He applied no brakes nor did he shut off the steam, but kept the speed of the train sustained, using live steam up the hill as he entered the curve. When the engine reached the curve, it "rolled up" and over, ditching itself and fatally injuring Hodgman.

It is admitted that the action is properly brought under the Employers Liability Act, and that the defendant company is in violation, technically only, of the Safety Appliance Act, so called. The action is brought under Sec. 8605 of Chap. C, and Secs. 8657, 8658 and 8659 of Chap. E of the Revised Statutes of the United States, and plaintiff further relies on the provision of Sec. 8612 of the R. S. U. S., relating to assumption of risk.

Sec. 8605 of Chap. C of the R. S. of the United States reads as follows:

"From and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive

engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train brake system, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose."

The failure to equip the engine with power driving-wheel brakes was a violation of Sec. 8605 of the Federal Statutes requiring the same, while Sec. 8612 of the Statute provides that "Any employee of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provisions of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge." *Union Pacific R. R. Co.* v. *Huxol*, 245 U. S. Rep., 535; *Louisville & Nashville R. R. Co.* v. *Layton*, 243 U. S. Rep., 617.

The defendant's counsel frankly admits that "technically the defendant was in violation of the Safety Appliance Act", and argues that improvements were made which amount to a substantial compliance with the Statute, but we find no warrant for saying that a mechanical contrivance for equalizing the distributing of the weight on the springs, an improvement in no way affecting the speed of an engine, is a substantial compliance with the statute requirement that the engine shall be equipped with a power driving-wheel brake.

Counsel urges that the provisions of Sec. 8660, in view of their claim that the accident was due to the negligence of Hodgman, and not to the absence of a power brake, is a bar to this action, because it is not shown that the absence of power brakes contributed to the accident. The Section reads: "In any action brought against any common carrier under or by virtue of any of the provisions of this Act to recover damages for injuries to, or the death of, any of its employes, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." And urging defendant's rights thereunder, counsel contends that the proximate cause of the injury was the speed of the train when it reached the curve in the track, and that the speed of the train was in the sole

control of the plaintiff's intestate, and was caused "by his own wanton, reckless and indifferent conduct in running too fast for safety when going onto a curve."

With the other questions presented to the jury, this subject was considered and with it the testimony of the witnesses that the engineer was running slower than the established schedule time by one minute. It was solely for the jury under proper instruction, which we must assume was properly given.

Counsel further argues that an additional and vital question was, "did the absence of the driver brakes from the engine contribute in whole or in part to the speed of the train," and insists that it did not. This, like all the other questions here noted, was the subject of very careful inquiry both in the examination in chief and in cross-examination, and was necessarily, from the very nature of the case, a leading question, and as necessarily associated with all the other questions submitted to the jury. That it was submitted to the jury with proper instruction is apparent.

The evidence shows conclusively that the Federal Statutes were not complied with in that the engine was not equipped with power driving-wheel brakes. This fact alone does not make the defendant liable per se; the burden is still on the plaintiff to show that the absence of such brakes contributed in whole or in part to produce the accident.

The principal reliance of defendant's counsel is stated in their brief statement, in these words:

"1. That the said defendant was not in violation of the Safety Appliance Act, so-called, together with all subsequent amendments thereto, being Chapter 196 of Volume 27 of the Statutes of the United States, at page 531, but said defendant had made a substantial compliance with said Act by equipping its trains, cars and engines with all the safety appliances required by said Act. 2. That the said plaintiff was not in the exercise of due care at the time of and prior to the fatal accident which resulted in his death."

As to these contentions, the testimony fails to show a substantial compliance with the Act, and we are very clear that any improvement to other parts of the engine or tender could not take the place of the power driving-wheel brakes required by law. The engine was not properly and lawfully equipped without such brakes. In our view there can be no such thing as substantial compliance shown

to relieve the defendant from strict compliance with the statute. The law required the power driving-wheel brakes; and the plaintiff's intestate was entitled to have such brakes installed so he could use them when necessary. It will serve no useful purpose to restate the evidence as to the use and effectiveness of power driving-wheel brakes. The working and effect of such brakes is a matter of common knowledge.

The evidence carefully considered confines us to these inquiries, which were in their order submitted to the jury under proper instruction:

1. If the brakes were on the driving wheels as required by law, would they have steadied the engine?

The evidence shows they would.

2. Would the plaintiff's intestate have used the brakes?

The jury have said that he would.

3. Is there sufficient evidence upon which they could base their conclusion?

There is no positive evidence upon this point, but from the inferences to be drawn from the undisputed facts, ordinary fair-minded, reasonable men might differ. It was thus clearly a question for the jury, and we find nothing in the case to indicate bias, prejudice or misunderstanding, the verdict being so reasonable in amount as to show a perfectly fair mind toward the defendant.

We are not justified in saying that the verdict is manifestly wrong.

The entry will be,

Motion overruled.

VIVIAN NASH *vs.* INHABITANTS OF SORRENTO.

Hancock. Opinion June 26, 1919.

Public Laws, 1917, Chap. 276, Sec. 10 interpreted. Rule where a statute creates a new right but provides no remedy for its enforcement. Rule where a remedy is given, as to that being the exclusive way of enforcing the new right. Rule where the statute is simply declaratory of certain common law rights.

Action against a town by the wife of a man in naval service to recover State aid under Laws of 1917, Chap. 276.

Held: that action is not maintainable, the remedy provided by Sec. 10 of the Act being exclusive.

Where a statute creates a new right but provides no remedy for its enforcement a remedy exists by implication; if however the statute conferring the right provides a remedy such remedy is ordinarily exclusive.

Action brought under Public Laws, 1917, Chap. 276, Sec. 10. Case was entered in Bar Harbor Municipal Court, and by agreement of parties was reported to Law Court for determination. Judgment in accordance with opinion.

Case stated in opinion.

Percy L. Aiken, for plaintiff.

W. B. Blaisdell, for defendant.

SITTING: CORNISH, C. J., SPEAR, HANSON, DUNN, WILSON, DEASY, JJ.

DEASY, J. Action brought by the wife of a man in the United States Naval service against the Town of Sorrento, to recover "State Aid" of four dollars per week, provided by Chap. 276, of the Laws of 1917.

The act provides in substance that the State Aid, so-called, shall in the first instance be paid by towns and that the towns shall be reimbursed by the state.

Sec. 10 of Chap. 276 is as follows:

"If any city, town or plantation, or the municipal officers thereof, shall neglect or refuse to comply with the provisions of this act according to its true intent and meaning, and to the satisfaction of the governor and council, such city, town or plantation, or the municipal officers thereof, as the case may be, shall forfeit and pay the sum of one hundred dollars, one half to the use of the aggrieved party and one half to the county where the cause is tried, to be recovered by an action on the case in any court proper to try the the same."

Where a statute creates a new right but provides no remedy for its enforcement a remedy exists by implication. *Stearns* v. *R. R. Co.*, 46 Maine, 95; *Rackliff* v. *Greenbush*, 93 Maine, 99; *Ricker Classical Institute* v. *Mapleton*, 101 Maine, 553.

If, however, the statute conferring the right provides a remedy such remedy is ordinarily exclusive. *Pollock* v. *Eastern Railroad Co.*, 124 Mass., 158; *Thayer* v. *Kitchen*, 200 Mass., 382; *Great Western Company* v. *State*, 181 Ind., 28, 102 N. E., 849; *Evers* v. *Davis*, 86 N. J. Law, 196, 90 At., 677; *Schmidt* v. *Milwaukee*, 149 Wis., 367; 135 N. W., 883; *State* v. *Western & A. R. Co.*, 136 Ga., 619; 71 S. E., 1055; *Farmers National Bank* v. *Deering*, 91 U. S., 29; *Yates* v. *Jones National Bank*, 206 U. S., 158.

There is a further class of cases holding that where statutes do not create new rights, but are merely declaratory of common law rights, remedies provided by such statutes are cumulative and not exclusive. *Train* v. *Boston Disinfecting Company*, 144 Mass., 523; *Pollock* v. *Eastern Railroad Company*, 124 Mass., 158; *King* v. *Viscoloid Company*, 219 Mass., 420; *Field* v. *Milwaukee*, 161 Wis., 393, 154 N. W., 698; *Levy & Company* v. *Davis*, 115 Va., 814, 80 S. E., 791.

In the pending case the statute involved gives a new right and is not merely declaratory. In Sec. 10 it provides a remedy which we must assume the Legislature intended to be exclusive.

The entry must be,

Judgment for defendant.

EUGENE M. JOHNSON, et al. *vs.* MOSES PALMER, et als.

York. Opinion July 7, 1919.

Wills. Construction of same. General rule to be applied in ascertaining the intention and meaning of a testator. General meaning and scope of the term "reversion." General rule in equity as to considering that as done which ought to have been done.

After devising certain real estate in trust for the benefit of his wife, if she should become, and while she remained, his widow, a testator further provided:

"And in the event of the death or intermarriage of my said wife the said (trustee) shall in trust convey to my two sons, N., Jr. and M. . . . . that part of my lands which constituted my said original homestead to have and to hold the same for and during their natural lives and the reversion of the last mentioned farm to be conveyed to the children of said N. and M. if they have any, otherwise to all my grandchildren . . . ."

The trust in favor of the widow attached. It terminated upon her marriage, at which said N. Jr. and M., and as well other children of the testator, were living. N., Jr. then had only one child. M. lived and died unmarried and childless. N. Jr's. child outlived him, and died intestate before M. died, herself survived by a husband and one child. When M. (survivor of the life tenants) died, other grandchildren of the testator were living. The trustee never made conveyance of the farm either by carving out life estates to N. Jr. and M., or by deeding the reversion.

Upon bill by said surviving husband and child, praying construction of the will, as against the insistence of certain defendants that, as they only of testator's grandchildren survived both life tenants, title to the reversion of the original homestead farm passed to them, it is,

Held:

That title to the reversion was to remain in the trustee dependent on an event certain to occur, perhaps on one that might. The testator clearly meant to postpone the vesting of the reversionary estate until his widow either died or married, and not longer. When the widow married, conveyance of the life estates forthwith should have been made. And, at that same time, the class entitled to the reversion should have been ascertained, and the reversion accordingly conveyed. As N. Jr's. daughter, of the first denominated class, then alone was in being, the reversion should have been delivered over to her. What ought to have been done is considered to have been done.

Bill in equity asking for the construction of the will of Nathan Palmer, late of Hollis, Maine, deceased. The cause was heard on bill, answer, replication and agreed statement of facts; and, it appearing to the Justice presiding that questions of law of sufficient importance were involved, by agreement of parties cause was reported to Law Court for hearing and decision.

Judgment in accordance with opinion.

Case stated in opinion.

George F. Gould, for plaintiffs.

Woodman & Whitehouse, for defendants.

SITTING: CORNISH, C. J., HANSON, PHILBROOK, MORRILL, DUNN, DEASY, JJ.

DUNN, J. In the year of 1863, Nathan Palmer, who lived at Hollis, in York County, made his will. Promptly after his death, about two years later, the Probate Court in that County took proof that the instrument was indeed his lawful act, and allowed it. This suit in equity recently was brought to obtain a construction of that portion of the seventh clause of the will which, as set forth herein, is italicized for distinguishment. The clause referred to reads:

"Seventh. I give and devise unto my said nephew Daniel Townsend, all the rest and residue of my real estate in said Hollis, being my former and original homestead, and the "Haley Farm" being the same farms before mentioned, together with all my cattle, stock and farming tools, necessary to stock and carry on said farms and all my other personal estate after payment of the sums and expenses herein before specified to hold in trust, in the manner and for the purposes following, viz: that said Daniel Townsend shall carry on, lease or rent said farms, stocked with such cattle as he may deem necessary, to the best advantage, and of the proceeds thereof lay out so much as may be necessary and proper to keep said farms in good order and condition and to raise on said farms such stock as may be necessary and at sundry times and as may seem to him most advantageous, sell or exchange any cattle from or on said farms and of any gains or net income from said farms derived as aforesaid to pay over yearly to my wife, said Mary A. Palmer, so long as she shall remain my widow and unmarried, so much as she may require for the comfortable support and maintainance of herself, and of said minor children during their

minority. . . . . *And in the event of the death or intermarriage of my said wife the said Daniel Townsend shall in trust convey to my two sons Nathan Palmer, Jr. and Moses Palmer, or in case of the death of either without children, to the survivor of them that part of my lands which constituted my said original homestead to have and to hold the same for and during their natural lives and the reversion of the last mentioned farm to be conveyed to the children of said Nathan and Moses if they have any, otherwise to all my grandchildren.* . . . ."

Mr. Palmer twice was married. Surviving him there were, (a) his wife, Mary A. Palmer, who remained his widow for nine years, when she married again; (b) his aforesaid children, Nathan Jr. and Moses, only two sons of his first marriage; (c) three daughters born of the first, and a son and a daughter born of the second marriage. The children of the children of group *c* contend with great insistence that, as they only of the testator's grandchildren survived the life tenants, title to the revision of the "original homestead" farm passed by the will to them.

Nathan, Jr. and Moses Palmer both were living, (the former having only one child and the other being unmarried and childless), when their stepmother, the testator's widow, married. But the testamentary trustee, neither then nor to the time of his own death long subsequently, made conveyance of the original homestead farm, either by carving out life estates to Nathan and Moses or by deeding the reversion. Nathan, Jr. died in 1891, outlived by his said child, born about two months after the death of her grandfather, of the name of Fredonia. She lived until 1911. The plaintiffs respectively are husband and only heir, her surviving. Moses Palmer, who never married, has died since the cause was argued. In the circumstances, his death does not necessitate pause in the case. On petition of them who now are plaintiffs, on February 18, 1913, a trustee under the will was appointed, in succession to the dead trustee. This trustee purported to transfer the title to the reversion of the original homestead farm to the plaintiffs, on the ground that to it they were of right entitled, in the stead of their wife and mother, who had died before conveyance to her by the first trustee. Three years later, on petition in behalf of Moses, who was alleged to be the owner in possession of an estate therein subject to a contingent remainder or an executory devise, the York Probate Court assumed to appoint a trustee to sell and convey the fee of the farm (R. S., Chap. 78, Sec. 4) which that

trustee promptly undertook to do, for the consideration of $11,000.00. Plaintiffs afterward filed this bill as against the life tenant, the trustee appointed to sell and convey the farm, and the testator's living grandchildren, praying construction of the will.

The intent and meaning of a testator, as he defined and recorded it, must be spelled out by scanning the words of his will, and that from his point of view. Words are pictures represented by sounds. They are to be read in the light of the day of their delineation. The object of judicial interpretation, in a case like this, is to ascertain what the language used by a testator represented in his mind; what he understood it signified. It is not so much a question as to what the words mean as to what they mean as he purposely employed them. And this to the end that, if agreeable to legal canons, his will shall prevail and not fail.

A chief object of Nathan Palmer in making his will, as gleaned from a reading of that document, was to provide for the befitting livelihood of his wife, should she become and remain his widow. Her he gave, for life or widowhood, whichever first should come to an end, the furniture of the family homestead, the (live) stock of the homestead farm, together with that farm itself, and all the personal property he used thereon. Beyond this, in the mooted seventh clause of the will, he created a trust, nominating a nephew of his to perform it. The body of this trust comprised the rest of Mr. Palmer's real estate in Hollis; that is to say, two farms, called by him the original homestead and the Haley farms; and it included, too, cattle, stock, and farming tools to carry them on, and all his available personal estate. From the net income of the trust, yearly was to be paid to testator's widow, so much money as she might have required for her appropriate support, and that of her minor children. When she died, or in case she married, the trustee was instructed to convey the original homestead farm, in life estates to testator's sons, Nathan and Moses. And, continues the will, "the reversion of the last mentioned farm to be conveyed to the children of said Nathan and Moses, if they have any, otherwise to all my grandchildren."

Failure of the trustee to discharge duty has not essentially complicated the situation. Equity will regard and treat him in whose favor an act should have been performed as clothed with the same interest, and entitled to the same rights, as if the act actually had been performed. The underlying inquiry of the case is, when and to

whom ought the trustee to have conveyed the reversion? The term, "reversion" sometimes is loosely used in wills or deeds. The reversion is that estate which is left, when from the entire fee, a lesser particular estate in being is granted. *Stinson* v. *Rouse*, 52 Maine, 261. It is that present vested, alienable, inheritable and devisable residue of an estate remaining in a grantor or his successors, or in the successors of a testator, to be enjoyed in possession, from and after the happening of a particular event, at some future time. The word, as the testator applied it, in disposing of his original homestead farm, must be held to have related to the title which would have remained in the trustee after the latter, conformably to the terms of the will, had conveyed to the sons for life. Imperatively the trustee should have conveyed the reversion to the children of Nathan and Moses, "if they had any." A conveyance presupposes both a conveyable estate and a grantee. Not having vested the less estates in the testator's sons, the trustee was without reversion to convey. But his neglect of duty has not affected the rights of the parties. When ought he to have done that which he was bound to do? For the reason that it is operative from the death of its maker, a will is presumed to refer to a situation then existing; but this presumption yields when the will manifests the testator's intention differently. "In the event of the death or intermarriage of my said wife," to recur again to Mr. Palmer's will, my trustee "shall in trust convey" (obviously, in discharge of his trust he shall convey), to my sons, Nathan and Moses, . . . my original homestead farm . . . for and during their natural lives, and that of the survivor of them; and the reversion of that farm "to be conveyed to the children of Nathan and Moses, if they have any." Lack, in the clause, of words of present gift to the children of Nathan and Moses is highly significant. By the will the trustee took a fee simple estate in trust. Title to the reversion did not vest immediately on the death of the testator in an indicated class of grandchildren. They were to take through the medium of a power in trust. Vesting of the reversion was to remain contingent until the happening of a conclusion. *Deering* v. *Adams*, 37 Maine, 264; *Pierce* v. *Savage*, 45 Maine, 90. Absence of words of present gift tends strongly to show that the testator intended his bounty should not be bestowed; that the beneficiaries should not immediately be clothed with possession of the title; that it should remain in the trustee dependent on an event certain to occur; perhaps

on one that might. The latter came to pass. When the widow married, the persons answering the same description and sustaining the same relation to the devise, should have been ascertained. *Giddings* v. *Gillingham,* 108 Maine, 512; *Hale* v. *Hobson,* 167 Mass., 397. The intention of the testator is not shrouded in mystery. His speech is that of the past pronounced at a time future to his own death. It is the testator himself, speaking at the time of the marriage and saying to the trustee: "She who was my widow has become the wife of another; henceforth of my estate she shall have only the provision made for her in that case. By consequence, now convey the farm on which I at first lived, in life estates to my sons, Nathan and Moses; and, contemporaneously, transfer the reversion in that property to Nathan's daughter, she being the only child yet born to either of my said sons." We think, and decide, that the testator clearly meant to postpone the vesting of the reversionary estate,—the trustee intervening,—until his widow either died or married, and not longer. She married. Therefore, conveyance of the life estates forthwith should have been made. And, at that same time, the class entitled to the reversion should have been ascertained; the reversion accordingly conveyed; and that formality have marked the termination of the trust, so far as it concerned the original homestead farm. As Fredonia, of the first denominated class, then alone was in being, the whole reversion should have been delivered over to her. The present day rights of the plaintiffs, on the presented record, are the same as if those things had been done; and Fredonia, afterward grown to womanhood, had died intestate owning the property, it burdened with a life estate in Moses, which estate in him ceased to exist when he died.

The view that the testator fixed upon the incident either of the death or the marriage of his widow as the time when the trustee should have devested himself of title, readily finds convincing accentuation upon reading the complete will. In different dispositive clauses he gave legacies to his children. First, to Nathan, Martha, Ruth and Lavina, "to be paid . . . as soon after my decease as may be convenient." Next, to Moses, payable "after he shall become 21 years of age." Likewise to a daughter, Emma Frances. The home farm he devised to his wife for life, the reversion to his son, Franklin, and his daughter, Emma Frances, ... "their heirs and assigns forever." In the seventh paragraph is bequest to Franklin

and Emma when "they severally arrive at the age of twenty one years." Also there, following the provision relating to the disposal of the original homestead farm, and unseparated therefrom even by punctuation point, is explicit command to the trustee to convey the remainder of the trust, namely, the Haley farm, to Franklin "after he shall have become twenty one years of age." In the next, that of the residuum, "I give and bequeath all the rest and residue of my personal estate . . . . to my three sons . . . . to be paid to them severally in equal shares and proportions after the decease or intermarriage of my said wife as aforesaid." No one seriously can doubt the significance of the testator's words regarding the old home farm. Their persuasiveness is outstanding. Deep sentiment clusters about them. In substance, said he: "When I am gone, pay the income from my former homestead farm to my widow until she dies or marries. When she dies, or in case she marries, in either event, then convey the farm in life estates to Nathan and to Moses, only sons of my first marriage. And, at the same time, convey the reversion to the children of said Nathan and Moses, if any they have; the other farms eventually shall become the property of the children of my second marriage." True, his intention could have been worked out in more perfect detail. But frailties inhere in every work of man, and not infrequently it is easy, as one travels a pathway, which is reasonably fit as another blazed it, to suggest possible improvement therein. Nathan Palmer said, in effect, that the reversion of his original homestead farm should be conveyed to the children of his sons, Nathan and Moses, if any they had, living when his widow died or married. To hold that by his written speech he meant and intended that the particular reversion should be conveyed to one or the other of two classes of his grandchildren, as the same might have existence when the life tenancies were over, would import to his language a sense he never designed.

When the testator's widow married, the trustee should have conveyed the reversion to Fredonia F. Palmer, the child of Nathan Palmer, Jr. What ought to have been done is considered to have been done. *Bank* v. *Portland*, 82 Maine, 99-110; *Railway* v. *Pierce*, 88 Maine, 86-93; *Chalmers* v. *Littlefield*, 103 Maine, 271-281. The reversion then vested exclusively in her.

Bill sustained with single bill of costs.
Decree in accordance with this opinion.

STATE OF MAINE *vs.* HIRAM W. CHADWICK.

Knox. Opinion July 7, 1919.

R. S., Chap. 45, Sec. 35, interpreted.

By the revision of the statutes relating to Sea and Shore Fisheries in 1901, Chap. 284, Public Laws, a radical change was effected in the nature of the offense of buying, selling, exposing for sale or having in possession "short lobsters." Prior to that time, the penalty was imposed for buying, selling, giving away or exposing for sale or having in possession lobsters that should have been liberated alive and were not.

Under the present statute the basis of the offense of buying, selling, giving away or exposing for sale or having in possession is the fact that the lobsters are of less than lawful length, whatever the condition in which they may be found; nor does it matter what their length was when caught, if they were of less than lawful length when seized, whether dead or alive, cooked or uncooked.

In a complaint for buying, selling, giving away or exposing for sale, it, therefore, is not necessary under the present statute to allege that they were shorter than the prescribed length when caught or were alive, or, even, that they were not liberated alive.

In a complaint for catching or having in possession, however, it is still necessary to allege that they were not immediately liberated alive at the risk and cost of the party taking them,—in a charge of catching, because it is a necessary element of the offense; in a charge of having in possession, in order to negative the lawful possession between the time of catching and the liberation under the statute.

State v. *Brewer*, 102 Mo., 293, modified in accordance with the opinion.

Complaint and warrant under R. S., Chap. 45, Sec. 35. The case originated in the Municipal Court, Rockland, Knox County, and an appeal was entered to the Supreme Court where respondent filed demurrer with right to plead over in case demurrer was overruled. The presiding Justice overruled the demurrer, to which ruling respondent filed exceptions. Exceptions overruled.

Case stated in opinion.

Henry L. Withee, County Attorney, for the State.

Rodney I. Thompson, for respondent.

SITTING: CORNISH, C. J., SPEAR, HANSON, PHILBROOK, DUNN, WILSON, DEASY, JJ.

WILSON, J. A complaint under Sec. 35, Chap. 45, R. S., charging the respondent with having in possession one hundred and nine lobsters of less than lawful length, the language of the complaint is, "unlawfully did have in his possession one hundred and nine lobsters, each of said lobsters being then and there less than four and three-quarters inches in length measured in manner as follows: . . . and none of said lobsters were liberated alive at the risk and cost of the parties taking them or at the risk and cost of Hiram W. Chadwick."

It will be noted that the complaint does not set forth whether the lobsters when found in the possession of the respondent were alive or dead, or whether the measurement was taken "when caught," or while alive, or after they were dead.

The respondent has demurred on the ground that since the lobsters may have been dead and cooked, under the decisions of this court in *Thompson* v. *Smith*, 79 Maine, 160, and *State* v. *Brewer*, 102 Maine, 293, it is necessary to allege either that the lobsters were alive or that the measurements were taken when caught.

When *Thompson* v. *Smith* was decided it was no doubt a correct interpretation of the statute as it then stood. Numerous revisions and amendments have been made to this statute since the decision in 1887, the most radical one being made in 1901, Chap. 284, which, we think, indicated an intent on the part of the Legislature to change the entire effect of the statute so far as the grounds for imposing penalties are concerned.

Prior to 1901 the penalty was imposed for catching, buying, selling or exposing for sale or having in possession lobsters shorter than the prescribed length that were not liberated as required by law. It was the failure to liberate them alive that rendered them contraband and illegal to buy, sell or possess, and hence it could well be said that if there was a difference in measurement between a lobster alive and a lobster cooked, it was only those that were shorter than the required length when caught or alive that it was illegal to hold.

The statute as it has since been amended now declares it unlawful to buy, sell, give away, expose for sale or have in possession lobsters either dead or alive, cooked or uncooked, less than four and three-quarters inches in length measured according to the statute, and

imposes a penalty for each lobster "so bought, sold, given away, or exposed for sale or in possession," that is, for each lobster unlawfully bought, sold, etc., or in possession. The unlawfulness for buying, selling, exposing for sale, or having in possession does not under the present statute arise from the fact that they were not liberated alive, but entirely from the fact that they were of less than lawful length whether dead or alive, cooked or uncooked.

The statute still requires that any lobster less than the prescribed length when caught shall be immediately liberated alive by the party taking it and at his risk and cost. There appears to have been a changed attitude in the intent of the Legislature as to the manner by which it proposed to accomplish the purpose of protecting young lobsters from destruction. In the early statute, Chap. 138, Laws of 1883, and until the revision of the laws applying to Sea & Shore Fisheries in 1901, the method by which the Legislature proposed to secure this result was to require all young lobsters less than a prescribed length to be liberated alive, and impose a penalty for buying, selling, or having in possession any lobsters that were "not so liberated." The failure to liberate alive was the essence of the offense. If therefore they were of lawful length when alive, it mattered not what their condition was after being cooked. The purpose of the statute was secured by requiring their liberation, if of unlawful length when caught, and by making it unlawful to deal in them, whatever their condition might be, if they were not so liberated.

Under the present statute instead of making the failure to liberate the basis of the offense, it is now unlawful and an offense to have lobsters of less than lawful length in possession or to deal in them in any way, without regard to whether they should have been liberated or not, hence it now matters not what their measurement may have been when alive or when caught—if there is any change by cooking under the present method of measurement—except when the charge is for catching.

It will be noted that it is not now unlawful to catch "short lobsters", but the statute does enjoin upon every person catching them the immediate liberation of them alive, and imposes a penalty for every lobster "so caught", that is, caught and not immediately liberated.

We are therefore of the opinion that under the present statute in the case of a charge of buying, selling, giving away, or exposing for sale, it is sufficient to allege simply that the lobsters were of less than

the prescribed length measured according to the statute, without alleging they were not immediately liberated alive, or whether they were alive or dead. That they were not immediately liberated alive is not an essential element of the offense, and in any event follows by necessary intendment in case of a charge of buying, selling, or exposing for sale.

In the case of a charge of catching or having in possession, however, we think it is still necessary to set forth that they were not immediately liberated alive at the risk and cost of the party taking them. In the case of catching it is a necessary element of the offense. By the terms of the statute the penalty is imposed when they are "so caught," that is, caught and not liberated. In case of a charge of having in possession, it is also necessary to allege that they were not immediately liberated alive at the risk and cost of the party taking them, in order to negative the lawful possession that is incident to catching by the present methods prior to liberation in accordance with the statute. As the complaint in this case meets these requirements we must overrule the exception.

We have considered carefully the decision in *State* v. *Brewer*, supra, cited by the respondent, and while this case was decided since the change in the statute in 1901, the views therein expressed, following the doctrine laid down in *Thompson* v. *Smith*, supra, are not wholly in accord with what seems to us the clear intent of the Legislature under the present statute, and to that extent it must be regarded as modified.

Entry will be,

Exceptions overruled.

STATE OF MAINE *vs.* DAVID STEPHENS.

Penobscot. Opinion July 14, 1919.

Indictments. Bigamy. Rule as to Statutes of State having extra-territorial force. Rule as to courts having jurisdiction over offenses committed in other states or foreign countries. R. S., Chap. 126, Sec. 4, interpreted.

The courts of this State have no jurisdiction of offenses committed outside the boundaries of the State.

Sec. 4 of Chap. 126, R. S., simply enlarges the jurisdiction of the court by giving it jurisdiction of the offense of bigamy in the county where the respondent resides or is apprehended, as well as in the county where the offense was committed; and cannot be construed as extending the jurisdiction of the courts of this State to this offense when committed in other states or foreign countries.

Indictment for the crime of bigamy. The indictment was returned by the Grand Jury, County of Penobscot, State of Maine, alleging that the respondent was living in Bangor, Penobscot County, State of Maine, and that the crime was committed in McAdam, Province of New Brunswick. Respondent filed a general demurrer, which was overruled by presiding Justice; to which ruling respondent filed exceptions. Exceptions sustained.

Case stated in opinion.

A. L. Blanchard, for State.

Donald F. Snow, for defendant.

SITTING: CORNISH, C. J., SPEAR, HANSON, DUNN, WILSON, DEASY, JJ.

WILSON, J. This indictment charges the respondent with having committed the crime of bigamy in the Province of New Brunswick. The respondent filed a general demurrer which was overruled by the presiding Justice, to which ruling the respondent excepted. The respondent urges in support of his exceptions that the indictment does not set forth any crime committed within the jurisdiction of this State.

It is elementary law that the statutes of a state have no extra-territorial force, nor do its courts have any jurisdiction of offenses committed in other states or foreign countries. *State* v. *Cutshall*, 110 N. C., 538; *State* v. *Ray*, 151 N. C., 710; *Scroggins* v. *State*, 32 Ark., 205, 214; *Johnson Com.*, 86 Ken., 122; Bish. Stat. Crimes, Sec. 586; *State* v. *Stewart*, 194 Mo., 345.

The offense described in the indictment is alleged to have taken place in New Brunswick. No criminal acts are alleged to have taken place in Maine. It does not even allege cohabitation here with his bigamous spouse, which some states recognizing the lack of jurisdiction over the bigamous marriage entered into in another state, have made an offense by statute, *State* v. *Stewart*, supra, *Com.* v. *Bradley*, 2 Cush., 553; *Beggs* v. *State*, 55 Ala., 108, 110; and cases cited in 7 Corpus Juris 1163, note 83.

It is urged, however, and the indictment was apparently framed upon this theory, that since Sec. 4, Chap. 126, R. S., provides that the indictment for such an offense may be found and tried in the county where the offender resides or where he or she is apprehended, it matters not where the offense was committed. But this provision cannot be construed to give our courts jurisdiction of offenses committed beyond the boundaries of the State. *State* v. *Cutshall*, supra, *State* v. *Ray*, supra. It simply enlarges the jurisdiction of this court by giving it jurisdiction of this offense in any county where the offender may reside or be apprehended, as well as in the county where the offense was committed. *State* v. *Sweetser*, 53 Maine, 438. It is beyond the power of the Legislature to give jurisdiction to the courts of this State of offences entirely committed beyond its limits.

In *State* v. *Ray*, supra, the same provision, in substantially the same language as our statute, was construed to refer "only to the venue of the crime defined in the first clause." The offense there as in our statute, is the second marriage and not the after cohabitation. The respondent may be guilty of offenses against our statutes, but he has not committed the crime, of which he stands charged in this indictment, within the jurisdiction of the courts of this State.

The entry will be,

Exception sustained.

HARRISON R. WATERHOUSE *vs.* PAUL G. TILENIUS, et als.

Cumberland. Opinion July 14, 1919.

Action of debt on bond. Issues raised by plea of non est factum. Chancering the penal sum of a bond. Form of declaration in suit upon bond conditioned for the payment of money. Rule of practice relative to Law Court dismissing amendments filed contrary to agreement and understanding when leave to file same was granted.

When during the trial of a cause before the presiding Justice without a jury the plaintiff asks and obtains leave to amend the first count of his declaration, containing three counts, and by agreement the case proceeds on trial and the amendment is filled after a decision for plaintiff to which defendants have exceptions; and when at argument on the exceptions in the Law Court, it is found that by mistake the amendment as actually drawn changes the form of the action, contrary to the agreement and understanding when leave to file the amendment was granted, and defendants refuse to consent to the correction of the error, the amendment will be rejected by the Law Court and the declaration must stand as originally drawn.

A count upon the penal part alone of a bond conditioned for the payment of money is sufficient; it is not necessary to include any other part of the instrument.

Upon a plea of non est factum, which is joined, with a brief statement under the general issue, that he does not owe the plaintiff any sum of money demanded by plaintiff, which is not joined, nor is counter brief statement thereto filed, no issue, except the general issue which denies the execution of the bond, is presented.

Action of debt upon bond given to release an attachment. Defendant filed plea of non est factum, and also brief statement. Cause was heard before sitting Justice without jury, reserving rights of exception. At close of evidence on part of plaintiff, no evidence having been offered on part of defendant, motion was filed by defendant requesting the court to direct verdict for defendant. The court refused to grant said motion; to which ruling defendant filed exceptions. Judgment in accordance with opinion.

Case stated in opinon.

Willis B. Hall, for plaintiff.

William H. Gulliver, Dennis A. Meaher, and William B. Mahoney, for defendants.

SITTING: CORNISH, C. J., HANSON, PHILBROOK, DUNN, MORRILL, DEASY, JJ.

MORRILL, J. This is an action of debt upon a bond given to obtain the release of an attachment made upon a writ against the principal in the bond. The writ contains three counts; the first declaring upon the penal part of the bond alone, alleging an indebtedness in the penal sum; the second count alleges an indebtedness in the penal sum and purports to set out the condition of the bond; the third count purports to set out the bond verbatim.

The case was heard before the presiding Justice without a jury with right of exception reserved. The plaintiff proved the execution of the bond by the subscribing witness and offered the bond in evidence; it was admitted subject to objection and exception. The plaintiff then rested his case. The defendants offered no evidence and at the close of the case filed a written motion requesting that a verdict be directed for defendants, which was denied, and judgment rendered for plaintiff subject to defendants' exception.

In the course of the trial, the plaintiff asked and was granted permission to amend the first count of his writ. The amended count as printed begins thus: "In a plea of the case," etc. The use of the word "case", is manifestly an oversight, probably an error of the typist; but the defendants refuse to consent to the correction of the error.

This amendment affected all three counts, and the declaration was no longer in debt, although defendants' pleadings were unchanged.

The amendment was not presented to the presiding Justice; by agreement it was to be framed later, and the case proceeded as an action of debt upon defendants' pleadings as if the amendment had been presented and filed at the time. It is clear that this amendment is not drawn in accordance with the understanding with the presiding Justice when he granted permission to file the same; it must therefore be rejected and the declaration must stand as originally drawn.

The original first count in the writ is drafted according to approved precedents. Chitty on Pleading, Vol. 2, page 437. The defendants' plea is non est factum which puts in issue only the execution of the instrument. *Bank* v. *Bugbee*, 19 Maine, 29; *Waterman* v. *Dockray*, 56 Maine, 54; nor can it be shown under this issue that the bond

was not taken conformably to the requirements of a statute. 2 Greenleaf on Evidence, Sec. 292. The brief statement filed under the general issue is equivalent to a plea of nil debet, which as a plea of the general issue, is an inappropriate plea, *Miller* v. *Moses*, 56 Maine, 128, 140, and was not joined nor was counter brief statement filed. No issue, except the general issue which denies the execution of the bond, is presented. It was not necessary for the plaintiff in his declaration to count upon any other than the penal part of the instrument. *York* v. *Stewart et als.*, 103 Maine, 474.

Upon the evidence the presiding Justice was fully justified in finding that the bond was duly executed by defendants. The exceptions must be overruled. Judgment must be entered for the penal sum of the bond; but the penalty may be chancered and execution issued for the amount remaining due on the judgment in the suit in which the bond declared upon was given including costs, with costs of this suit. *Machiasport* v. *Small*, 77 Maine, 109, 111. The case will be remanded to nisi prius for determination of amount for which execution should issue.

Exceptions overruled. Judgment will be entered for the penal sum of the bond. Cause remanded to nisi prius to determine the amount for which execution should issue in accordance with opinion.

MOSES HOLDEN *vs.* BLIN W. PAGE.

Somerset. Opinion August 1, 1919.

Rule as to necessary character of possession of land where persons claim to hold same adversely. What are considered as wild lands. Rule where same lands are contiguous to improved and cultivated lands and commonly used therewith for fuel, fencing or pasturing. General rule as to adverse possession of cultivated and improved land extending to wood lots or wild lands, so called, used in connection with improved lands. General rule as to payment of taxes by occupant of lands being of some evidence that the occupant is claiming title to the lands upon which said taxes are paid. Rule where the knowledge of payment of taxes is brought home to the real owner. Necessity of proving actual knowledge on part of the real owner of the adverse claim of ownership, or possession. Presumption in such case. R. S., Chap. 110, Sec. 10, interpreted.

Trespass to try title to land known as the Holden Farm, situated in Dennistown Plantation, County of Somerset. The defendant has the record title. The plaintiff claims the property by adverse possession. A verdict was returned for the plaintiff. The case is brought up on motion and exceptions.

Motion:

The defendant in argument conceded the plaintiff's title to the cleared and cultivated land. Title to about forty acres of woodland is involved in the hearing before this court. The wood land is only in small part fenced. No color of title under recorded deeds is claimed. The plaintiff relies upon R. S., Chap. 110, Sec. 10, which provides in substance that title to woodland belonging to a farm and used therewith as a wood lot, though not enclosed by fences, or otherwise, may be acquired by adverse possession if the possession has been open, notorious and comporting with the ordinary management of a farm. It was contended that the land involved was and is wild land not within the contemplation of the statute and that the plaintiff was but an occasional trespasser upon it.

Held:

That when land is contiguous to improved and cultivated land and commonly used therewith for fuel, fencing, repairs or pasturing it no longer has the character of wild land;

That in an action involving a claim of possessory title to land the fact that taxes upon it have been assessed to the occupant is immaterial, payment of taxes by him is not proof of possession; but that such payment by an occupant who is not a tenant is evidence of an adverse claim of title;

That occasional trespasses will not ripen into title, but when a person in possession of land pays taxes upon it year after year, with the knowledge of the owner, such occupant cannot be properly classified as an occasional trespasser.

That the evidence in this case is sufficient to justify the verdict.

Exceptions:

The presiding Justice permitted the plaintiff to introduce evidence that Omar Clark, one of the defendant's predecessors in title, in exploring and surveying the plantation and computing its area, deducted from the acreage the Samuel Holden Farm. Clark was not then owner of the property, but was exploring with the view of purchasing it and with others he did later acquire it. The evidence was admissible. To make title by adverse possession it is not necessary to bring home to the owner actual knowledge of the possession. It is sufficient to prove acts of possession so open and notorious that the owners knowledge of them and of their adverse character may be presumed. But actual knowledge may be shown. Whenever it is competent to prove a fact presumptively it may be proved directly. The evidence excepted to tended to prove that Clark, before his purchase but while exploring the land in view of acquiring it, had actual knowledge of Holden's possession and of the adverse character of that possession. That knowledge may fairly be presumed to have continued until Clark became one of the owners.

Action of trespass quare clausum. Defendant filed plea of general issue; also brief statement setting forth an alleged ownership in the parcels of land described in plaintiff's writ. Verdict for plaintiff in the sum of $211.00. Defendant filed motion for new trial; also exceptions. Motion and exceptions overruled.

Case stated in opinion.

Walton & Walton, for plaintiff.

George W. Gower, for defendant.

SITTING: CORNISH, C. J., SPEAR, HANSON, DUNN, WILSON, DEASY, JJ.

DEASY, J. Trespass to try title to land in Dennistown Plantation, County of Somerset. The property involved is an approximately rectangular lot containing, including several acres of water, nearly one hundred acres, with a farm house and farm buildings thereon.

The defendant has the record title to the locus, derived under deeds dated 1882 from Abner and Philander Coburn, who are conceded to have been the owners of the property.

The plaintiff claims title by adverse possession. The case shows that the plaintiff's father, Samuel Holden, settled upon the lot in 1858, erected farm buildings and lived upon the place until his death in 1884, and that the plaintiff, who is sixty years of age, was born and spent his life there. In 1911 the plaintiff received a conveyance from the other heirs of Samuel Holden.

Mr. Buswell who made the plan used in this case, divided the lot into six parcels, irregular in shape and varying in size from one acre to thirty-five acres, the division being based upon the difference in the kind of land and character of use. The jury found by their answers to questions submitted by the court that the plaintiff had acquired title by possession to all these parcels. They also returned a general verdict for the plaintiff for the sum of two hundred and eleven dollars. The case comes to the Law Court on motion and exceptions.

MOTION:

In the argument before the Law Court it was conceded that the plaintiff had acquired title to fifty acres of field and pasture land, being Parcels 2 and 5 on Buswell's plan. The controversy, therefore, relates only to about forty acres of woodland. The woodland is only in small part fenced. No color of title under recorded deeds is relied on by the plaintiff. If he has gained title by adverse possession to the land now in dispute it must be by reason of R. S., Chap. 110, Sec. 10, which reads as follows:

"To constitute a disseizin, or such exclusive and adverse possession of lands as to bar or limit the right of the true owner thereof to recover them, such lands need not be surrounded with fences or rendered inaccessible by water; but it is sufficient, if the possession, occupation and improvement are open, notorious and comporting with the ordinary management of a farm; although that part of the same, which composes the woodland belonging to such farm and used therewith as a wood lot, is not so enclosed."

This statute does not dispense with any of the elements necessary to make possessory title. *Tilton* v. *Hunter*, 24 Maine, 33. While color of title is not essential and enclosure by fences not necessary, acts of possession must be shown so open, notorious and continuous

that the owner viewing the land may be presumed to know of the use and of its character and extent. Occasional trespasses will not ripen into title. *Adams* v. *Clapp*, 87 Maine, 316; *Smith* v. *Sawyer*, 108 Maine, 485.

Were the court passing originally upon the facts it might find against the plaintiff's contention but the verdict of the jury is not so clearly wrong as to require reversal. It appears that with negligible exceptions all the wood used on the farm for fuel, fencing and repairs during nearly half a century was cut on these wood lots. There was evidence of wood cutting from time to time on all parcels of land. Mr. Buswell testified that the land appeared like land that had been cut over.

The defendant contends that the use was interrupted. The defendants predecessor operated upon the land in 1884. The defendant did some lumbering there in 1910. Between 1858, when Samuel Holden settled upon the property, and 1910 there are two periods of more than twenty years during which such use as the Holdens made of the property was apparently uninterrupted.

The defendant claims that outside the field and pasture the property consisted of wild land and that the statute above quoted does not apply. But wild land has been defined as "land in a wilderness state, not used in connection with improved estates." *Stevens* v. *Owen*, 25 Maine, 100.

When land is contiguous to improved and cultivated land and commonly used therewith for fuel, fencing, repairs or pasturing, it no longer has the character of wild land. *Stevens* v. *Owen*, supra; *Chase* v. *Alley*, 82 Maine, 234.

Again the defendant urges that the plaintiff was but an occasional trespasser, or, at all events, that the defendant was justified in so regarding him. In this connection the evidence relating to taxation is significant.

In an action involving title the mere fact that taxes are assessed against a person in possession of land is utterly inconsequential. At most it shows the opinion of the assessors in reference to the title and their opinion is immaterial. *Smith* v. *Booth Brothers*, 112 Maine, 308.

Payment of taxes upon land is not evidence of possession. *Smith* v. *Booth Brothers*, supra.

But payment of a tax upon land is evidence of a claim of title. *Daly* v. *Children's Home*, 113 Maine, 528; *Carter* v. *Clark*, 92 Maine, 228. If such payment is known to and acquiesced in by the owner it becomes more significant.

Turning to the facts of this case it appears that in every year from 1885 to date the plaintiff has paid taxes in Dennistown Plantation upon one hundred acres, or more. The land was not described in the assessment books, but the defendant admits his knowledge that the plaintiff was paying taxes on the one hundred acres in dispute. See testimony of defendant as follows:

"Q—Now as a matter of fact, have you not known that Moses Holden was paying taxes on that so-called Holden farm, and that—you were not paying taxes on it?

A—No, not that I wasn't. I know he has been paying taxes, I assume he has been paying taxes on 100 acres.

Q—You knew that?

A—Yes, sir.

Q—Didn't you understand it was that particular farm that he was paying taxes on?

A—I suppose it would be round about somewhere there.

Q—Didn't you understand that it was that farm that he was paying taxes on?

A—Why, yes, sure.

Q—Sure?

A—Sure."

Paying taxes upon land year after year is inconsistent with the character of an occasional trespasser. Such payment by an occupant who is not a tenant is an assertion of title. It may transmute mere possession into a disseizin.

From the evidence and the defendant's admissions the jury were authorized to find that the plaintiff during more than twenty years claimed title to this woodland and without interruption used it as farmers ordinarily use their wood lots and that the defendant knew of and acquiesced in such use.

EXCEPTIONS:

The presiding Justice permitted the plaintiff to introduce evidence that Omar Clark, one of the defendant's predecessors in title, in exploring and surveying the plantation and computing its area

deducted from the acreage the Samuel Holden farm. Clark was not then owner of the property, but was exploring with the view of purchasing it and with others he did later acquire it. We think that the evidence was admissible.

To make title by adverse possession it is not *necessary* to bring home to the owner actual knowledge of the possession. *Green* v. *Horn*, 112 N. Y. S., 993; *Land Company* v. *Powers' Heirs*, (Ky.), 144 S. W., 2. It is sufficient to prove acts of possession so open and notorious that the owners knowledge of them and of their adverse character may be presumed. *Morse* v. *Williams*, 62 Maine, 446; *Roberts* v. *Richards*, 84 Maine, 10; *Carter* v. *Clark*, 92 Maine, 230; *Hooper* v. *Leavitt*, 109 Maine, 77. But actual knowledge may be shown. Wherever it is competent to prove a fact presumptively it may be proved directly. *Thompson* v. *Logan*, (Ala.), 51 So., 985; *McCaughn* v. *Young*, (Miss.), 37 So., 839; *Lasley* v. *Kniskern*, (Mich.), 115 N. W., 971.

The evidence excepted to tended to prove that Clark before his purchase but while exploring the land in view of acquiring it, had actual knowledge of Holden's possession and of the adverse character of that possession. That knowledge may fairly be presumed to have continued until Clark became one of the owners.

Motion and Exceptions overruled.

BENJAMIN L. BERMAN, Executor

vs.

FRED E. BEAUDRY AND FRANK CHESNEL.

Androscoggin. Opinion September 10, 1919.

Wills. Rule as to right of testator to dispose by Will of proceeds of insurance policies on his life. Rule as to proceeds from insurance policy being considered personal estate of testator.

Anaise L. Beaudry died in 1916, childless, testate and solvent. The complainant, executor of her will, has a sum of money collected from an insurance policy upon her life. To the defendant, Chesnel, her brother, the testatrix bequeathed the life insurance. For the defendant, Beaudry, her husband, she made no testamentary provision.

The brother and husband both claim the insurance. The former under the will, the latter under R. S., Chap. 80, Sec. 14.

Held that:

Except for the provision that three years premiums and interest shall be deducted, the right of a solvent testator to dispose by will of life insurance payable to himself is unqualified.

Sec. 21 of Chap. 80, R. S., relating to life insurance is not qualified by Section 14 of the same chapter, because proceeds of life insurance is not "personal estate of such testatrix" within the purview of the statute.

The insurance fund should be paid to Frank Chesnel, the legatee. But the executor should first deduct from the fund an amount equal to three years premiums with interest and administer the same as a part of the estate. This is required by the statute.

Failure to provide for this deduction was error. For this reason the exceptions must be sustained.

Bill in Equity asking for the construction of certain provisions of a will. To the ruling of the single Justice certain exceptions were filed.

Case stated in opinion.

Benjamin L. Berman, pro se, complainant, in his capacity as executor of Anaise L. Beaudry.

Edgar M. Briggs, for Fred E. Beaudry.
George S. McCarty, for Frank Chesnel.

SITTING: CORNISH, C. J., HANSON, PHILBROOK, DUNN, MORRILL, DEASY, JJ.

DEASY, J. Anaise L. Beaudry died in 1916, childless, testate and solvent. The complainant, executor of her will, has a sum of money collected from an insurance policy upon her life. To the defendant, Chesnel, her brother, the testatrix bequeathed the life insurance. For the defendant, Beaudry, her husband, she made no testamentary provision.

The brother and husband both claim the insurance, the former under the will, the latter under R. S., Chap. 80, Sec. 14.

The executor brought a bill in equity in the Probate Court for Androscoggin County, praying for a construction of the will and especially for a determination of the ownership of the insurance fund. The decree of the Judge of Probate was in favor of the husband. The brother appealed. The single Judge, sitting as the Court of Probate, reversed the decree. The husband, Beaudry, excepts to this ruling.

Except for the provision that three years premiums and interest shall be deducted, the right of a solvent testator to dispose by will of life insurance payable to himself is unqualified.

"It (money received for life insurance less three years premiums and interest) may be disposed of by will." R. S., Chap. 80, Sec. 21.

No part of Sec. 21, other than the sentence above quoted, applies in this case, except that the pronoun "it" necessarily looks back to the preceding sentence for its antecedent. All of the section preceding the above quoted sentence refers to intestate estates. The estate involved in this case is testate. All that follows refers to insolvent estates. Anaise Beaudry's estate is solvent.

But the defendant, Beaudry, contends that the provision of Section 21 "it may be disposed of by will" is qualified by Section 14 of the same chapter. Section 14, omitting parts here immaterial, without indicating the omitted parts by blanks, or otherwise, is as follows:

"When no provision is made for her widower in the will of a testatrix such widower shall have and receive the same distributive share of the personal estate of such testatrix as is provided by law in intes-

tate estates. Provided such widower shall, within six months after the probate of such will, file in the Registry of Probate written notice that he claims such share of the personal estate of such testatrix."

No provision was made in the will of Anaise L. Beaudry for the defendant, Fred E. Beaudry, her husband. He seasonably filed the notice of claim provided for by Section 14. If money received from an insurance policy on the life of the testatrix were "personal estate of such testatrix" within the meaning of the statute, then the defendant, Beaudry, would be, notwithstanding the will, entitled to his distributive share of it under R. S., Chap. 80, Sec. 20. But money so received is not "personal estate of the testatrix" within the purview of the act. This is so determined by Justice Strout's opinion in *Golder* v. *Chandler*, 87 Maine, 69. Judge Strout's definition of the phrase "personal estate of such testatrix" is so completely adequate and the reasoning of the opinion is so convincing that no other authority need be cited. Neither is it necessary to expand this opinion by any extended quotation from it.

The other authorities cited are not in point. *Hathaway* v. *Sherman*, 61 Maine, 466, relates to insolvent estates. *Blouin* v. *Phaneuf*, 81 Maine, 180, holds that insurance can be by will diverted from a widow and children only if such intention be "well declared" in the will. *Hamilton* v. *McQuillan*, 82 Maine, 204, decides that a solvent testator may bequeath insurance money to a person other than his widow. The effect of Section 14 is not involved in the case. *Fogg Appellant*, 105 Maine, 480, does not refer to distribution of insurance money.

When, by Chap. 74 of the Public Laws of 1905, the Legislature amended Chap. 80, Sec. 21 (then Chap. 77, Sec. 19) it did not make a corresponding change in R. S., Chap. 68, Sec. 50. Whatever the reason for or effect of this omission may have been it does not affect our conclusion in this case.

The insurance fund should be paid to Frank Chesnel, the legatee. But from it should be first deducted three years premiums with interest. This is required by Section 21. The clause requiring this deduction qualifies not the sentence merely but the section in which it is contained. The antecedent of the pronoun "it" beginning the second sentence of Section 21 is "money received for insurance (after) deducting etc." Moreover, the Legislature cannot be presumed to

have intended to discriminate against dependents and in favor of legatees by providing for a deduction from the former and not from the latter.

The single Justice decreed that the entire insurance fund should be paid to the legatee without deduction. We hold that the executor should first deduct from the fund an amount equal to three years premiums with interest and administer the same as a part of the estate. The balance should be paid to Frank Chesnel, the legatee.

The Justice was in error in not providing for the deduction. For this reason the exceptions must be sustained.

Exceptions sustained. Decree to be modified in accordance with this opinion.

VERA PAYNE,
Petitioner for Habeas Corpus,

vs.

KING F. GRAHAM.

Cumberland. Opinion September 10, 1919.

General rule as to the right of the court to pass upon the question as to whether a legislative act is an emergency act. Rule as to setting forth in the preamble of a legislative act the necessary facts constituting the act an emergency measure.

In May 1919 Vera Payne was indicted in the Superior Court, Cumberland County, for violation of Chap. 112, of the Public Laws of 1919, which act, approved March 27, 1919, makes more stringent the provisions of statute for the prevention and punishment of sexual crimes.

She presents her petition for writ of habeas corpus upon the ground that at the time of her indictment and conviction Chapter 112 had not become effective as law. The preamble and concluding paragraph of Chapter 112 are as follows:

Preamble. "Whereas, owing to the necessity of preserving the public health in general, the enactment of more stringent laws prohibiting prostitution, lewd-

ness and assignation and providing punishment therefor, is an emergency measure immediately necessary for the preservation of the public peace, health or safety."

Section 7. "In view of the emergency cited in the preamble this act shall take effect when approved."

But the petitioner says that Chapter 112, notwithstanding this legislative pronouncement, is not an emergency act and did not take effect until ninety days after the recess of the legislature which period expired after her conviction. The amended Maine Constitution provides that acts of the Legislature shall become effective ninety days after the legislative recess.

Emergency acts, however, may be made to take effect upon approval. The Constitution further provides that the emergency with the facts constituting the emergency shall be expressed in the preamble of the act and also that an emergency bill shall include only such measures as are immediately necessary for the preservation of the public peace, health or safety.

Held that:

Constitutional limitations are subjects of judicial interpretation and effectuation. Questions of public policy such as the justice expediency, necessity or urgency (immediate necessity) of laws are for final legislative determination. But the control by the Legislature of even these questions may be qualified by express constitutional limitations.

The provision of the Maine Constitution requiring the emergency, with the facts constituting it, to be expressed in the preamble of the act creates a limitation upon legislative power and without conforming to it no act can be made an emergency act and as such be given immediate effect. The preamble of Chapter 112 contains an assumption that there is "a necessity of preserving the public health in general," and the conclusion that "the enactment of more stringent laws is an emergency measure." It contains no statement of facts as required by the Constitution and no facts that are even suggestive of an emergency. In argument, indeed, facts are presented which give the act an emergent character. In argument it is said that a great World War had been raging; that while an armistice had been declared large bodies of troops were still assembled; that for preventing the spread among these troops of sexual disorders, destructive of military efficiency, existing laws were inadequate and that the Federal authorities had requested the co-operation of the State in meeting these conditions. But these facts are not, as the Constitution requires, expressed in the preamble. Chapter 112 is, therefore, not an emergency act as defined by the Constitution.

Whether a legislative finding that an act is immediately necessary for the preservation of the public peace, health or safety is open to judicial review is a question concerning which courts of different states are at variance. Mindful of the long established rule that questions of constitutional law should not be passed upon unless strictly necessary to a decision of the case under consideration this Court defers expressing a final opinion upon this question, inasmuch as the point first above determined is decisive of the case.

Writ of Habeas Corpus. From the ruling of the single Justice denying the writ, petitioner filed exceptions. Exceptions sustained.

Case stated in opinion.

John J. Devine, and Samuel L. Bates, for petitioner.

Carroll L. Beedy, and Clement F. Robinson, for respondent.

SITTING: CORNISH, C. J., HANSON, PHILBROOK, DUNN, MORRILL, DEASY, JJ.

DEASY, J. In May 1919, Vera Payne was indicted and convicted in the Superior Court, Cumberland County, for violation of Chap. 112, of the Public Laws of 1919, which act, approved March 27, 1919, makes more stringent the provisions of statute for the prevention and punishment of sexual crimes.

She presents her petition for writ of habeas corpus upon the ground that at the time of her indictment and conviction Chapter 112 had not become effective as law.

Section 7 of the act is as follows:

"In view of the emergency cited in the preamble this act shall take effect when approved."

But the petitioner says that Chapter 112, notwithstanding this legislative pronouncement, is not an emergency act and that it did not take effect until ninety days after the recess of the Legislature, which period expired after her conviction.

The amended Constitution of Maine, Article IV, Part Third. Section 16, is as follows:

"No act or joint resolution of the legislature, except such orders or resolutions as pertain solely to facilitating the performance of the business of the legislature, of either branch, or of any committee or officer thereof, or appropriate money therefor or for the payment of salaries fixed by law, shall take effect until ninety days after the recess of the legislature passing it, unless in case of emergency, (which with the facts constituting the emergency shall be expressed in the preamble of the act), the legislature shall, by a vote of two-thirds of all the members elected to each house, otherwise direct. An emergency bill shall include only such measures as are immediately necessary for the preservation of the public peace, health or safety; and shall not include (1) an infringement of the right of home rule for municipalities, (2) a franchise or a license to a corporation or an individual to

extend longer than one year, or (3) provision for the sale or purchase or renting for more than five years of real estate."

The petitioner contends that the act in question is not immediately necessary for the preservation of the public peace, health or safety and that the court should so declare.

But the State maintains that the question presented is one for final legislative determination.

The leading case touching this matter is *Kadderly* v. *The City of Portland*, 44 Oregon, 120, 74 Pac., 721. The opinion in this case sustains the State's contention. See also, to same effect: *Hanson* v. *Hodges*, 109 Ark., 479, 160 S. W., 392; *Oklahoma City* v. *Shields*, 22 Oklahoma, 265, 100 Pac., 559; In re Menefee (Or.), 97 Pac., 1014; Re Senate Resolutions, 54 Col., 269, 130 Pac., 336; *Bennett Trust Co.* v. *Sengstacken*, (Or.), 113 Pac., 863.

But in the case of *State* v. *Meath*, 84 Wash., 302, 147 Pac., 11, the doctrine of the Oregon Court is by a majority opinion denied and its conclusions rejected. Other cases also hold that the question is one for court review: *State* v. *Whisman*. (S. D.), 154 N. W., 711; *Miami County* v. *City of Dayton*, (Ohio), 110 N. E., 728; *Attorney General* v. *Lindsay*, 178 Mich., 542, 145 N. W., 98.

Obviously the test is the extent to which legislative power is limited by the Constitution. Constitutional limitations are subjects of judicial interpretation and effectuation. Questions of public policy, such as the justice, expediency, necessity or urgency (immediate necessity) of laws are for final legislative determination. But the control by the Legislature of even these questions may be qualified by express constitutional limitation.

The only Maine case touching the subject is *LeMaire* v. *Crockett*, 116 Maine, 267. This case is not directly in point, because it involves one of the express limitations of the Constitution. Though it may deem an act which is an "infringement of the right of home rule for municipalities" to be immediately necessary, the Legislature is forbidden by the positive mandate of the Constitution to give it immediate effect. Whether a given act is such an infringement is a judicial question. The case of *LeMaire* v. *Crockett* does not reach the question concerning which courts differ so radically, i. e., whether the words "an emergency bill shall include only such measures as are immediately necessary for the preservation of the public peace, health

or safety", or other similar language, creates a limitation upon legislative power which the courts have jurisdiction to interpret and give effect to.

We are mindful of the long established rule that questions of constitutional law should not be passed upon unless strictly necessary to a decision of the cause under consideration. We, therefore, defer expressing a final opinion upon the question concerning which, as appears above, courts are at variance, because, for another reason not touched upon in any of the above cited cases, we hold that Chapter 112 did not take immediate effect as an emergency act.

Of the states that have provided for giving emergency acts immediate effect, generally in connection with the initiative and referendum, the constitutions of nearly all provide in effect that emergency legislation shall include only such measures as are immediately necessary for the preservation of the public health, peace or safety. But our Constitution goes further and requires that the emergency "with the facts constituting the emergency shall be expressed in the preamble of the act." The only state constitutions containing similar language are those of California, Article IV, Section 1; Ohio, Article II, Section 1d; North Dakota, Article II, Section 25; Mississippi, Amendment of 1914; Massachusetts, Amendment of 1918. In neither of these is the language precisely like that of the Maine Constitution, but all require that the facts constituting, or reasons for, an emergency be expressed or set forth in the preamble or some part of the act. Our investigation does not disclose that in either of these states such constitutional provisions have been judicially interpreted. The case of *City of Roanoke* v. *Eliot*, (Va.), 96 S. E., 821 construes that clause of the Virginia Constitution reading: "The emergency shall be expressed in the body of the bill." The Virginia Constitution does not require the facts or reasons to be expressed and it is held that in the absence of an explicit constitutional mandate the facts need not be set forth.

We think it clear that the above quoted language of the Maine Constitution creates a limitation upon legislative power and that without conforming to it no act can be made an emergency act and as such be given immediate effect.

The preamble of Section 112, under consideration, is as follows:

"Whereas, owing to the necessity of preserving the public health in general, the enactment of more stringent laws prohibiting prostitu-

tion, lewdness and assignation and providing punishment therefor, is an emergency measure immediately necessary for the preservation of the public peace, health or safety."

This preamble contains an assumption that there is "a necessity of preserving the public health in general" and a conclusion that "the enactment of more stringent laws . . . . . is an emergency measure." It contains no statement of facts as required by the Constitution and no facts that are even suggestive of an emergency.

In argument, indeed, facts are presented which give the act an emergent character. In argument it is said that a great World War had been raging; that while an armistice had been declared large bodies of troops were still assembled; that for preventing the spread among these troops of sexual disorders, destructive of military efficiency, existing laws were inadquate and that the Federal authorities had requested the co-operation of the State in meeting these conditions.

But these facts are not, as the Constitution requires, expressed in the preamble. The facts constituting the emergency are expressed in the briefs of counsel instead of in the preamble of the act. Chapter 112 is, therefore, not an emergency act as defined by the Constitution. It did not take effect until after the petitioner's indictment and conviction. Her detention is, therefore, not warranted and the entry must be,

Exceptions sustained.
Writ of Habeas Corpus to Issue.

STATE OF MAINE *vs.* EMILE PELLETIER.

Androscoggin. Opinion October 7, 1919.

R. S., Chap. 52, Sec. 2 Interpreted. General scope and meaning of maintaining a bank. Distinction between bank and loan and building association.

Two indictments against the same defendant are included in one report to this court. The State's attorney concedes that one of these indictments is not sustained by evidence. The other, brought under R. S., Chap. 52, Sec. 2, charges the defendant with doing a banking business without legal authority.

The acts of the defendant alleged to constitute illegal banking were done by him as agent for The Mutual Construction Company, a New Hampshire corporation.

Held:

That the business carried on by The Mutual Construction Company and by the defendant as its agent, as shown by the Articles of Association and By-Laws of the corporation and by the agreements or certificates which the defendant negotiated and sold, is not banking as the term is ordinarily used and understood and is not banking within the definition of the term as set forth in R. S., Chap. 52, Sec. 2.

The question as to whether the business of The Mutual Construction Company carried on in this State may not be a violation of Chap. 52, Sec. 120, of R. S., forbidding the conducting without official sanction of the business of a loan and building association or "any business similar thereto" is not raised in this case and is not passed upon by the court. But the evidence does not show that the defendant or his principal was engaged in a banking business.

Indictments for alleged violation of the banking laws of the State of Maine. Questions of law having arisen as to the sufficiency of said indictments, by agreement, the cases were reported to the Law Court for final determination. Judgment of court that the entry of nolle prosequi be entered in both cases.

Case stated in opinion.

Albert E. Verrill, County Attorney, for State.

McGillicuddy & Morey, for respondent.

SITTING: CORNISH, C. J., HANSON, PHILBROOK, DUNN, MORRILL. DEASY, JJ.

DEASY, J. Two indictments against the same defendant are together reported to this court. The attorney for the State concedes that one of the indictments, to wit, the first set forth in the printed case, is not sustained by evidence.

The other indictment is brought under R. S., Chap. 52, Sec. 2. It is charged that the respondent not being legally authorized did, at a certain time and place, "do a banking business."

The acts of the respondent which are claimed to be in violation of the statute were done by him as agent for The Mutual Construction Company of Manchester, N. H.

To prove the allegations of the indictment the Articles of Association and By-Laws of The Mutual Construction Company are introduced, and also the agreements or certificates that the respondent, Pelletier, in behalf of that corporation, negotiated and sold.

The business of the corporation in which the respondent participated as agent in Maine and for which, if in contravention of law, he is responsible, may be (omitting immaterial details) briefly summarized as follows:

Its main ostensible purpose is "the improvement of real estate." We may assume that it recommends itself to prospective members as a builder of homes. Apparently any person may become a member by making a preliminary payment and agreeing to pay certain monthly installments toward a "co-operative fund" or "building fund" and to make further monthly payments equivalent to fifteen per cent of the former toward the Company's "administrative fund." Each member receives a serial number, depending on the date of his membership. When payments by all members toward the co-operative fund reach $1,000, member number one has the privilege of having his real estate improved to that amount, provided that such member agrees to keep his monthly payments up until they amount to $1,000, toward the co-operative fund and $150 toward the administrative fund and "shall furnish such security for the payment of the balance of said sum of $1150., then remaining unpaid as the Company may deem sufficient." Thereafter other members as their numbers are reached have the same privilege.

A member failing for two months to make his payments forfeits his membership and his number but may be reinstated in his membership, taking the number open at the time of reinstatment. The consequence of failure to make payment for three months is loss of membership with no right of reinstatement but with right to recover payments made toward the co-operative fund without interest. Members whose payments have been kept up and whose real estate has not been improved by the corporation have the right, upon three months notice, to withdraw all sums paid toward the co-operative fund with interest at 4%.

It is obvious that the business of The Mutual Construction Company is very different from banking:—

Banks are financial institutions. It is a building company.

Depositors in banks become creditors of the bank and in a certain sense cestuis que trust, but they are not members of the bank. A person making a payment to The Mutual Construction Company becomes a member.

Banks do business with the public generally. The Construction Company transacts business only with its members.

Banks loan money. The Construction Company improves real estate and takes security for so doing, but does not loan money.

The administrative expenses of banks are paid from earnings. The administrative expenses of the Construction Company are paid by membership dues.

But the State's attorney says that the legislature has, in Sec. 2, of Chap. 52, defined the term "banking" for the purposes of this act and that whether or not the business of the corporation is banking as the term is ordinarily understood and used, it is banking within the purview of the legislative definition. Section 2 is as follows:

"No person, copartnership, association, or corporation shall do a banking business unless duly authorized under the laws of this state or the United States, except as provided by the following section. The soliciting, receiving, or accepting of money or its equivalent on deposit as a regular business by any person, copartnership, association, or corporation shall be deemed to be doing a banking business, whether such deposit is made subject to check or is evidenced by a certificate of deposit, a pass-book, a note, a receipt, or other writing; provided that nothing herein shall apply to or include money left with an agent, pending investment in real estate or securities for or on account of his principal."

We need not say that (subject to constitutional limitations) this court is bound by legislative definitions. The court gives effect to statutes according to what it finds to be the legislative intent. If the language of the statute is perfectly clear it is not for the judicial department to say that the Legislature did not intend to use the language. But when the words used are susceptible of two or more interpretations it is for the court to determine which meaning conforms to the legislative intention.

Did the Legislature, in using the words "money or its equivalent on deposit," mean to include monthly installments paid by members of a construction company conducting a business like that above outlined? This question must be answered in the negative. The defendant, acting as agent for The Mutual Construction Company, received money, but did not receive it as a deposit within the meaning of the act.

We are confirmed in this opinion by Sec. 120 of Chap. 52. The statute forbids banking without proper authority. It also forbids conducting without official sanction the business of a loan and building association, or "any business similar thereto." The business conducted by The Mutual Construction Company is radically different from banking but in important respects resembles the business of a loan and building association. If any Maine statute has been violated by the respondent it is Sec. 120 of Chap. 52 relating to loan and building associations and not Section 2 relating to banks.

It is said that in the case of corporations conducting business-like that of The Mutual Construction Company there is at least as great need of official examination and supervision as in the case of banks, loan and building associations and insurance companies. In this view we concur. But we are convinced that the evidence does not prove the offence charged which is a violation of Sec. 2 of Chap. 52.

In accordance with the terms of report,

Nolle prosequi to be entered in both cases.

FRIEDA L. ELMS *vs.* REBECCA RIGGS CRANE.

Knox. Opinion October 7, 1919.

Libel. General rule to be applied in considering whether defamatory words are actionable. Rule as to liability for repetition of slanderous words. When slanderous words may be privileged. Degrees of malice in actions of slander and libel. Damages. Rule of pleading where special damages are claimed. When punitive damages may be assessed.

Action to recover damages for a libel contained in letters written by the defendant to one Sarah L. Yeager. Not in terms but by necessary implication the letters charged the plaintiff with larceny.

The defendant contends that the letters were privileged in that they were written for the purpose of aiding in the investigation and punishment of crime.

Held:

That to be thus privileged an accusation of crime must be made (1) in good faith and without actual malice, (2) upon reasonable or probable cause after a reasonably careful inquiry, and (3) for the public purpose of detecting and bringing a criminal to punishment.

That the defense of privilege is not sustained.

That the defendant is responsible for such repetition of the libel and such publicity as are fairly within the contemplation of the original libel and are the natural consequences of it.

That special damages can be recovered only if alleged and proved and punitive damages only if actual malice is shown.

That there is and can be no fixed rule for determining even actual damages in this class of cases. The plaintiff is entitled to recover for her injuries caused by the libel, including damages up to the present time and for the future. She is entitled to damages sufficient to compensate her for her humiliation and for such injury to her feelings and to her reputation as have been proved or may reasonably be presumed. She is not confined to such damages as might have resulted from a communication to Mrs. Yeager alone, never communicated by her to any other. The plaintiff is not entitled to damages for the

publicity which this trial has caused. But such repetition and such publicity as are the natural consequences of the original publication may be taken into account.

Action on the case for libel. Defendant filed plea of general issue, and also brief statement claiming that certain parts of the alleged libel were privileged. At the close of the evidence by agreement of parties, the case was reported to the Law Court to determine all questions of law and fact and render judgment in accordance therewith. Judgment for plaintiff in the sum of seven hundred and fifty dollars.

Case stated in opinion.

Charles T. Smalley, for plaintiff.

A. S. Littlefield, for defendant.

SITTING: CORNISH, C. J., HANSON, PHILBROOK, DUNN, MORRILL, DEASY, JJ.

DEASY, J. On report. Action of libel. The circumstances involved occurred at Islesboro, where in the summer and autumn of 1917 the plaintiff and the deponent, Sarah L. Yeager, were boarding with the witness, Laura E. Hatch, and the defendant was occupying a summer cottage owned by her mother.

The plaintiff, who is by occupation an artist's model, posed during the summer for Charles Dana Gibson. In her spare time she was employed by the defendant who is an amateur sculptress In September, Mr. Gibson left Islesboro and the plaintiff, for about two weeks, posed exclusively for the defendant.

On Saturday, September 22nd, the plaintiff's employment by the defendant terminated. A little later on the same day the defendant discovered that a beaver coat owned by her was missing. She suspected that the plaintiff had taken it and knowing Mrs. Yeager, and that she lived at Mrs. Hatch's house, where the plaintiff was boarding, wrote the following letter:

"DEAR MRS. YEAGER:

We cannot find that long soft beaver coat you have so often seen me come in in. I am very anxious not to make a fuss that would hurt Miss Elms in any way but we have also missed a pair of Mr. Crane's

gold rimmed goggles and a small electric lamp. Could you get her away quietly and make a search without her knowing it? She is the only one who has been where these things were. I implore you to keep it a dead secret. I am hurrying as I am afraid she goes to Camden tonight or tomorrow.

Hastily,

R. R. CRANE."

Mrs. Yeager informed Mrs. Hatch and together they searched the plaintiff's room but did not find the coat. The following (Sunday) morning, after an interview with the plaintiff, the defendant again wrote Mrs. Yeager, as follows:

"DEAR MRS. YEAGER:

I have told Miss Elms to produce the coat and I will forget the money. She confessed she had lied to me about the board. She tells me she has only $14 left and Mrs. Hatch better see to it that she is paid before she leaves on the 2:40 today, which is when I told her to at first, but have just written her that if she can't produce the coat today to wait over till tomorrow and think it over. Please get Mrs. Hatch to let me know when she does go. Marsh has missed a razor since her visit today.

So sorry to bother you,

Sincerely yours,

REBECCA R. CRANE."

Sometime after both parties left Islesboro the coat was found in some shrubbery and returned to Mrs. Crane. This action of libel is brought against the defendant for the writing and publishing of the letters above quoted.

ARE LETTERS LIBELOUS.

"If the defamatory words taken in their natural and ordinary signification fairly import a criminal charge it is sufficient to render them actionable." *Thompson* v. *Sun. Pub. Co.*, 91 Maine, 207; *Davis* v. *Starrett*, 97 Maine, 575.

It is clear and is not disputed by the defendant's counsel that the letters above quoted, construing their language according to its natural and ordinary meaning fairly import a charge of larceny.

PRIVILEGE:

The defendant claims that her communications were privileged in that they were written for the purpose of aiding in the investigation and punishment of crime.

"Upon grounds of public policy communications which would otherwise be slanderous are protected as privileged if they are made in good faith in the prosecution of an inquiry regarding a crime which has been committed and for the purpose of detecting and bringing to punishment the criminal." *Eames* v. *Whittaker*, 123 Mass., 344. See also to same effect: *Chapman* v. *Battle*, 124 Ga., 574, 52, S. E., 812; *Flanagan* v. *McLane*, 87 Conn., 220, 87 Atl., 727; *Beshiers* v. *Allen*, (Okl.), 148 Pac., 141.

But to be on this ground privileged any accusation of crime in pursuance of such inquiry must be made (1) in good faith and without actual malice, (*Eames* v. *Whittaker*, supra; *McNally* v. *Burleigh*, 91 Maine, 22; *Hollenbeck* v. *Ristine*, 105 Iowa, 488, 75 N. W., 355), (2) upon reasonable or probable cause after a reasonably careful inquiry (*McNally* v. *Burleigh*, 91 Maine, 23), and (3) for the public purpose of detecting and bringing a criminal to punishment. *Eames* v. *Whittaker*, supra; *Bigner* v. *Hodges*, 82 Miss., 215, 33 So., 980; *Fahey* v. *Shafer*, 98 Wash., 517, 167 Pac., 1118.

1. Malice in its popular sense of rancor, personal animosity or ill will, is not shown in this case. But the courts construe the word more broadly. A charge of crime is malicious, and, therefore, not privileged if made "wantonly and recklessly . . . . out of an entire disregard to the rights of the person" accused. *Robinson* v. *Van Auken*, 190 Mass., 166.

In this sense the conduct of the defendant may be fairly characterized as malicious.

2. The case of *McNally* v. *Burleigh*, cited above, is, of course, not parallel to the pending case. It involved the publication of a libel in a newspaper. Such a publication manifestly requires for its justification a better foundation and a fuller inquiry than a publication by private letter. But a charge of crime based upon groundless suspicion can never be privileged.

In this case the only reason for suspicion was the by no means exclusive opportunity which the plaintiff had to take the coat. The admitted fact that Miss Elms deceived the defendant in respect to the board does not affect the situation. The accusation of larceny had been made before the defendant discovered the deception.

3. The defendant made the accusation not to an officer charged with the duty of enforcing the law, but to a private person having no duty and no responsibility in the premises. It is apparent that hers was not the public motive of vindicating the law and protecting society by punishing the criminal, but rather the purely private motive of recovering her lost garment. No other ground of privilege is claimed.

The defense of privilege is not sustained by the evidence.

DAMAGES:

Where, as in the case at bar, the language used is libelous per se it is legally malicious and such damages as naturally, proximately and necessarily result from the publication are presumed. *Newbit* v. *Statuck*, 35 Maine, 318; *True* v. *Plumley*, 36 Maine, 478.

"The repetition of the slander by those to whom it was uttered and after that by others may be regarded as fairly within the contemplation of the original slander and a consequence for which the defendant may be held responsible." *Davis* v. *Starrett*, 97 Maine, 576.

There are authorities opposed to this view. But we adhere to the opinion of Judge Savage in *Davis* v. *Starrett*. We hold that the defendant is responsible for such repetitions of the libel and such publicity as are fairly within the contemplation of the original publication and are the natural consequences of it. 18 A. & E. Ency., 2 Ed. 1018. 25 Cyc. 506 and cases cited.

Such general damages are not necessarily nominal. Substantial damages may be recovered without proof either of special damages or actual malice. *Davis* v. *Starrett*, supra. Actual malice, or malice in fact may be shown for the purpose of enhancing damages. *Pullen* v. *Glidden*, 68 Maine, 564; *Jellison* v. *Goodwin*, 43 Maine, 288.

Special damages may be recovered but only if alleged and proved. *Davis* v. *Starrett*, supra.

The jury or the court in a case reported may assess punitive damages, but not unless actual malice is proved. 18 Am. & Eng., Ency., 2 Ed. 1093, 25 Cyc. 536 and cases cited.

In the pending case the language used is libelous per se. It is legally malicious. The defendant is liable for the natural, proximate and necessary consequences of the libel. Mrs. Crane was a woman of high social standing whose accusation would carry greater weight and naturally cause greater damage than would a similar accusation by a person in humbler circumstances. The charge was in a legal sense malicious, though not malignant nor based upon personal ill will. On the other hand, it does not appear that the plaintiff actually lost employment or in other respects suffered special damage. There is and can be no fixed rule for determining even actual damages in this class of cases. The plaintiff is entitled to recover for her injuries caused by the libel, including damages up to the present time and for the future. She is entitled to damages sufficient to compensate her for her humiliation and for such injury to her feelings and to her reputation as have been proved or may reasonably be presumed. She is not confined to such damages as might have resulted from a communication to Mrs. Yeager alone, never communicated by her to any other. The plaintiff is not entitled to damages for the publicity which this trial has caused. But such repetition and such publicity as are the natural consequences of the original publication may be taken into account.

Upon considering the whole case we think that the plaintiff's damages should properly be assessed at $750.

Judgment for plaintiff for $750.

EDDIE DYER *vs.* FRED MUDGETT.

Penobscot. Opinion October 7, 1919.

General rule as to the right of permitting horses or other domestic animals to be at large in the limits of the public highway without a keeper. Rule where there is a town law or ordinance prohibiting same. Burden of showing that owner of domestic animals permitted same to be at large on public highway.

It is no longer unlawful by statute to allow domestic animals to graze in the public highway; and at common law an owner may lawfully permit his domestic animals to graze within the limits of the highway in front of his own premises.

Such animals being lawfully in the highway within these limits, for the above purposes, unless of vicious disposition of which the owner had knowledge, the owner will not be liable for damage resulting therefrom which he could not reasonably have anticipated. This must, of course, be true where animals are within the highway without the owner's knowledge or negligence, of which evidence in the case is lacking.

Action on the case to recover damages for the injury to plaintiff's automobile caused by the alleged negligence of defendant in permitting his horse to be at large without a keeper on the public highway. The defendant filed plea of general issue. At close of plaintiff's evidence, upon motion of defendant, a non suit was granted to which ruling plaintiff filed exceptions. Exceptions overruled.

Case stated in opinion.

W. B. Pierce and George H. Morse, for plaintiff.

Harry R. Coolidge, for defendant.

SITTING: CORNISH, C. J., SPEAR, HANSON, DUNN, DEASY, WILSON, JJ.

WILSON, J. This is an action to recover damages resulting to the automobile of the plaintiff from coming into contact with the defendant's horse, which at the time of the accident was at large within the limits of the highway in front of the defendant's premises. The plaintiff in his automobile was driving along the highway just after dark and as he was passing the defendant's premises the defendant's horse

suddenly appeared in front of his car, and by reason of the collision the damages complained of resulted.

At the close of the plaintiff's testimony the defendant moved for a non suit which the presiding Justice granted, to which ruling the plaintiff excepted.

It is no longer unlawful by statute to allow a horse or other domestic animal to be at large in the public highway without a keeper. *Briggs* v. *Ice Co.*, 112 Maine, 344, 347. If injury and damage result therefrom the rights of the parties are determined by the common law, unless made unlawful by a town by-law or city ordinance. At common law while one was obliged to restrain his own animals and prevent them from trespassing on his neighbors' lands, he might allow his domestic animals, such as horses, cattle and sheep, to graze within the limits of the highway, but only in front of his own premises. The abutting owner owned the soil to the center of the way, and subject to the right of public travel had the right to cultivate the soil and to the herbage growing thereon. *Burr* v. *Stevens*, 90 Maine, 500, 503; *Robinson* v. *Railroad Co.*, 79 Mich., 323, 327; *Holden* v. *Shattuck*, 34 Vt., 336, 342; *Heath's Garage Lim.* v. *Hodges*, 2 Law Rep., K. B., (1916) 370. Such animals being lawfully in the highway within these limits, unless of vicious disposition of which the owner has knowledge, do not render him liable for damages resulting that could not reasonably be anticipated. *Cox* v. *Burbridge*, 106 Eng. Com., Law Rep., 430; *Heath's Garage* v. *Hodges*, supra; *Holden* v. *Shattuck*, supra; *Dix* v. *Somerset Coal Co.*, 217 Mass., 146. This must, of course, be true when the animal was there without the owner's knowledge, and through no negligence on his part.

As to whether allowing domestic animals such as horses, cattle or sheep to run at large in the highway at night, even on that part fronting on the owner's premises, is an act of negligence for which the owner may be responsible in case of injury, it is not necessary to decide. This case is lacking in evidence that the defendant knowingly permitted the horse with which the plaintiff's car collided to be at large on the night the accident occurred. It not being shown to be unlawful by any by-law of the town of Burnham for a horse to be at large in the public ways of that town, and without proof of negligence or knowledge on the part of the defendant, the plaintiff failed to sustain his declaration. Entry will be,

Exceptions overruled.

ALTHEA M. GORDON *vs.* ALTON A. KEENE, Admr.

Androscoggin. Opinion October 7, 1919.

General rule in regard to proof necessary in actions to recover for services rendered.

In actions to recover for services rendered it is incumbent on the plaintiff to prove that the services were rendered by the plaintiff either in pursuance of a mutual understanding between the parties that she was to receive payment, or in the expectation and belief that she was to receive payment and that the circumstances of the case and the conduct of the defendant's intestate justified such expectation and belief. It is not enough to show that valuable service was rendered. It must be shown also that the plaintiff expected to receive compensation and that the defendant's intestate so understood, by reason of a mutual understanding or otherwise, or that under the circumstances he ought so to have understood. Both propositions are essential and must be proved.

Action of assumpsit to recover for services alleged to have been rendered defendant's intestate, and also to recover certain money claimed as due to plaintiff on account of a certain note and also to recover for certain money alleged to have been loaned to said defendant's intestate by plaintiff. Defendant filed plea of general issue. Verdict for plaintiff in the sum of $1836.33. Defendant filed motion for new trial, also exceptions to certain rulings of presiding Justice.

Judgment in accordance with opinion.

Case stated in opinion.

Harry Manser, for plaintiff.

Frederick R. Dyer, for defendant.

SITTING: CORNISH, C. J., HANSON, PHILBROOK, DUNN, MORRILL, DEASY, JJ.

MORRILL, J. In his lifetime Benjamin C. Keene was a prosperous farmer residing in Hebron, Oxford County; he was a large owner of farm lands and an extensive apple grower. In March, 1904 he obtained a divorce from his wife; his married daughter acted as his housekeeper for a few months thereafter. The plaintiff had been

acquainted with Mr. Keene for a number of years; for about four years before going to Hebron she kept a boarding house on Sabattus Street in Lewiston, where Mr. Keene frequently called to sell vegetables and other farm produce; sometimes he took lunch there and his horse was stabled and fed there; on June 25, 1904 the plaintiff went to Mr. Keene's house and lived there from that time until his death, acting during the whole period as his housekeeper. Other help was hired from time to time to assist in the household, especially during the latter years of Mr. Keene's life, and was paid by him. Mr. Keene died October 13, 1917. Shortly after the funeral the plaintiff sold thirteen head of cattle out of the twenty-five head of cattle on the place, receiving the proceeds thereof, and moved away taking with her substantially all the furniture, claiming that as her own.

On August 21, 1918 she brought this action to recover the sum of $2190 for her services during six years prior to Mr. Keene's death, being at the rate of one dollar per day; the declaration contains two other counts, one to recover $260.50 for money loaned, another upon a note for $65 dated December 7, 1916; liability on the note is conceded. The plaintiff has a verdict for $1836.33. The case is before us upon a motion for a new trial in the usual form and upon exceptions to certain rulings of the Justice of the Superior Court.

We will first consider the motion. The record does not disclose convincing evidence of an express contract by the deceased to pay the plaintiff one dollar per day, or any stipulated sum, for her services at Mr. Keene's house. Judging by the amount of the verdict, the jury must have so found. The conversations between the plaintiff and Mr. Keene related by Mrs. Aubin, a sister of the plaintiff, which constitute the only evidence of an express contract, fail to show any completed contract; they show proposals made by Mr.Keene, not accepted by the plaintiff; the final arrangement between the parties is not disclosed.

It was therefore "incumbent on the plaintiff to prove that the services were rendered by the plaintiff either in pursuance of a mutual understanding between the parties that she was to receive payment, or in the expectation and belief that she was to receive payment and that the circumstances of the case and the conduct of the defendant's intestate justified such expectation and belief. It is not enough to show that valuable service was rendered. It must be shown also

that the plaintiff expected to receive compensation and that the defendant's intestate so understood, by reason of a mutual understanding or otherwise, or that under the circumstances he ought so to have understood. Both propositions are essential and must be proved." *Leighton* v. *Nash*, 111 Maine, 525, 528.

It clearly appears, and in fact is undisputed, that beginning about two years after going to Hebron, the plaintiff engaged in poultry raising on a large scale; that she had the assistance of Mr. Keene's hired man to do the rough work; that she regularly devoted a portion of her time each day to caring for her hens and chickens; that she had the entire proceeds of this industry.

Two witnesses, apparently disinterested, testify to conversations with the plaintiff at different times in which she said in substance that she was to have what her hens brought her in to pay for her work in the house; another witness, likewise apparently disinterested, testified to a statement made by Mr. Keene in Mrs. Gordon's presence to the effect that he had writings to show that she was to work there without wages for a chance to keep her hens; to this statement when made by Mr. Keene, she made no reply, according to the witness. This testimony impresses us very strongly in favor of the defendant's contention; the witnesses, so far as we can discover, had no motive or opportunity to frame their testimony in corroboration of each other. Yet the jury saw and heard the witnesses and had better opportunity than we have to judge of the weight to be given to their testimony; and we might hesitate to disturb the verdict, had not the plaintiff furnished convincing evidence in corroboration.

It appears that the plaintiff kept a book showing her transactions in poultry raising. This book was put in evidence; it begins January 2, 1911; the last entries are October 1, 1917. The book is kept month by month; on the right hand page in Mrs. Gordon's handwriting the receipts are entered; on the left hand page, usually in Mr. Keene's handwriting, are the charges for grain and feed furnished by Mr. Keene, items of other expense and sometimes checks given by Mr. Keene to her for use in paying her bills. That these accounts were invariably settled every month is conceded, Mrs. Gordon paying Mr. Keene for his charges against her during the month. So unfailing was this course of business that on October 2, 1917, eleven days before he died, Mr. Keene, unable to be fully dressed, sat up at the table and settled the September account and receipted it upon the book.

But this is not all; one hundred and sixty-four checks drawn by Mr. Keene in favor of Mrs. Gordon are produced; the first is for $375, dated November 1, 1911; the last is for $7.44, dated September 24, 1917. Mrs. Gordon denies that any of these checks represent money paid for services, or as gifts. She says that certain of these, for example, thirteen checks which bear the endorsement of A. W. Harvey were given for waste purchased of Mr. Harvey, a fish dealer in Lewiston, for her hens, and were charged in the book with the grain and included in the monthly settlements. We find the thirteen checks so identified by her entered upon the book; we also find twelve other checks endorsed by A. W. Harvey which we have been unable to identify with entries on the book. Two checks endorsed by Fred Hodgdon and one check endorsed by Ray Hodgdon were for eggs received from them and are charged on the book; the check of September 29, 1916, endorsed by A. M. Fogg and the check of January 9, 1917, endorsed by H. E. Eastman relate to similar transactions, and are charged on the book; we find six other checks endorsed by A. M. Fogg which we have been unable to identify with entries on the book. The check of February 13, 1914 to Hester R. Oldham was to pay car fare of Mrs. Gordon's sister who was coming to help in the house; it is charged in the book. In March, 1914 we find a check to A. G. Atkinson charged, evidently the check of March 9, 1914; we find three other checks endorsed by A. G. Atkinson which we have been unable to identify with entries on the book. It must be remembered that all these checks were drawn payable to Mrs. Gordon and by her endorsed. There are other charges of checks on the book which we have been unable to identify with checks produced. In all we are able to identify forty-five checks charged to the plaintiff.

Another class of checks is more significant; a check for $9.62 dated June 12, 1912 endorsed to A. N. Despins Company appears, as to which Mrs. Gordon says:

"Q. I call your attention to two checks, one dated June 12, 1912, endorsed by yourself and A. N. Despins Co. Can you explain that?

A. Well, Mr. Despins' checks were for boots for Mr. Keene and myself.

Q. And did that represent money which Mr. Keene paid you?

A. Yes, he gave me checks to get boots at different times for himself and my own boots I paid for."

We do not find any charge corresponding to this check, nor to a previous check dated November 1, 1911, for $10.90 also endorsed to A. N. Despins Company; but under date of December 6, 1912 is a charge "Cash—Boots $3.50," and a check appears of that date and amount endorsed to A. N. Despins Company; and under date of February 8, 1917, is a charge of "check to A. N. Despin $2.25" and a corresponding check is found; this, Mrs. Gordon says, was for a pair of slippers for herself. A check for $5 dated November 10, 1913, collected through the Livermore Falls Trust & Banking Company, is explained as follows: "That was for our fare, Mr. Keene and I visited my nephew at Livermore Falls, and that was for our fares and my hat that I got there at that time." We find the charge on the book, "Livermore Falls, check, hat $2.75

fare 1.40"

And similar charges are found under dates of October 7, 1913, "Due on check trip to Portland $5.08," and December 18, 1913, "Trip to Town $10.00."

A check for $2 dated April 30, 1914, endorsed by W. H. Berry, and another for $5 dated May 1, 1914 endorsed by E. M. Swift and W. H. Berry are produced; the latter was Mrs. Gordon's contribution to the church, the former her contribution towards a church organ; both are charged to her in her own handwriting.

Is it probable that if Mr. Keene was owing Mrs. Gordon for services, she would have included in her accounts not only charges for poultry feed and eggs, but also charges for checks furnished for her clothing, church contributions, and vacation expenses, and would have paid such charges to Mr. Keene month after month during the whole six years? That she did make these monthly settlements and pay him is the positive testimony of the plaintiff and her sister Mrs. Aubin. Such a course of dealing is not consistent with the ordinary conduct of persons standing in the continuing relation of debtor and creditor.

Without further extending this opinion it is sufficient to say that after a careful examination of the whole record the court is of the opinion that the verdict upon the first count is unmistakably wrong; that the monthly settlements embraced all outstanding claims between the parties except when evidenced by notes or other writings; that the plaintiff did not expect to receive, nor defendant's intestate to pay further compensation; the jury must have failed to apply the rules of law to the undisputed facts of the case.

In support of the second count the plaintiff introduced a check payable to her for $260.50 dated November 4, 1913 signed by Mr. Keene, which Mrs. Gordon said was not presented for payment either before or after his death; but in this she was mistaken. The bank clerk testified that she did present it for payment after Mr. Keene's death, and payment was refused for that reason. Without further evidence this check would not support a claim for money loaned. But Mrs. Gordon testified on cross examination and on redirect examination that this check was given to her for money borrowed for apple picking. She added, "Well, he said that I might get it cashed when he had money in the bank to pay." Although her delay in presenting the check is not satisfactorily explained, as Mr. Keene had nearly $1300 on deposit when the check was given and not less than $589 at any time during that month of November, yet we must consider that the jury had opportunity to see the woman, to judge of the weight of her testimony. If they believed her statement they were justified in awarding her the amount of the check; there was no evidence to the contrary. The declaration does not contain a count upon the check; but taking a check for an existing debt is not, ipso facto, payment of the debt, and an action may be maintained for recovery of the original debt. *Marrett* v. *Brackett,* 60 Maine, 524.

The defendant has four exceptions to rulings of the presiding Justice admitting answers given by the plaintiff to questions propounded by her counsel. It appears that the defendant testified in his own behalf to certain facts happening before Mr. Keene's death, admissible upon the rules of evidence; he was then cross examined; the cross examination was not confined to the facts as to which he had testified on direct examination, but took a wider range; but no exceptions were taken to this method of cross examination. The plaintiff was called in rebuttal and asked the questions upon which the exceptions are based. Without expressing an opinion upon the questions of law propounded by defendant's counsel, we think that the questions and answers were not prejudicial to the excepting party. How was it material to the issue, whether or not Mrs. Gordon had any experience in raising hens in 1904, or had kept a boarding house prior to going to Mr. Keene's, (a fact which had already appeared), or how many calves she raised while at Mr. Keene's, or whether she furnished eggs for the cooking and table? In their zeal to leave no facts unpresented the counsel, as frequently happens, seem to have drifted away from

the main issue. If exceptions had been presented to the method of cross examination adopted with defendant, an important question would have been presented.

An exception to the refusal to give a requested instruction is presented. The requested instruction seems to have been taken verbatim from the opinion in *Spring* v. *Hulett,* 104 Mass., 592, withdrawn from the context. The jury had been fully instructed as to the law of implied contracts; we think that the requested instruction was properly refused. *Lunge* v. *Abbott,* 114 Maine, 177, 182.

Exceptions overruled.

Motion sustained and new trial granted, unless within twenty days after this rescript is received by the clerk in Androscoggin County, plaintiff formally remits all of the verdict above the amount due on the note dated December 7, 1916, and the amount of the check for $260.50 with interest on the latter from date of writ; in which case judgment shall be entered accordingly.

KATIE B. HOPKINS *vs.* MOSES ERSKINE.

Lincoln. Opinion October 7, 1919.

Rule as to demurrer admitting conclusions of law. Recovery of interest where the principle sum or debt has already been paid. How interest is regarded.

Action for the recovery of interest on money of plaintiff delivered by her to defendant; a part of the principal sum was disbursed by defendant for the benefit of plaintiff; the balance was paid by him to plaintiff's guardian before action brought. A promise is not expressly alleged in the declaration, nor is it alleged that defendant received interest on plaintiff's money in his hands.

Held:

The allegations of defendant's liability are allegations of law, not of fact. They are the pleader's inferences of law from the facts previously stated. The demurrer does not admit mere statements of conclusions of law from the facts averred.

The plaintiff alleges that defendant "assumed to be the guardian of said plaintiff, and held possession of her said money in his said assumed capacity"; it is not alleged that the defendant was not the legally appointed guardian of plaintiff. Construing the above allegation to mean that the defendant undertook to act as legal guardian of the plaintiff, the action is not maintainable, because an action of indebitatus assumpsit cannot be maintained before the guardian's accounts are settled in Probate Court.

Nor can the action be maintained upon the view that the pleader used the word "assumed" in its secondary meaning "to pretend", upon this view interest would only be recoverable as damages for detention of the money, and where so recoverable, an action to recover it cannot be maintained after payment of the principal.

Interest is regarded as incidental to the principal debt and not as a part of it, and an action cannot be maintained to recover it after payment of the principal, unless there is an express contract to pay interest.

Action of assumpsit with allegations setting forth defendant's liability for interest on money advanced by plaintiff to defendant and held by said defendant for several years claiming to be the guardian of plaintiff. An amended declaration was filed and allowed by agreement. A demurrer to said amended declaration was filed and sustained by the court. To which ruling the plaintiff filed exceptions. Exceptions overruled.

Case stated in opinion.

George A. Cowan, for plaintiff.

Harold R. Smith, for defendant.

SITTING: CORNISH, C. J., HANSON, PHILBROOK, DUNN, MORRILL, DEASY, JJ.

MORRILL, J. The plaintiff has exceptions to a ruling of the Justice presiding at nisi prius sustaining a general demurrer to the declaration.

The action is for the recovery of interest on money of plaintiff delivered by her to defendant; a part of the principal sum was disbursed by defendant for the benefit of plaintiff, and the balance was paid by him to plaintiff's guardian before action brought.

A promise is not expressly alleged in the declaration, nor is it alleged that defendant received interest on plaintiff's money in his hands; the plaintiff, however, alleges "that by virtue of his assuming to be the guardian of the plaintiff, the defendant became liable to account to the plaintiff for all interest on said money, during such time as the whole was held by him, and on all balances to the fifth day of January, 1918, or in an amount equal to a fair rate of interest thereon." But this is an allegation of law, not of fact. It is the pleader's inference of law from the facts previously stated; the demurrer does not admit a mere statement of a conclusion of law from the facts averred. *Bean* v. *Ayers,* 67 Maine, 482, 488. So with the final statement, "and plaintiff avers that there was due her in interest on said sum and balances as above mentioned, on the fifth day of January 1918, the sum of $162, which by virtue of the defendant's assuming to be the guardian of the plaintiff, he became liable to pay to the plaintiff on demand." This likewise, is a statement of a conclusion of law, not admitted by the demurrer.

It is clear that defendant's liability, if any, must rest upon the allegation that he "assumed to be the guardian of said plaintiff, and held possession of her said money in his said assumed capacity." The meaning of the verb "assume", both in legal parlance and common speech is "to undertake", it is derived from the same root as the word which designates the form of action based upon a promise. In the absence of any allegation that defendant was not the legally appointed guardian of plaintiff, we must understand the above allegation to

mean that the defendant undertook to act as legal guardian of the plaintiff. Upon this construction, the action is not maintainable, because an action of indebitatus assumpsit cannot be maintained before the guardian's accounts are settled in Probate Court. *Thorndike v. Hinckley* 155 Mass. 263.

We apprehend that the pleader may have used the word "assume" in its secondary meaning, "to pretend", although a wrongful intent is not alleged. Upon this view interest would only be recoverable as damages for detention of the money, and when so recoverable an action to recover it cannot be maintained, after payment of the principal. *American Bible Society v. Wells*, 68 Maine 572. Interest is regarded as incidental to the principal debt and not as a part of it, and an action cannot be maintained to recover it after payment of the principal, unless there is an express contract to pay interest. *Howe* v. *Bradley*, 19 Maine, 31, 35. *Milliken* v. *Southgate*, 26 Maine, 427. *Robbins Cordage Co.* v. *Brewer*, 48 Maine, 481, 485. But a promise is not alleged nor does the declaration contain averments which are fully tantamount to the allegation of an express promise. 1 Chitty Pl. *308, 16th, Amer. Ed., 392-4.

Whether the conduct of the defendant towards the plaintiff has been such that he may be held to account in equity (Story's Eq. Jur., Sec. 511. *Sherman* v. *Ballou*, 8 Cow., 304. *Davis* v. *Harkness*, 6 Illinois, 173. *Chaney* v. *Smallwood*, 1 Gill, 367) is not before us.

Exceptions overruled.

EUGENE R. BASSETT *vs.* JOHN P. BREEN.

Androscoggin. Opinion October 7, 1919.

General rule bearing on the question of the admissability of parol testimony to vary or contradict the terms of a written contract.

The written contract between the parties is complete in its terms; purports to include all stipulations between the parties, and particularizes the items included; the articles in question are of such kind, that the omission to include them in the particularization indicates that they were not agreed upon as included in the trade.

Evidence of conversations between the parties, during their negotiations, before the agreement was signed, offered for the purpose of showing that the chattels in question were included in the property purchased for the consideration named, was rightly excluded.

The case does not fall within the exception to the parol evidence rule as stated in *Gould* v. *Boston Excelsior Co.*, 91 Maine, 214, 220, and *Vumbaca* v. *West*, 107 Maine, 130, 133.

Evidence of declarations of the agent of the plaintiff to sell the property made prior to the date of the written agreement, as to whether the articles in question were to go to the purchaser in the trade were also rightly excluded.

The law of fixtures has no application to the case. The articles in question had not been annexed to the reality; they were unwrought material.

Action of trover to recover the value of certain lumber and building materials on lot of land sold by plaintiff to defendant. Defendant filed plea of general issue. Verdict for plaintiff in the sum of $35.42. To the rulings of the court relative to the admission of certain evidence offered by defendant and excluded by the court exceptions were filed. Exceptions overruled.

Case stated in opinion.

Benjamin L. Berman, for plaintiff.

Robert J. Curran, for defendant.

SITTING: CORNISH, C. J., HANSON, PHILBROOK, DUNN, MORRILL, DEASY, JJ.

MORRILL, J. On the 22d day of July, 1918 the parties entered into a written agreement of the following tenor:

"Memorandum of agreement by and between John P. Breen of Lewiston, Me., and E. R. Bassett of Lisbon, Me. Whereby Mr. Bassett agrees to sell and Mr. Breen agrees to buy Mr. Bassett's land and buildings on Wellman Street, Lewiston.

The land to include five lots 50 x 120, house, 3 hen houses, and shed.

Consideration of this sale to be nine hundred dollars payable twenty five on this date, seventy-five July 27, 1918. Three hundred dollars within 30 days on delivery of a satisfactory deed. Balance of Five hundred dollars to remain on a mortgage at 6%.

Dated this 22nd day of July, 1918.

Signed—E. R. BASSETT.
Signed—JOHN P. BREEN.

Witness—GUY E. FLAGG."

Later the sale was completed by delivery of a deed of the property. At the date of the agreement certain chattels were upon the premises and were taken by defendant under claim of title. The plaintiff now brings trover for the value of the chattels and has a verdict.

At the trial the defendant offered evidence of conversations between the parties, during their negotiations, before the agreement was signed, for the purpose of showing that the chattels in question were included in the property purchased for the consideration named. The presiding Justice excluded the evidence. The ruling was correct and in harmony with the general rule that parol evidence cannot be received to contradict or vary the terms of a written contract; when parties put their contracts in writing, the writing must be considered as expressing the ultimate intentions of the parties to it, and in the absence of fraud, parol evidence is not admitted to alter or modify the terms or legal effect of it. All prior negotiations, or so much of them as the parties see fit, are merged in the written contract.

The contract is complete in its terms; purports to include all stipulations between the parties, and particularizes the items included; the articles in question are of such kind that the omission to include them in the particularization indicates that they were not agreed upon as included in the trade. The case does not fall within the

exception to the parol evidence rule as stated in *Gould* v. *Boston Excelsior Co.*, 91 Maine, 214, 220, and *Vumbaca* v. *West*, 107 Maine, 130, 133.

The law of fixtures, discussed in defendant's brief somewhat extensively, has no application here. The articles in question had not been annexed to the realty; they were unwrought material; the blinds, two door-frames and two window-frames had not been fitted and put in place in the unplastered house.

The questions put to the real estate agent, Mr. Flagg, were also rightfully excluded. There is no evidence that Flagg was the agent of the plaintiff to sell this property prior to July 22, 1918. But irrespective of the form of the questions, any prior statements of Flagg, as to what the real estate included or whether the articles in question were to go with the real estate, were merged in the written contract which specified the property included.

Exceptions overruled.

BERNIE M. CONANT *vs.* ROBAIN ARSENAULT, et al.

Androscoggin. Opinion October 13, 1919.

Form of action to enforce an award. Rule where the submission was under seal. Defenses where action is brought to enforce an award. Rule as to right of action upon original claim where the submission and award are valid. Cause of action being merged in award.

This is an action on the case in the nature of assumpsit, to enforce an award of three hundred dollars. The plaintiff's original claim was for damages caused by the defendants or their servants and agents in negligently causing fires which destroyed property of the plaintiff. The verdict of the jury was in favor of the plaintiff in the sum of one hundred and fifteen dollars. This verdict is manifestly wrong.

1. Had the submission been under seal, the action should have been in debt, the same as debt on judgment; but as it was not under seal, assumpsit to enforce the award was the proper form of action.
2. The original cause of action which was one of tort had been merged in the award if valid and therefore the issue here was clearly defined. If the award was valid the plaintiff was entitled to the full amount of the award. If for any reason the award was invalid then the verdict should have been for the defendant. There was no place for the compromise verdict rendered.
3. The explanation seems to be that the cause of action as set forth in the writ was lost sight of and the case was tried throughout as if it were an action of tort for negligently setting fire to the plaintiff's property, involving the amount of damages recoverable if the defendants were liable. Both these issues had been foreclosed if the award was valid, and no attempt was made to vitiate the award.

The verdict is entirely incongruous and should not be allowed to stand.

Action of assumpsit to recover the amount due under a certain award. Defendant filed plea of not guilty. Verdict for plaintiff in the sum of one hundred and fifteen dollars.

Defendant filed motion for new trial. Judgment in accordance with opinion.

Case stated in opinion.

George C. Wing, for plaintiff.

Mc*Gillicuddy & Morey*, for defendant.

SITTING: CORNISH, C. J., HANSON, PHILBROOK, DUNN, MORRILL, DEASY, JJ.

CORNISH, C. J. On July 28, 1917, the plaintiff and defendants entered into a certain contract in writing, but not under seal, whereby the plaintiff sold to the defendants all the merchantable saw logs of soft wood and oak timber growing on a certain lot in East Livermore, "reserving the boughs, tops, bark, saw-dust and all slabs not used in firing the saw mill engine." The defendants were given the right to enter upon the premises, cut the timber, install a portable saw mill and manufacture the lumber, under the terms and conditions specified in said agreement.

The fifth clause of the contract reads as follows: "And it is hereby lastly agreed that in case any dispute shall arise between the said parties hereto relating to the sale of said lumber, timber and trees, or

to the compensation to be made for injury or damage done in felling, cutting down and carrying away the same, or to any cause, matter or thing herein contained, the same shall be finally determined by two indifferent persons, one to be chosen by each of said parties; and if such two persons shall not agree, then an umpire shall be chosen between them, whose decision shall be conclusive on both parties; and in case either of said parties shall neglect or fail to appoint a referee within ten days after request by the other party, then the referee appointed by the other party may proceed alone, and his award shall be conclusive on both parties."

The defendants entered upon the premises and proceeded to cut and manufacture the lumber. During the progress of the work three fires occurred which destroyed or injured the tops which had been reserved by the plaintiff, which fires the plaintiff claimed to be caused by the negligence of the defendants or their employees. Thereupon the plaintiff sought an arbitration and award under section five before recited. He chose John H. Maxwell as his arbitrator and in writing requested the defendants to select one. They made no reply, and in fact ignored all notices, both from the plaintiff and from Mr. Maxwell. June 28, 1918, was fixed as the date of hearing, but the defendants did not appear and Mr. Maxwell awarded $300 as the amount of damage sustained by fire on the lot.

On August 10, 1918, the plaintiff brought this suit, which is an action on the case in the nature of assumpsit, to enforce the award. The declaration after setting forth the contract in full, the submission as provided in paragraph five and the award made thereunder, concludes by stating the cause of action in these words: "Whereupon an action hath accrued to the plaintiff to have and recover of the said defendants the sum of three hundred dollars, together with interest from the date of said award."

The second count is for the same cause and alleges the defendants to be indebted in the same sum for the violation of the terms of the agreement and the non-payment of the award.

Had the submission been under seal the action should have been in debt, *Knight* v. *Trim*, 89 Maine, 469, the same as debt on judgment, but as it was not under seal, assumpsit to enforce the award was the proper form of action. *Holmes* v. *Smith*, 49 Maine, 242. The issue was therefore clearly defined. The original cause of action, which was negligence in setting fires, had been merged in the award if valid,

in the same manner as a claim under an account annexed is merged in a judgment. If the award was valid then the plaintiff was entitled to the full amount of the award, three hundred dollars. If for any reason the submission was invalid, as for instance if it were an attempt to oust the courts of their ultimate jurisdiction, *Hill* v. *More*, 40 Maine, 515; *Stephenson* v. *Ins. Co.*, 54 Maine, 55; *Dugan* v. *Thomas*, 79 Maine, 223; *Fisher* v. *Ins. Co.*, 95 Maine, 486; *Miles* v. *Schmidt*, 168 Mass., 339, or if the award was invalid for any reason, as on the ground that the proper steps and procedure in connection therewith had not been taken, or on the ground that this matter in dispute was not embraced in the provisions of section five of the contract, or if the award were impeached because of fraud, then the plaintiff was not entitled to recovery and the verdict should have been for the defendants. In that event an action can be maintained upon the original claim, namely an action of tort for negligence, *Colcord* v. *Fletcher*, 50 Maine, 398, but if the submission and award are valid then they constitute a bar to any suit upon the original claim. *Duren* v. *Getchell*, 55 Maine, 241-9. Under these circumstances there was no legal opportunity for a compromise verdict, and yet the jury found for the plaintiff in the sum of one hundred and fifteen dollars, a verdict that is manifestly wrong.

The explanation seems to be this. The defendants, instead of pleading non assumpsit as they should have done, pleaded not guilty as if this were an action of tort. The plaintiff joined issue. The case was then tried throughout as if it were an action of tort for negligently setting fire to the plaintiff's property. The cause of action, as set forth in the writ, was entirely lost sight of and all the parties treated it as a case of negligence in which the plaintiff was obliged to prove the want of care on the part of the defendants or their agents and servants, and the damages resulting therefrom. Even in the briefs before the Law Court, counsel on both sides so state the issue.

The evidence covered fully all the facts connected with the origin and extent of the fires in the effort to connect the defendants therewith, and to show the value of the property destroyed. But both these issues were foreclosed. They had been finally and conclusively determined by the arbitrator if the submission and award were valid, and could not be reopened in this proceeding.

In short the issue tendered by the writ, and the only cause of action pending before the court, has not been decided, while the evi-

dence introduced on both sides was clearly inadmissible. The verdict is entirely incongruous and should not be allowed to stand. It does not legally determine the rights of the parties. *Nicholson* v. *Railroad Co.*, 100 Maine, 342-6.

Motion sustained.
New trial granted.

FREEMAN G. DAVIS *vs.* UNITED STATES BOBBIN & SHUTTLE CO.

Androscoggin. Opinion October 13, 1919.

Rights, limitation, and procedure under trustee action. Question to be determined in charging a trustee.

1. The sole ground upon which a trustee in a trustee suit is held chargeable is his liability to the principal defendant by virtue of some contract between them express or implied or deposit of goods and effects.
2. The single question to be determined in charging a trustee is the amount of the goods, effects or credits belonging to the debtor in the hands of the alleged trustee at the time of service upon the latter.
3. The trustee cannot be charged because of an alleged independent guaranty claimed to have been given by him to the plaintiff. Whether such a guaranty was in fact made, and its legal effect if made, can only be decided in an action brought by the plaintiff against the guarantor to which action the principal defendant is not a party. In such an action the issue would be the liability of the trustee, the guarantor, to the plaintiff. In this action the issue on the trustee process is the liability of the trustee to the principal defendant. The two propositions are entirely distinct and cannot be commingled.

Action of scire facias against defendant which company was sued in a former action as trustee of principal defendant, the trustee and principal defendant being defaulted in said action. From the ruling of the presiding Justice certain exceptions were filed by plaintiff. Exceptions overruled.

Case stated in opinion.

Pulsifer & Ludden, for plaintiff.

Harry Manser, for defendant.

SITTING: CORNISH, C. J., HANSON, PHILBROOK, DUNN, DEASY, JJ.

CORNISH, C. J. This is an action of scire facias. The present plaintiff, Davis, brought an action of assumpsit against one Bean, a lumber operator, to recover the sum of $1861.77 for supplies, and trusteed the United States Bobbin and Shuttle Company with which corporation Bean had a contract for the sale of his logs. Both Bean and the Shuttle Company were defaulted in the original suit and execution was issued. This suit was then brought. It is admitted that the balance due to Bean from the trustee and in its hands at the time of the service of the original writ was $389.30, which sum has been paid to the plaintiff and indorsed on the execution.

But the plaintiff claims that the Shuttle Company through its superintendent guaranteed to the plaintiff the payment of his bill for all supplies that he might furnish to Bean, and that in this suit the Shuttle Company should be further charged as having in its possession the balance of said bill because of said guaranty. The court at nisi prius held that the trustee was not so chargeable even if it were true in fact that such a guaranty was given, and the case is before the Law Court on exceptions to this ruling.

The exceptions must be overruled. Trustee process, or as it is termed in some States the garnishee process, is unknown to the common law. It is a creature of statute, and the rights as well as the procedure are governed by statute. It is simply a form of attachment. The ordinary attachment fastens itself upon the goods or property owned and possessed by the debtor himself, that is the principal defendant. The trustee process reaches and binds all goods, effects or credits of the principal defendant entrusted to and deposited in the possession of the trustee to respond to the final judgment in the action as when attached by ordinary process. R. S., Chap. 91, Sec. 4. The single question then to be determined in charging a trustee is the amount of the goods, effects or credits belonging to the debtor in the hands of the alleged trustee at the time of service upon the latter. In the case at bar it is admitted that at that time the trustee was indebted to the principal defendant in the sum of $389.30, and that amount has been paid to the plaintiff. That sum marks the limit of the indebtedness owed by the trustee to the debtor and therefore marks the extent of the attachable credits in his hands. It marks too the limit of any judgment that can be rendered against the trustee in this proceeding.

The plaintiff seeks to go further and reach the trustee's own property because of an alleged independent guaranty given by the trustee to the plaintiff. But that question is entirely beside the issue involved here. That is a controversy between the plaintiff and trustee in which the principal defendant has no concern, and to which he is not a party. Whether such guaranty was made and its legal effect if made, can only be decided in an action brought by the plaintiff, the alleged guarantee, against the Shuttle Company, the alleged guarantor. In such a suit the issue would be the liability of the Shuttle Company to Mr. Davis. Here the issue is the liability of the Shuttle Company to Mr. Bean. The two propositions are entirely distinct and cannot be commingled. As well might the plaintiff claim to charge the trustee in this suit with damages due him from the trustee for alleged breach of warranty in the sale of a horse.

The sole ground upon which a trustee is chargeable is his liability to the principal defendant by virtue of some contract, between them express or implied, or deposit of goods and effects. His liability to the plaintiff is measured by his liability to the defendant. Beyond that the trustee process does not reach. These principles have been declared and consistently adhered to in numerous decisions. *Denny* v. *Metcalf*, 28 Maine, 389; *Skowhegan Bank* v. *Farrar*, 46 Maine, 293; *Hanson* v. *Butler*, 48 Maine, 81; *Hibbard* v. *Newman*, 101 Maine, 410.

Exceptions overruled.

MAHALIA E. COLBY, et als., In Equity

vs

LEONARD N. RICHARDS, et al.

Aroostook. Opinion October 13, 1919.

Rule as to evidence necessary to sustain a charge of forgery or other serious crime where the same is set up in a civil action.

Bill in equity in which the plaintiffs ask that a certain deed purporting to bear their signatures as grantors be declared void as to them on the grounds of forgery. The sitting Justice sustained the bill and the defendants appealed.

Held:

1. When a serious crime like forgery is set up in a civil action, the evidence to sustain the charge must be full, clear and convincing.
2. In view of all the evidence and the circumstances, and considering the gravity of the charge made against a deceased brother, it is the opinion of the court that the finding is so manifestly wrong that it cannot be allowed to stand.

Bill in equity to cancel deed alleging that certain signatures to said deed were forgeries. From ruling of sitting Justice sustaining bill, defendants entered appeal. Judgment in accordance with opinion.

Case stated in opinion.

Shaw & Thornton, A. B. Donworth, for plaintiff.

Powers & Guild, for defendant.

SITTING: CORNISH, C. J., HANSON, DUNN, WILSON, DEASY, JJ.

CORNISH, C. J., This is a bill in equity in which the plaintiffs ask that a certain deed, dated March 31, 1896, and purporting to bear their signatures, as grantors, be declared void as to them on the ground of forgery. The sitting Justice sustained the bill and the defendants appealed.

The situation was this. One Joseph Cyr, the name being Anglicized as Sears, was the owner of the west half of lot 146 in Limestone, containing about one hundred and twenty-two acres.

He died intestate on March 24, 1887, leaving a wife and ten children who were occupying this place as their homestead at the time of his decease.

On March 31, 1896, the widow, Esther Cyr, conveyed all her right, title and interest in the place to Leonard N. Richards, one of these defendants, the deed being recorded on July 22, 1896.

On the same date, March 31, 1896, a quit claim deed was drafted with George E. Cyr (alias Sears) of Limestone, Melissa Cyr (alias Sears) of Newton, Massachusetts, and Mahalia Colby of Newtonville, Massachusetts, three of the children and heirs at law of Joseph Cyr, as grantors of one-tenth interest each in the same premises, and Leonard N. Richards as grantee. The consideration was stated to be twenty-five dollars. This deed purports to be signed by George E. Sears, Leaner Sears his wife, by Melissa V. Sears,by Mahalia E. Colby and by Charles L. Colby her husband. It was recorded on July 22, 1896, the same date on which the widow's deed was recorded. At about the same time Richards also acquired the interests of certain other heirs to the same property.

This deed of March 31, 1896, is the object of attack in these proceedings so far as the signatures of all the grantors are concerned except that of George E. Sears.

The plaintiffs' case therefore rests upon the direct charge of forgery of their names by their brother George E. Sears, and this was the single issue before the sitting Justice. His finding sustained the charge. While granting to his decision the full force of the verdict of a jury and admitting that it should not be reversed unless considered manifestly wrong, we are constrained, after thorough and careful consideration of all the facts and circumstances of the case and a critical examination of the signatures alleged to have been forged, to hold that the decree should not be sustained.

It is apparent from the memorandum of decision that in the mind of the sitting Justice the case was exceedingly close. He says: "The case is so nearly balanced in the weight of testimony that it turns upon a preponderance of the testimony." If by this is meant a slightly greater weight of testimony on the part of the plaintiffs than on the part of the defendants, the burden which the law sets up in this class of cases was not insisted upon, and certainly it was not met.

It is an established and salutary rule that when a serious crime like forgery is set up in a civil action, the evidence to sustain the charge

must be full, clear and convincing. The reason is apparent and has been stated by this court as follows: "To create a preponderance of the evidence, the evidence must be sufficient to overcome the opposing presumptions as well as the opposing evidence. Presumptions like probabilities are of different degrees of strength. To overcome a strong presumption requires more evidence than to overcome a weak one. To fasten upon a man a very heinous or repulsive act requires stronger proof than to fasten upon him an indifferent act, or one in accordance with his own inclinations." *Decker* v. *Ins. co.*, 66 Maine, 406. The rule was restated and applied in the recent case of *Palmer* v. *Blanchard*, 113 Maine, 380, where forgery was set up by the defense in an action upon promissory notes, and the verdict of a jury in favor of the defendant was set aside.

The application of the same rule here finds the case falling far short of that full, clear and convincing evidence which is required. To sustain the charge we have first the deposition of the plaintiffs, Melissa V. Sears, taken in Los Angeles, California, on January 26, 1917. She was shown not the original deed purporting to bear her signature, but merely a copy, and she testified that she had never conveyed her interest in this land by this deed or by any other. This was a matter merely of memory on the part of an interested party, testifying twenty-one years after the date of the transaction in question. In the second place we have the testimony of Mahalia E. Colby, who when shown the original deed denied her signature and gave as the only reason therefor, "Because there is a period after Mahalia, which I never wrote in my life." She also denied the signature of her husband Charles L. Colby, on the ground that "it was too good writing for my husband, he was a very poor writer." Mr. Colby did not testify and therefore made no denial of signature, but the specimens of his signature admitted as genuine were strikingly similar to that on the deed, and showed him to be a very good penman.

The third witness was Leaner Sears Bureby, the former wife of George E. Sears, who denied her signature, giving the same reason as Mrs. Colby, that there was a period between "Leaner" and "Sears", which she never used because she "didn't know where to put them."

The plaintiffs further introduced the testimony of a witness who many years before was familiar with the handwriting of Melissa V. Sears, and who testified that in his judgment the signature was not genuine. But on cross examination the reasons given for his opinion were quite demolished by comparison with the admitted standards.

This in substance is the plaintiff's case. It consists of the practically uncorroborated statements of the interested parties, based upon a mere recollection of an event more than twenty years old. Recorded muniments of title should be jealously guarded against such attacks.

On the other hand it appears from the attorney who drew both the conveyance of the mother and that of the children that the mother and the son George went to his office together and from them he obtained the information as to names and residences from which to prepare the deed in question; that he wrote it all himself, and George signed and acknowledged it in his presence, that he witnessed the signature of George, that then the deed was taken by George presumably to obtain the other signatures, and later it was returned to his office; that he then had it recorded, and it has remained in his office from that time until after this bill in equity was brought, having in the meantime been misplaced.

George Sears, against whom this charge of forgery is made, is dead. The date of his death does not appear. The mother, Esther Cyr, is also dead. She lived until December, 1912, and at the time of her decease was residing with Mrs. Colby. No claim was made by these plaintiffs until many years after the death of both the mother and brother, when it was impossible for the brother to free himself from this heinous charge of felony, and for the mother who was with him when the deed was written to state the facts within her knowledge.

Moreover these plaintiffs knew the time when the family left the premises and that since that time they have been occupied by bona fide purchasers. Mr. Richards occupied them fifteen years, until 1911, and then conveyed them to one Embleton, and Embleton to James R. Wright in 1913, and the latter to Margaret R. Wright in 1917. As far back as January 21, 1908, Melissa wrote to her mother asking who was living on the old place where her father was buried and whether the grave was looked after. It seems irreconcilable with their present claim that during all these years these plaintiffs have never asserted their title. They have paid no taxes, and have exercised no dominion. Their conduct is consistent with non-ownership, not with ownership, and their acts negative their words. The presumption or probabliity that the plaintiffs signed this deed and forgot it is much stronger than the presumption or probability that a forgery was committed.

The defendants further introduce the testimony of one Hingston, an expert in handwriting, who has made it his exclusive business for eighteen years and for the past ten years has been in the employment of the United States Government solely in this line of work. His opinion is unhesitatingly given that the signatures are genuine, and the detailed reasons with which he fortifies his opinion are most convincing.

To this should be added a visual inspection of the signatures by the court and their comparison with the admitted standards, the result of which fails to sustain the plaintiff's allegations.

In view then of all the evidence and circumstances, giving to each the weight to which it is fairly entitled, and considering the seriousness of the charge which these sisters see fit to make against their deceased brother, considering too the improbability of his having the wicked design to defraud his sisters by such a criminal act, of his possessing the skill to effectuate it, and the boldness to face the charge which was likely to confront him at any time during the remainder of his life, it is the opinion of the court that the finding is so manifestly wrong that it cannot be allowed to stand. The bill should be dismissed with a single bill of costs for defendants.

The entry therefore must be,

Appeal sustained with costs.
Decree in accordance with opinion.

INHABITANTS OF MOUNT DESERT

vs.

INHABITANTS OF BLUEHILL.

Hancock. Opinion October 31, 1919.

Pauper supplies. Proof necessary to charge a person with having received pauper supplies. Rule as to action of majority of Board of Selectmen being necessary in the matter of deciding what may be pauper supplies and also in relation to furnishing same to alleged pauper. Rule where the act of one member of the Board of Selectmen is ratified by the others.

Action to recover for pauper supplies furnished to one Lulu Grindle and her two illegitimate children and before the court on report.

Held:

1. The person alleged to be a pauper must have fallen into distress and stood in need of immediate relief, and it must appear that the supplies furnished were necessary for their maintenance and support.
2. To constitute pauper supplies, it must be shown that there was an adjudication by a majority of the overseers of the poor that the alleged pauper had fallen into distress and stood in need of relief, or that the overseer furnished the supplies upon his own view of what is necessary and proper, if his act is subsequently assented to or ratified by a majority of the board.

Action on the case to recover for pauper supplies. Defendant filed plea of general issue. Statement of facts having been agreed upon case was reported to the Law Court for final determination.

Judgment in accordance with the opinion.

Case stated in opinion.

J. H. Knowles, D. E. Hurley, for plaintiff.

Forrest B. Snow, for defendant.

SITTING: CORNISH, C. J., HANSON, DUNN, WILSON, DEASY, JJ.

HANSON, J. This is an action to recover for pauper supplies furnished to one Lulu Grindle and her two illegitimate children and is

before the court on report. The plaintiff claims to have expended for the relief of the alleged paupers, from Oct. 25, 1917, to September 21, 1918, the sum of $574.98.

The principal contention of the parties is found in the final item of the account sued for, namely, "Paid Julia C. Nevins for board and clothing from October 25, 1917, to Aug. 9, 1918 . . . . $524.00." This charge includes the alleged pauper supplies for Lulu Grindle, as well as such support for her two children during the period stated.

Certain admissions appear in the report of the evidence, two of which may be mentioned as necessary in the determination of this case, and are as follows:

1. The pauper settlement of the two children of Lulu Grindle named in the plaintiff's writ at this date is in the town of Bluehill, their pauper settlement not being questioned in this action.

2. Lulu Grindle moved to the town of Mt. Desert in 1910, and resided there continuously from that time until sometime in 1918.

The first admission involves the question of the amount to be allowed for the support of said children as an independent charge, inasmuch as they were born while Lulu Grindle had a pauper settlement in the defendant town.

From the evidence in the case we find that a proper allowance for their support during the time claimed would be two dollars per week for each child, or in the whole $170.85.

The only other question involved, in the order of the admission in the record is this: Was the continuity of the residence of Lulu Grindle in the plaintiff town from 1910 to 1918, interrupted by the receipt of pauper supplies from that town? The plaintiff claims that such residence was interrupted in 1913, and that Lulu Grindle did not during the period acquire a pauper settlement in plaintiff town. In support of this contention the plaintiff introduced testimony tending to show that one James I. Myrick, with whom Lulu Grindle was living unlawfully, applied to one of the selectmen of Mt. Desert for "pauper support," and the plaintiff introduced Exhibit No. 1, which reads as follows:—

"Town of Mount Desert, Maine
Selectmen's Office.
Northeast Harbor, Me. Aug. 1, 1912.

I hereby apply to the Town of Mt. Desert for support for myself and Family.

JAMES I. MYRICK."

The selectman mentioned was one George J. Joy, and so far as the report shows he was the only officer of the town having knowledge of such application. No action was taken by the selectmen as a body, or by the overseers of the poor. The provisions of the statute in such cases were wholly disregarded.

The remaining Exhibit No. 2 reads:—

"Northeast Harbor, Maine, June 18, 1913.
Town of Mount Desert

To GEO. J. JOY, DR.

For rent for James I. Myrick from Jan'y. 1, 1913 to July 1, 1913—6 months at $6.00 per month,..... $36.00

Received payment,

GEO. J. JOY."

It will be seen that "rent for James I. Myrick" is the only item of alleged "pauper supplies," and that rent was furnished five months after the date of the application.

It follows that the claim as to Lulu Grindle is without merit. It does not appear that James I. Myrick, or any member of his household, had fallen into distress and stood in need of immediate relief, and it is very clear that the legal status of Lulu Grindle was in no way affected by the action of Myrick and the selectman in August, 1912. The persons alleged to be paupers must have fallen into distress and stood in need of immediate relief, and it must appear that the supplies furnished were necessary for their maintenance and support. *Bangor* v. *Hampden*, 41 Maine, 484; *Corinna* v. *Exeter*, 13 Maine, 321.

To constitute pauper supplies, it must be shown that there was an adjudication by a majority of the overseers of the poor that the alleged pauper had fallen into distress and stood in need of relief, or that the overseer furnished the supplies upon his own view of what is necessary and proper, if his act is subsequently assented to or ratified by a majority of the board. *Linneus* v. *Sidney*, 70 Maine, 114.

The entry will be,

Judgment for the plaintiff for $170.85 and costs.

ALBERT E. DRUMMOND *vs.* C. J. TRICKEY.

Waldo. Opinion October 31, 1919.

Personal property mortgages. Right of mortgagee to take possession of and sell mortgaged property before perfecting his title to same by foreclosure proceedings. Tender. Rule as to making tender where it is not possible to have return of the property for which tender is made.

This is an action by a mortgagor against a mortgagee to recover damages for selling certain cows and a calf, included in the mortgage, after the mortgagee had taken possession for breach of conditions and before the mortgage was foreclosed. A verdict was rendered for the plaintiff and the case comes before the court on a motion for new trial.

Held:

1. As to a tender: The statute requires a tender of the amount due on the mortgage, and we hold that the facts in the case disclose that a tender was made. We further hold that from the undisputed testimony no tender was necessary although in fact made. The defendant by his own admission could not restore the property mortgaged. A tender in such case would be an idle, useless ceremony which the law does not require. A tender is not necessary when the recipient has not the power to return the property.
2. The defendant was not the owner of the property and could not lawfully sell the same until he had complied with the statute. The statute was ignored by him. His mortgage was security for a debt, and the mortgagor had a right to redeem by the payment of the debt, until the mortgage was legally foreclosed.

Action by mortgagor against mortgagee of personal property to recover value of certain personal property taken by the mortgagee and sold by him before perfecting his title under foreclosure proceedings. Defendant filed plea of general issue and also brief statement. Verdict for plaintiff in the sum of $117.68.

Defendant filed a motion for new trial. Motion overruled.

Case stated in opinion.

C. C. Jones, for plaintiff.

H. R. Coolidge, H. C. Buzzell, for defendant.

SITTING: CORNISH, C. J., HANSON, DUNN, WILSON, DEASY, JJ.

HANSON, J. This is an action by a mortgagor against a mortgagee to recover damages for selling certain cows and a calf, included in the mortgage, after the mortgagee had taken possession for breach of condition, and before the mortgage was foreclosed. A verdict was rendered for the plaintiff and the case comes before the court on a motion for new trial.

The case shows that the plaintiff gave defendant a mortgage on seven cows June 12, 1915, for $537.00. The mortgage was transferred to Borden's Condensed Milk Company and the amount due was to be paid by the Borden's Company withholding $35.00 a month during certain months of the year from money due plaintiff from the milk company for milk purchased. Borden's Company discontinued their milk-route and plaintiff being unable to continue payments a breach of the conditions of the mortgage occurred. December 18th, 1917, defendant replevied the cows. Defendant sold two of the cows February 20th, 1918; two February 26th; and three March 15th, 1918. Foreclosure of the mortgage was commenced May 28th, 1918, and was perfected July 29, 1918, and this action was commenced August 27th, 1918.

Before this suit was brought the plaintiff sought the defendant for the purpose of redeeming the mortgage, and was told by the defendant that he had sold the cows to different parties, and that some of them were shipped out of the country. The plaintiff then went to the office of defendant's counsel, and there produced the amount due on the mortgage and passed it to defendant's counsel at his desk, telling him that he was there to make a tender and redeem the mortgage, and on receiving the same information that the defendant had imparted, that the cows had been sold, he recovered his money and left the office. This action followed, and the defendant contends that the sale of the cows was not a conversion, and that the action of the plaintiff in producing the money as before stated, did not constitute a tender, because the money was not refused. We cannot agree with either contention of the defendant's counsel. When the mortgagee exercised absolute dominion over the mortgaged property, and disposed of the same by absolute sale before foreclosure, and did not account to the plaintiff, or in any manner regard his substantial rights, he committed a wrongful act, which in this state has been held to be a conversion. *Mathews* v. *Fisk*, 64 Maine, 101, citing *Spaudling* v. *Barnes*, 4 Gray, 330, 11 Corpus Juris, 593 (h), 596, 597; L. R. A.,

1915, E. 198; *Montenegro-Riehm Music Company* v. *Beuris*, L. R. A., 1916, C-557; *Lee* v. *Gorham*, 165 Mass., 130; 42 N. E., 556; *Bacon* v. *Hooker*, 173 Mass., 554; 54 N. E., 253.

But here no doubt exists as to the plaintiff's right of action as presented. R. S., Chap. 96, Sec. 3, provides for redemption of mortgaged personal property, and concludes,—"and the property, if not immediately restored, may be replevied, or damages for withholding it recovered in an action on the case."

As to a tender: The statute requires a tender of the amount due on the mortgage, and we hold that the facts in the case disclose that a tender was made. We further hold that from the undisputed testimony no tender was necessary, although in fact made. The defendant by his own admission could not restore the property mortgaged. A tender in such case would be an idle, useless ceremony which the law does not require. A tender is not necessary when the recipient has not the power to return the property. *Richards* v. *Allen*, 17 Maine, 296-299; *Woods* v. *Cooke*, 61 Maine, 215-218; 11 Corpus Juris, 595; *Brink* v. *Freoff*, 40 Mich., 610; 44 Mich., 69; 6 N. W., 94.

The defendant was not the owner of the property, and could not lawfully sell the same until he had complied with the statute. The statute was ignored by him. His mortgage was security for a debt, and the mortgagor had a right to redeem by the payment of the debt, until the mortgage was legally foreclosed.

The questions involved we must assume were presented to the jury under proper instruction. We find nothing in the case to indicate that the verdict is wrong.

Motion overruled.

WILLIAM S. GOOGINS, pro ami, *vs.* ROSCOE L. SKILLINGS, et al.

Cumberland. Opinion October 31, 1919.

Equity. Right of creditor to proceed in State Court to set aside a conveyance fraudulent as to him where the grantor has been adjudicated a bankrupt. Right of trustee in bankruptcy to proceed in State Court to set aside a fraudulent conveyance. Exceptions. Burden on party taking exceptions to ruling of presiding Justice to show that the ruling is erroneous and that he is aggrieved thereby.

Bill in equity to set aside a conveyance of certain real estate as fraudulent as against the plaintiff, and before the court on appeal and exceptions.

Held:

1. That a creditor may proceed in the State Courts to set aside a transfer fraudulent as to him, notwithstanding the grantor has been adjudicated a bankrupt, when the trustee has not taken action, is well settled, and it is equally well settled that a creditor whose claim is not provable in bankruptcy may so proceed.
2. A trustee in bankruptcy may also proceed in the State Courts in behalf of all the creditors to set aside a fraudulent transfer or in proper cases may intervene in behalf of all the creditors in an action brought by one creditor for that purpose.
3. When a party takes exceptions to the rulings of a presiding Justice, it is incumbent on such party to show affirmatively that there was error in such rulings and that he is aggrieved thereby.

Bill in equity to set aside an alleged fraudulent conveyance. The cause was heard upon bill, answer, replication, and proof. From the finding of the Justice in favor of plaintiff an appeal was taken by defendant and exceptions also were filed. Judgment in accordance with opinion.

Case stated in opinion.

W. C. Eaton, for plaintiff.

H. C. Sullivan, Intervening Trustee.

D. A. Meaher, for defendants.

SITTING: CORNISH, C. J., HANSON, PHILBROOK, DUNN, MORRILL, DEASY, JJ.

HANSON, J. This is a bill in equity to set aside a conveyance of certain real estate as fraudulent as against the plaintiff, and is before the court on appeal and on exceptions.

The sitting Justice found the following facts:

On the eighteenth day of May, 1916, Roscoe L. Skillings, through the negligent operation of his automobile, ran into the plaintiff and injured him. The defendant, Roscoe Skillings, or his wife, the defendant, Dena Skillings, soon after the injury paid something toward the expenses of the plaintiff at the hospital in response to a demand from the mother of the plaintiff. In November, 1916, the plaintiff through his father as next friend brought an action against the defendant, Roscoe Skillings, and on the 2nd day of April, 1917, recovered judgment for his injuries in the amount of four hundred dollars.

Some five or six years prior to the accident and following their marriage, the defendants in their joint names took the title to a lot of land in Scarboro and later built a dwelling house and other buildings thereon in which they lived. On the 24th day of June, 1916, or about five weeks after the accident, Roscoe Skillings conveyed to his wife, the defendant, Dena Skillings, without any valuable consideration, all his interest in the property then held in their joint names, and about the same time transferred to his brother the automobile which he was operating at the time of the accident, which included all the attachable property then belonging to him or standing in his name or in his possession.

The reasons assigned for these transfers following so soon after the accident, were:

That the real property was purchased with money belonging to the wife and the buildings were built solely with her funds earned and saved by her and the title was taken in their joint names so that he could buy the lumber as her agent when they proceeded to build, and for the purpose of giving the husband a financial standing and a basis for credit, but only until he went into some business for himself when it was to be transferred to the wife. He went into the business of landscape gardening for himself about the first of April, 1916, and prior to that time had been employed by someone else in a similar line

of work, in which his only requirements for credit seem to have been in the event of the purchase of gardening tools; that the automobile was transferred to the brother because the brother had signed notes with him to pay for it when he bought it. The automobile has since been recovered for the benefit of the creditors. On March 26, 1917, the defendant, Roscoe Skillings, filed a voluntary petition in bankruptcy in which his provable debts amounted to less than $120.00, of which $40.00 were for counsel fees apparently incurred prior to the bankruptcy proceedings; and on March 31st, he was adjudged a bankrupt. On the 18th day of April, 1917, the intervening petitioner, Henry C. Sullivan, was appointed trustee and duly filed his bond. Date of hearing, January 26th, 1919.

On the twenty-fourth day of April, 1917, this bill was filed to set aside the conveyance of the real estate as fraudulent against this plaintiff, being a subsequent creditor, and on the 7th day of the following May the trustee in bankruptcy was allowed to intervene and become a party to these proceedings.

The court further finds "that the evidence sustains the allegations in the plaintiff's bill that this transfer was fraudulent as to the plaintiff and was intended to defeat and delay him in collecting any claim he might have against the defendant by reason of having been run into by said defendant's automobile."

The sitting Justice also found "that the evidence did not disclose whether there were any existing creditors at the time of the transfer and, if not, the evidence does not disclose an intent to defraud any subsequent creditors except the plaintiff. Therefore the right of the trustee in bankruptcy in these proceedings to relief in behalf of other creditors, is not proven."

The exceptions taken were to the jurisdiction of the court, to a refusal to adopt certain requested findings, to overruling the demurrer inserted in defendant's answer, to the admission of testimony of the referee in bankruptcy, and to the refusal of the presiding Justice to dismiss the bill.

In each of the foregoing instances the reasons underlying the exceptions are the same,—a challenge to the equity powers of the court in view of the bankruptcy of the defendant, Roscoe L. Skillings.

That a creditor may proceed in the State Courts to set aside a transfer fraudulent as to him, notwithstanding the grantor has been

adjudicated a bankrupt, when the trustee has not taken action, is well settled, and it is equally well settled that a creditor whose claim is not provable in bankruptcy may so proceed.

A trustee in bankruptcy may also proceed in the State Courts in behalf of all the creditors to set aside a fraudulent transfer or in proper cases may intervene in behalf of all the creditors in an action brought by one creditor for that purpose. Collier on Bankruptcy, page 1178; *Thompson* v. *Robinson,* 89 Maine, 46.

The finding of the sitting Justice, however, renders further consideration of the exceptions unnecessary, inasmuch as his conclusion is "that the right of the trustee in bankruptcy in those proceedings to relief in behalf of other creditors is not proven." Moreover, it does not appear that the rulings complained of were erroneous, or that the defendant was aggrieved thereby. When a party takes exceptions to the rulings of a presiding Justice, it is incumbent on such party to show affirmatively that there was error in such rulings and that he is aggrieved thereby. *Moore, Appellant,* 113 Maine, page 195.

We have read the record with great care and we are unable to say that the findings of the sitting Justice are incorrect. On the contrary, we are very clear that no other conclusion could fairly be reached, and this, while deprived of seeing and hearing the witnesses and the opportunity to judge of their credibility, an advantage possessed by the sitting Justice, and necessarily entering into his consideration of the equities involved. We find no error.

The entry will be,

Bill sustained.
Exceptions overruled.
Appeal dismissed.
Decree of the sitting Justice affirmed.

HARRY RANDALL *vs.* HERBERT C. PATCH.

York. Opinion November 13, 1919.

R. S. 1916, Chap. 126, Sec. 59 interpreted. Meaning of phrase "due process of law." Notice and hearing as being of the essence of due process of law. Rule as to hearing before a judicial tribunal being essential. Right of any act or statute to deprive an owner of his property without an opportunity for a hearing and without notice. Exceptional cases justifying the destruction of private property without preliminary notice or hearing and without compensation. Rule as to there being property rights or interest in an "abandoned animal."

The defendant took the plaintiff's horse from his possession and killed it. The defendant undertakes to justify the act as agent for the S. P. C. A. He invokes R. S., Chap. 126, Sec 59. The constitutionality of this section is challenged by the plaintiff.

Section 59 purports to authorize such an agent to destroy any animal "found abandoned or not properly cared for." Such authorization is made conditional upon the finding by two reputable persons that the animal is past recovery for any useful purpose. No notice to or compensation for the owner is provided for.

The constitution of the United States and of this State forbids depriving any person of his property without due process of law.

Notice and opportunity for hearing are of the essence of due process of law. A hearing before a judicial tribunal is not essential, but there must be notice and reasonable opportunity for hearing before some tribunal.

The defendant urges that a horse so diseased or injured as to be "Beyond recovery for any useful purpose" is not property within the purview of the constitutional guaranty, but this begs the question.

The plaintiff claims that the animal is not past recovery and that it has value. To conclusively determine this question against the plaintiff without notice or opportunity for hearing would be to nullify the constitutional guaranty.

The defendant argues that the necessity or expediency of any legal enactment is a purely legislative question. This is true. But a legislative enactment which is admittedly expedient and which has been determined by the Legislature to be necessary is void if it violates an express constitutional mandate.

It is true, as the plaintiff contends, that under the Police Power the use of private property is subject to uncompensated restriction and regulation. In cases of

extreme and urgent necessity, as conflagrations or epidemics, it justifies the destruction of property without preliminary notice or hearing and even without compensation. But Chap. 126, Sec. 59, R. S., cannot be justified on the ground of extreme and urgent necessity, and it provides for the destruction of property and not merely its restriction or regulation.

In so far as this statute purports to authorize the taking of animals from the possession of their owners without consent of the owners and the destruction of the same without hearing and without notice, it violates explicit constitutional guaranties and cannot be given effect to by the courts.

Action of trover for the taking and killing by defendant of plaintiff's horse, defendant acting as agent or officer of the Society for the Prevention of Cruelty to Animals. Case was reported to Law Court upon certain agreed statements with a stipulation that if the Law Court should decide that the provisions of Sec. 59, Chap. 126, R. S., were constitutional, the case was to be non suited, otherwise case to stand for trial. Judgment in accordance with opinion.

Case stated in opinion.

Elias Smith, for plaintiff.

Emery, Waterhouse and Paquin for defendant.

SITTING: CORNISH, C. J., HANSON, PHILBROOK, DUNN, MORRILL, DEASY, JJ.

DEASY, J. Trover for a horse taken from the plaintiff's possession against his objection and killed by the defendant. It is conceded that when the acts complained of were done the defendant was an officer or agent of the Society for the Prevention of Cruelty to Animals, and that he had complied with all the provisions of Sec. 59, Chap. 126, R. S. The constitutionality of Section 59 is challenged. The section is as follows:

"Any officer or agent of any society for the prevention of cruelty to animals may lawfully cause to be destroyed forthwith, any animal found abandoned or not properly cared for, appearing in the judgment of two reputable persons called by him to view the same in his presence, to be diseased or injured or in a condition from lack of food, water or shelter, past recovery for any useful purpose."

This section, when enacted as Sec. 12 of Chap. 183, Public Laws of 1883, related to abandoned animals only, the language being, "any animal found abandoned and not properly cared for."

By Chapter 70 of the Public Laws of 1905 the word "and" was changed to "or". As thus amended and otherwise by the same act slightly altered it became Section 59 as above quoted.

Neither in its original or amended form does it provide for compensation for, opportunity for hearing by or notice to the owner.

The plaintiff claims that he has been deprived of his property without "due process of law," (U. S. Constitution, 14th Amendment) and in contravention of "the law of the land," (Maine Constitution, Article 1, Section 6). The quoted phrases are identical in meaning. *State* v. *Knight,* 43 Maine, 122; *Bennett* v. *Davis,* 90 Maine, 105.

Notice and opportunity for hearing are of the essence of due process of law. *Bennett* v. *Davis,* supra; *Rusk* v. *Thompson,* (Missouri) 156 S. W., 64; *Smith* v. *State Board,* (Iowa), 117 N. W., 1117.

A hearing before a judicial tribunal is not essential, but there must be notice and a reasonable opportunity for a hearing before some tribunal. *Bennett* v. *Davis,* supra; *People* v. *Apfelbaum,* (Ill.) 251, Ill., 18, 95 N. E., 995.

An act that purports to authorize procedure depriving an owner of his property without opportunity for hearing and without notice violates both the Federal and State Constitutions.

Sec. 60, Chap. 126, R. S., in its present form, as amended in 1893, provides for notice and hearing. For want of such provisions in its original form (Act of 1883 Chap. 183, Sec. 13) it was held unconstitutional by *King* v. *Hayes,* 80 Maine, 206. See to same effect: *Loesch* v. *Koehler,* (Ind.), 144 Ind., 278, 41 N. E., 326; *Miller* v. *Horton,* 152 Mass., 544; *Brill* v. *Ohio Humane Society,* 4 Ohio C. C., 358; *Sahr* v. *Scholle,* 35 N. Y. S., 97; *Goodwin* v. *Toucy,* 71 Conn., 262, 41 Atl., 806; *Jenks* v. *Stump,* (Col.), 93 Pac., 17.

But the defendant urges that a horse which has been decided by two reputable persons to be injured or diseased and past recovery for any useful purpose is no longer property. The word "property" he contends does not include a "wreck of what was once a steed" having no utility and no value. This reasoning however begs the question. The plaintiff claims that his animal is not past recovery and that it has value. To conclusively determine this question against the plaintiff without notice or hearing would be to nullify the constitutional guaranty.

The defendant argues that the determination of the necessity or expediency of any legal enactment is within the exclusive province of

the Legislature. This is true. The court cannot declare a law to be void for the reason that it is unnecessary or inexpedient. But it may be the duty of the court to pronounce invalid an act which violates an express mandate of the constitution, even if the act is expedient and has been determined by the Legislature to be necessary.

Again, the defendant contends that Section 59 is a valid exercise of the police power. No court has ever undertaken to define the limits of the police power of the State. New occasions teach new applications of it. It is based upon Society's right of self-defense and is co-extensive with that right. *State* v. *Starkey*, 112 Maine, 12.

Under the police power the use by the owner of many species of private property has been held to be subject to uncompensated restriction and regulation. For numerous illustrations see: *State* v. *Robb*, 100 Maine, 186; *Opinion of Justices*, 103 Maine, 506; *State* v. *Starkey*, 112 Maine, 10.

In cases of extreme and urgent necessity as conflagrations, (*Farmer* v. *Portland*, 63 Maine, 47) or epidemics, (*Seavy* v. *Preble*, 64 Maine, 121), it justifies the destruction of property without preliminary notice or hearing and even without compensation.

But Section 59 provides for the destruction of property and not for restrictions upon or regulation of its use and it cannot be justified as a measure of urgent necessity.

If Section 59, now as in its original form in the act of 1883, related to abandoned animals merely our conclusion might be different. The destruction by public authority of an abandoned animal deprives nobody of property. But the section in its present form does not refer to abandoned animals only. It purports to authorize the defendant to do, without notice or hearing, what the agreed statement says he did, to wit, that he "took the horse from the plaintiff's possession against his objection" and killed it. It thus contravenes an explicit constitutional mandate.

Action to stand for trial.

WEBSTER KELSEY AND ALBERT J. KELSEY

vs.

W. A. IRVING.

Lincoln. Opinion November 13, 1919.

Pleading. Rule as to proving delivery in actions on an account annexed for specified goods or merchandise. Rule of practice permitting the use of the account annexed as a substitute for the common counts for goods sold and delivered and goods bargained and sold. General rule as to parties to litigation being held to have waived certain defenses or errors in pleading which were open to them while case was on trial but not considered until case in Law Court.

Action on account annexed for forty cords of wood. The plaintiff recovered a verdict for $416.40 while the testimony was sharply contradictory, the jury was justified in finding that the amount of the verdict was due from the defendant to the plaintiff. But this sum was not due for wood sold. The debt grew out of a transaction concerning wood, but no wood was sold by the plaintiff to the defendant.

The account annexed is a substitute for the common count for goods sold and delivered, or goods bargained and sold. Under this count delivery need not be proved, but a sale must be shown. In the pending case the only count was on account annexed. No sale was proved. There was, therefore, a variance. But the variance was waived. The case was fully tried on its merits. The real issue between the parties was submitted to the court and jury. No evidence offered by either party was objected to on account of the form of the declaration. No claim of variance was set up until after verdict rendered. Neither party has been prejudiced by any looseness or irregularity in the pleading.

Not prima facie but upon production of evidence showing the issue in fact tried, the judgment in this case will bar a further action for the cause actually litigated.

The verdict being justified on the facts and the error in pleading being waived the defendant's motion is overruled.

Action of assumpsit to recover the value of forty cords of wood at $10 per cord. The account attached to the writ was as follows:

1918 March 1. To forty cords hard wood at $10 per cord, $400.

Defendant filed plea of general issue. Verdict for plaintiff in the sum of $416.40. Defendant filed motion for new trial. Judgment in accordance with opinion.

Case stated in opinion.

H. E. Hall, A. S. Littlefield, for plaintiff.

Carl M. P. Larrabee, for defendant.

SITTING: CORNISH, C. J., HANSON, PHILBROOK, DUNN, MORRILL, DEASY, JJ.

DEASY, J. Action of assumpsit on account annexed for forty cords hard wood at ten dollars per cord. Verdict for the plaintiff for $416.40. The case comes to this court on motion.

The plaintiff, owning a lot of lumberland in South Bristol, sold to one W. A. Cole the stumpage of all the soft wood lumber on the lot suitable for sawing and also granted to him the right to set up on the land and operate a portable saw mill. Cole transferred his rights to the defendant, who constructed a mill and cut and sawed the soft wood lumber on the plaintiff's lot and on three neighboring lots, the lumber on which he had acquired from others.

The trouble between the parties resulting in this suit grew out of a transaction collateral to the above. The defendant located his mill with reference to water and other facilities, but its site was surrounded by a hard wood growth which he had no right to cut and which was so young as to be unprofitable to cut. To provide a suitable place near the mill for piling and sticking his lumber he had to secure the plaintiff's consent to the removal of this growth.

The defendant having been notified of the situation by his agent, or foreman, Joseph Couture, wrote the plaintiff, W. Kelsey, a letter as follows:

"Salem, Mass. November 16, 1917.

MR. KELSEY,
Damariscotta, Maine.

DEAR SIR:

I have just had a letter from Joseph Couture, stating the trouble was about 15 or 20 cords of wood, if that is all the trouble is, if you want to sell this wood at the market price there, allowing to clean off

the lot, we will pay for the 15 cords of wood or whatever we got, whatever wood is worth in that vicinity. For instance, if we get 15 cords, we will allow you $10.00 a cord, rather than hold this mill open.

As far as my deeds are concerned, you gave me the privilege to go ahead and set my mill there and stick lumber on the lot, and you wrote this out on your deed. Whilst I don't want to have any dispute or fuss over this matter, it is so small, we have a perfect right to go ahead and stick lumber according to deed to Mr. Cole. You have given the privilege to put my mill on the lot and stick lumber there.

We are not taking this stand at all, we will pay you for the 15 cords of wood or what we got at $10.00 a cord, if you will let this mill go along without delay. If this is satisfactory go ahead and notify my man to start at once on this mill, and let me know and we will arrange it that way.

Yours truly,

W. A. IRVING."

The plaintiffs accepted this offer and so notified Couture.

After the acceptance of the offer contained in the letter the defendant came to South Bristol and had an interview with the plaintiff, Webster Kelsey. At this interview the contract was in some degree changed or supplemented. To what extent changed or supplemented is the issue of fact in the case.

The defendant claims that it was totally rescinded and a new contract substituted, whereby the plaintiffs were to clear the wood off the proposed sticking ground and in addition to the wood were to receive and accept in full payment the flat sum of ten dollars. On the other hand, the plaintiff, W. Kelsey, says that the existing contract was expressly affirmed but that he made a further agreement to clear the wood off and for so doing was to have the wood.

This issue was submitted to a jury. The testimony showed that the plaintiffs had cleared the lot; that they cut seven cords themselves and that thirty-eight cords were cut by others to whom they gave permits and from whom they received as stumpage fifteen dollars. The jury returned a verdict for the plaintiffs for four hundred dollars and interest. The verdict was justified.

A contract was made whereby the defendant agreed to pay the plaintiffs ten dollars per cord for the wood standing and growing upon a lot of land that he desired to use as a piling and sticking ground. This may have been an unprofitable contract for the defendant, but by the letter and acceptance this was the contract which the parties made. The argument of probability and the weight of evidence is opposed to the contention that this contract was rescinded or that it was modified as the defendant claims by reducing the consideration from ten dollars a cord to ten dollars flat.

The defendant says that without regard to the merits, this action on account annexed must fail because of want of proof of delivery. But an action on account annexed for specified goods or merchandise does not require proof of delivery to support it. In the case of *Atwood* v. *Lucas*, 53 Maine, 508, a contrary view is expressed, but this case, as Justice Colt remarks in *Morse* v. *Sherman*, 106 Mass., 430, "erroneously assumed that goods bargained and sold required a special count and could not be recovered for under the common counts." And in *Cape Elizabeth* v. *Lombard*, 70 Maine, 399, Judge Peters says that "even delivery is not necessary (to support an account annexed) when title to the goods passes without delivery."

But while delivery is unnecessary a sale must be shown. Long usage has sanctioned the use of the account annexed as a substitute for the common counts for goods sold and delivered or bargained and sold. To support the action a sale must appear.

The letter and acceptance constituted a license to cut trees. The licensee did not cut the trees; therefore the title did not pass. There was no sale. *Erskine* v. *Savage*, 96 Maine, 57; *Stearns* v. *Washburn*, 7 Gray, 188.

After the contract was modified it presented no semblance of sale. There was no passing of title and none was intended. The property in and possession of the growth remained in the plaintiffs. The transaction related to the clearing of land and not to the sale of wood.

But it is the opinion of the court that the defendant has waived this objection. The case was fully tried on its merits. The real issue between the parties was submitted to the court and jury. No evidence offered by either party was objected to by reason of the form of the declaration. No claim of variance was set up until after verdict rendered. Neither party has been prejudiced by any looseness or irregularity in the pleading. Not prima facie indeed, but upon

production of evidence showing the issue which was in fact tried and determined the judgment in this case will bar a further action for the cause actually litigated. *Rogers* v. *Libby,* 35 Maine, 202; *Sturtevant* v. *Randall,* 53 Maine, 153; *Walker* v. *Chase,* 53 Maine, 260; *Lander* v. *Arno,* 65 Maine, 28.

Had the case resulted in a verdict for the defendant the judgment based upon such verdict would have been a bar.

"A party shall not take the chance of obtaining a decision in his favor without being bound by the result if the decision is against him." *Raymond* v. *County Commissioners,* 63 Maine, 110; *Shepherd* v. *Maine Central R. R. Co.,* 112 Maine, 350.

It is now too late for the defendant to take advantage of defects in the declaration not objected to at the nisi prius trial and which do not affect his substantial rights.

"Litigation is an expense to the public as well as to the parties. In fact the expense to the public is often greater than it is to the parties. It is for the public good, therefore, that there be an end of litigation. And when a case has been once fairly tried it ought not be tried over again, even if the parties are willing." *Walker* v. *Chase,* 53 Maine, 260. See also *Whiting* v. *Burger,* 78 Maine, 296; *City Club* v. *Howes,* 92 Maine, 214; *Cowan* v. *Bucksport,* 98 Maine, 308; *Shepherd* v. *Railroad Company,* 112 Maine, 353; *Coan* v. *Auburn Water Com'rs,* 109 Maine, 312.

The defendant sets up the further claim that the evidence does not show the cutting of forty cords of "hard" wood as claimed in the account annexed.

This objection does not go to the merits inasmuch as the letter of November 16th does not specify hard wood. The evidence proves the cutting of forty-five cords of wood only in small part soft.

In this finding that forty cords of hard wood were cut the jury were not manifestly in error.

Moreover, this point not having been raised at nisi prius must be held waived.

Motion overruled.

ERNEST E. HIGGINS *vs.* EVA SMITH.

Washington. Opinion November 13, 1919.

Mortgages. Foreclosure of same. Where foreclosure is by publication necessity of showing certificate of register of deeds that the publication was in a paper in the county where the land was situated.

In proceedings to foreclose a real estate mortgage by publication, a certificate of the register of deeds which fails to state that the notice of foreclosure was published in a newspaper published and printed in whole or in part in the county where the premises are situated is so defective as to invalidate the foreclosure proceedings.

Action of forcible entry and detainer. The plaintiff claiming title to the premises in question under and by virtue of the foreclosure of a certain mortgage which had been assigned to him. Case was reported to Law Court upon an agreed statement of facts. Judgment in accordance with opinion.

Case stated in opinion.

Gray and Sawyer, for plaintiff.

R. J. McGarrigle, for defendant.

SITTING: CORNISH, C. J., HANSON, PHILBROOK, DUNN, MORRILL, DEASY, JJ.

PHILBROOK, J. This is an action of forcible entry and detainer, coming to this court on an agreed statement of facts. Counsel on both sides, in argument, have travelled slightly beyond the boundaries of the agreed statement, but we must be limited to the record.

According to that record, the chronology of the case appears to be as follows: The title to the premises was originally in Fred P. Smith. He died March 7, 1913, leaving a widow, the defendant in this action, and three minor children. On October 12, 1913, this defendant caused the buildings to be insured in her own name. On November 10, 1913, the dwelling house was destroyed by fire and in 1914 the

defendant built the dwelling house now upon the lot. On March 8, 1915, the defendant mortgaged the lot and buildings thereon, with the usual covenants of warranty, purporting to convey the whole title, to Edgar Small, This mortgage was duly recorded. On November 19, 1915, this mortgage, and the debt thereby secured, were assigned by Small to the plaintiff, which assignment was duly recorded. The mortgage was foreclosed February 3, 1917, by publication.

The notice of foreclosure was forwarded to the Register of Deeds who made the following record: "County of Washington, ss; Machias, Maine, March 2, 1917. I hereby certify that the foregoing notice has been published three weeks successively in a newspaper called the Machias Republican, in the County of Washington, the first publication bearing date the third day of February, 1917, and the last publication bearing date of the seventeenth day of February, 1917, and that the same was entered for record on the second day of March, 1917." Thus it will be observed that the certificate failed to show that the newspaper was "published and printed in whole or in part in the county where the premises are situated." The defendant says this omission makes the foreclosure proceedings fatally defective. The plaintiff says that the omission may be cured by a deposition from the Register of Deeds to the effect that the omission was inadvertent. The printed record contains no such deposition, nor is there anything in the record to show that such a deposition is properly before us. Since a defective record is not notice in cases of foreclosure by publication, it must follow that as the case now stands before us, the foreclosure proceedings are null and void. *Stafford* v. *Morse*, 97 Maine, 222; *Bragdon* v. *Hatch*, 77 Maine, 433; *Hollis* v. *Hollis*, 84 Maine, 96; *Savings Bank* v. *Lancey*, 93 Maine, 422; *Wyman* v. *Porter*, 108 Maine, 110.

Plaintiff nonsuit.

STATE OF MAINE *vs.* MARY O'TOOLE.

Cumberland. Opinion November 13, 1919.

Discretionary power of sitting Justice relative to the question of remoteness of evidence offered. General rule as bearing on the question of offering evidence or the admissibility of same tending to show a custom, practice, or habit.

On trial of a complaint for keeping intoxicating liquor with intent unlawfully to sell it in this State, the Judge presiding, against objection on the ground of remoteness of time, permitted the prosecution to offer evidence that, some 18 months before the time charged in the complaint, persons were seen going in and coming out of the place which respondent had continuously occupied for years before the occasion in question; and that, on one day about 3 months after that on which the persons were seen going in and coming out, the respondent then had intoxicating liquor in her possession. Suitable instruction was given the jury, that the evidence was competent only in relation to the intent with which the respondent kept the particular liquor, for the keeping of which she was being prosecuted.

Reception of such evidence is largely for the discretion of the Judge presiding at the trial. It should come from a time near that in question, or be connected therewith by testimony showing the existence of a like condition through the intervening period. Remoteness of time is merely one consideration which may actuate the ruling of a trial Judge. What may seem far off in one case may appear very differently when looked back upon from the environment of another.

The Judge who presided at the trial having decided that the offered testimony was not too remote in point of time, this court is not privileged to say that his discretion was wrongly exercised.

Complaint and warrant for keeping intoxicating liquors with intent to sell same unlawfully. Superior Court, Cumberland County. Verdict of guilty. Respondent filed exceptions to the rulings of the presiding Justice admitting certain testimony offered on behalf of State. Exceptions overruled.

Case stated in opinion.

Carroll L. Beedy, Clement F. Robinson, for State.

Henry C. Sullivan, for respondent.

SITTING: CORNISH, C. J., HANSON, PHILBROOK, DUNN, MORRILL, DEASY, JJ.

DUNN, J. The complaint charged against the respondent, the possession of intoxicating liquor, at Portland, on November 30, 1918, with intent unlawfully to sell it in this State. Testimony tending to show respondent's possession of the liquor on that date, and that, for 16 years before that time, she continuously had occupied the premises where it was found, was introduced by the prosecution. Thereupon, in relation to the intent accompanying her possession of the liquor, the court, against objection, permitted the State to offer evidence that, on May 30, 1917, some 18 months before the date alleged in the complaint, persons were seen going in and coming out of the respondent's place; and that, on one day about three months later in the last named year, she then had intoxicating liquor in her possession. Suitable instruction was given the jury, that the evidence was competent only in relation to the intent with which the respondent kept the particular liquor, for the keeping of which she was being prosecuted.

In support of exceptions, respondent strenuously argues that the acts testified to were at times so remote as to be fatal to their admissibility.

Time in its flight affects the weight of evidence. Still, it does not necessarily impair its significance. Exact limitation within which an act must have had occurrence, in order to give it evidential status, would be difficult of satisfactory definition by an epochal boundary line. Questions of the nature of that here presented involve the principle of separate instances to show a character or habit, or a plan or course of business. The unlawfulness of the possession of the liquor by the respondent, as set out in the complaint, was directly in issue. It not only was an essential ingredient, but of the very essence, of the offense. Evidence, confined within reasonable limits, of a previous breach of the liquor laws by her, was admissible with regard to the unlawfulness of her possession of the particular liquor. The offense charged being in its nature a continuing one, sales by the respondent before, after, and at the time of the alleged keeping might have been shown to the limited extent of shedding light upon an intent to sell the especial liquor. *State* v. *Plunkett*, 64 Maine, 538; *State* v. *Neagle*, 65 Maine, 468; *State* v. *Raymond*, 24 Conn., 204;

State v. *Mead*, 46 Conn., 22. Introduction of this kind of evidence should be carefully guarded. It should come from a time near that in question, or be connected therewith by testimony showing the existence of a like condition through the intervening period. Reception of such evidence is largely for the discretion of the Judge presiding at the trial.

The acts testified to may or may not have been strong in probative force. They were not very near in point of time. If, previously, persons went to the respondent's place in such numbers, and under such circumstances as thereby to furnish evidence, in connection with other circumstances, that she then was violating the liquor laws, such fact might tend to prove guilty design as charged in the complaint. Possession by her, at an earlier time, with unlawful purpose, of intoxicating liquor, might reflect her later intent concerning other liquor. The point made against the testimony offered in this case was that of remoteness of time. Remoteness of time is merely one consideration which may actuate the ruling of the trial Judge. What may seem far off in one case may appear very differently when looked back upon from the environment of another. *State* v. *Plunkett*, *supra*, was a liquor search and seizure process. The record of a former conviction, about ten weeks before, was admitted as evidence of intent. In *Commonwealth* v. *Gagne*, 153 Mass., 205, an indictment for keeping intoxicating liquor for illegal sale, it was held that evidence of police officers as to what they had seen, in connection with the conduct of defendant's establishment, during the 7 months before the time alleged, was not so remote that it might not properly have been admitted. *State* v. *Welch*, 64 N. H., 525, was an indictment for a sale of cider to a person named. Evidence of sales to other persons, in the month following, five months previously, and in the year next preceding the first day of the term when the indictment was found, was admitted at the trial. As to the last, the court said that it tended to show that respondent "was in the business." On trial of an information, in *Caldwell* v. *State*, 17 Conn., 467, for keeping a house of ill-fame, evidence that divers persons of lewd and dissolute character, for 2 years next before the time when the statute on which the information was based went into operation, resorted to the house in question for the purpose of prostitution or lewdness, was held, in connection with the evidence which accompanied it, as fairly conducing to prove the character of the house, and the purpose for which

it was kept after the statute took effect. In *McMahon* v. *Harrison*, 6 N. Y., 443, concerning the fitness of a person to be administrator of an estate, his habits of life 19 months before were shown in evidence. Cases cited by counsel, with periods of time varying from 3 weeks to 6 months, all go to the principle of the general admissibility of the evidence. In each, depending on its own facts, the testimony was admitted.

In the case in hand, it was decided that the offered testimony was not too remote in point of time. Albeit another Judge might have decided otherwise, we are not privileged to say that the discretion of the presiding Justice was wrongly exercised.

Exceptions overruled.

JOSEPH B. REED, Ex'r *vs.* SARAH E. CREAMER, et als.

Penobscot. November 18, 1919.

Wills. Equity. Estates in fee as distinct from estates for life with qualified power of disposal. Rule as to gift of the perpetual income of real estate being a gift of the real estate itself. Rule where the gift of the income of real estate is for the life of the donee. Rule as to the gift being affected by limitations over.

Bill in equity to construe the following provision in the will of George S. Bartlett:

"I give and bequeath to Ellen M. Bartlett my beloved wife the use, improvement and income of all my estate both real and personal including rights and credits of every description wherever the same may be found. Together with the right to sell and to convey any part or all of my estate and to take to her use and benefit the proceeds of such sales whenever it shall be necessary for her comfort and maintenance paying my funeral charges and probate expense of this my last will and testament."

Held:

1. That the two sentences should be read together.
2. Thus read, the wife was given a life estate by implication coupled with a qualified power of disposal, the qualification being the necessity of sale by her in order to secure her comfort and maintenance.

3. That power of sale must of necessity be exercised by the beneficiary during her lifetime and cannot be exercised by will. At her decease the real estate in question not having been disposed of by her passed as intestate estate to the heirs at law of George S. Bartlett.

Bill in equity asking for the construction of the will of George S. Bartlett. Cause was heard upon bill and answer and reported by agreement to Law Court. Judgment in accordance with opinion.

Case stated in opinion.

Joseph B. Reed, pro se.

Mayo & Snare, for defendants.

SITTING: CORNISH, C. J., SPEAR, HANSON, DUNN, WILSON, DEASY, JJ.

CORNISH, C. J. Bill in equity asking construction of the will of George S. Bartlett, late of Orrington, dated October 6, 1874, and probated in Penobscot County at the October Term, 1877.

The language is as follows:

"First, I give and bequeat to Ellen M. Bartlett, my beloved wife the use improvment and income of all my estate both real and personal including rights and credits of every description wherever the same may be found. Together with the right to sell and to convey any part or all of my estate and to take to her use and benefit the proceeds of such sales whenever it shall be necessary for her comfort and maintainance paying my funeral charges and probate expence of this my last will and testament."

The second clause appoints his wife executrix. There is no devise over. The widow married a man named Sheil and died testate on January 28, 1916. By her will she attempted to devise the real estate which had come to her from her first husband, George B. Bartlett, under the provision before quoted.

The precise question before this court is, what was the nature of the estate devised to Ellen M. Bartlett? Was it an estate in fee, or was it an estate for life with a qualified power of disposal? We think it was the latter, that such was the intention of the testator and that his intention is adequately expressed.

The will was drawn apparently, not by an attorney, but by some layman whose orthography was not the best but who nevertheless

made clear the wish of the husband, namely, the comfortable maintenance of his wife from his property, from the use and income thereof if sufficient for that purpose, but if necessity should require, from the proceeds of such sales as she was given the power in her lifetime to make. This was a perfectly natural disposition of his property under the circumstances, as apparently there were no children to be provided for, and when that object was accomplished he attempted to control its distribution no further, but was willing that it should pass to his legal heirs as intestate property.

If this devise consisted of the first sentence alone, and the wife were given the absolute use, improvement and income of the estate both real and personal, without modification, qualification or explanation, it might reasonably be held that she took an estate in fee, because it is a settled rule of testamentary construction that a gift of the perpetual income of real estate is a gift of the real estate itself, and a gift of the income for life is a gift of the real estate for life, where there are no overruling words in the will establishing the contrary. *Sampson* v. *Randall*, 72 Maine, 109. *Hopkins* v. *Keazer*, 89 Maine, 347, 356. Words of inheritance are not necessary. R. S., Chap. 79, Sec. 16.

Here however there are qualifying and explanatory words which modify and overrule the presumption of a fee. The second sentence, although separated from the first by a period, is linked with it in meaning by the initial words: "Together with the right to sell and to convey any part or all of my estate and to take to her use and benefit the proceeds of such sales whenever it shall be necessary for her comfort and maintainance." The two sentences must in fairness be read to gether, and, thus read, it is evident that the estate granted is a life estate by implication coupled with a qualified power of disposal, the qualification being the necessity of sale in order to secure the comfort and maintenance of Mrs. Bartlett. That power of necessity must be exercised during the lifetime of the beneficiary. It cannot be exercised by will, because in that event the proceeds could not be used for her own support.

This is not a case where an absolute estate in fee is granted and then a futile attempt is made to restrain or restrict the power of alienation; but it falls within the fourth rule of construction stated in the recent case of *Barry* v. *Austin*, 118 Maine, 51, 105 At., 806, viz: "If however, the devise is expressed in such general terms as would other-

wise create an estate of inheritance under R. S., Chap. 79, Sec. 16, and these general terms are followed by a qualified and restricted power of disposal in the first taker, a life estate by implication is created and the limitation over is valid." There is no limitation over in the present case, but that does not affect the application of the rule so far as the creation of the life estate by implication is concerned. The validity of the limitation over is not the cause of the creation of a valid life estate, but the result, and the rule itself applies with equal force whether the life estate is followed by a limitation over to persons named by the testator, or by intestacy and the consequent distribution among his unnamed heirs at law.

This rule, its reason and its application are fully considered in *Barry* v. *Austin*, supra, and it is unnecessary to discuss them further here. That case in principle is decisive of the case at bar, although so far as the actual intent is concerned, the words of this will, giving only the use, improvement and income of the property instead of the property itself as in the Austin case, reveal far more clearly the rule of construction which has declared the two expressions to be equivalent.

Our answer therefore is that Ellen M. Bartlett took only a life estate in the real estate described in the bill and had no power to dispose of the same by will. At her decease this real estate passed as intestate estate to the heirs at law of George S. Bartlett.

Under the circumstances we think the parties were justified in applying to this court for instructions, and the intestate estate should properly bear the reasonable expense of this litigation. Reasonable counsel fees may be fixed by the sitting Justice. *Bailey* v. *Worster*, 103 Maine, 170; *Barry* v. *Austin*, 118 Maine, 51, 105 At., 806.

Bill sustained with costs.
Decree in accordance with
the opinion.

MELVILLE H. REED *vs.* J. BURTON REED.

Lincoln. Opinion November 18, 1919.

Taxing of costs. Filing and certifying of stenographer's evidence for preparation for Law Court.

The plaintiff's costs were taxed by the Clerk of Courts at $391.84. On appeal by the defendant to the court at nisi prius, the court reduced the taxation to $201.84. The items of reduction were two, viz: The plaintiff's attorney fee from $10 to $2.50, and the disallowance of the cost of printing copies for the Law Court, paid by the plaintiff, $182.50. Through some error or oversight the stenographer's transcript of evidence was filed in the office of the Clerk of Court of Cumberland County instead of Lincoln County and the printed copies were attested by the Clerk of Cumberland County who was also Clerk of the Law Court, instead of by the Clerk of Lincoln County. But the case was argued at the Portland Law Term, 1917, and decision was subsequently rendered in favor of the plaintiff, granting a new trial. At the October Term, 1918, a new trial was had and at that trial by agreement of counsel no testimony was offered but the evidence taken at the previous trial, which was contained in the printed copies now under consideration, was used as the evidence in the case. The presiding Justice ordered a verdict for the plaintiff upon that printed record to which order the defendant filed exceptions, and subsequently argued his exceptions in the December Term, 1918, of the Law Court, using this improperly certified record of 1917 as the basis of his argument. On December, 20, 1918, decision was rendered overruling the defendant's exceptions.

Held:

1. That the stenographer's transcript of evidence should have been filed in the Clerk's office of Lincoln County and the printed copies should have been attested and certified by that clerk. No other clerk had the power of certification.
2. That the Law Court notwithstanding the clerical errors had jurisdiction of the cause and the parties, and the objection now raised by the defendant to the payment of the printing bill, after he has twice argued in the Law Court upon this very record without objection, once when plaintiff was the moving party, and once when he himself was the moving party, comes too late.
3. The plaintiff's bill of costs as taxed by the clerk, $391.84, reducted by $7.50 the error in the attorney's fee, leaving a balance of $384.34 will stand as the correct taxation.

Appeal from the decision of Clerk of Courts in matter of taxing costs under R. S., Chap. 87, Sec. 158. Judgment in accordance with opinion.

Case stated in opinion.

Carl M. P. Larrabee, for plaintiff.

A. S. Littlefield, for defendant.

SITTING: CORNISH, C. J., HANSON, PHILBROOK, DUNN, MORRILL, DEASY, JJ.

CORNISH, C. J. On plaintiff's exceptions to taxation of costs. The situation is this, as appears by the bill of exceptions. Plaintiff's costs were taxed in the first instance by the Clerk of Courts of Lincoln County, where the action was pending, and amounted to $130.14 in the Supreme Judicial Court and $261.70 in the Law Court, an aggregate of $391.84. From that taxation the defendant appealed to the court at nisi prius. R. S., Chap. 87, Sec. 158. The court revised the taxation, allowing the taxation of $130.14 in the Supreme Judicial Court but reducing the taxation in the Law Court from $261.70 to $71.70, a reduction of $190, and leaving a total of $201.84.

The presiding Justice states in his finding as follows: "On defendant's appeal from taxation of costs in the within action by the Clerk I have allowed the within items and disallowed all other items taxed by the Clerk, and parts of items except as allowed within." A comparison of the items as allowed by the clerk and as allowed by the court shows two changes only, and they occur in the Law Court items. The clerk allows $10 as attorney fee while the court allows $2.50. The court's taxation is correct. The clerk evidently allowed $2.50 for each of the four terms the case was in the Law Court, while the schedule of fees adopted under Rule of Court provides that in the Law Court "if the plaintiff prevails, he may tax one attorney's fee in addition to that embraced in his writ." This reduction of $7.50 therefore should be allowed.

The other change is the change of the item of "Printing and copies 224.50" in the clerk's taxation to "Stenographer's bill $42." in the court's taxation, a reduction of $182.50. The item as stated by the clerk included stenographer's bill for transcribing evidence, and the printing bill in preparing copies for the Law Court. The court allows the former, $42, and disallows the other part of the item, the printing, amounting to $182.50.

The ground on which the printing bill was disallowed is thus stated in the exceptions: "The stenographer's transcript has never been filed in the Lincoln County Court, nor was the case ever certified by the Clerk of that Court and no copy of the Law Court case was ever there."

The defendant relies upon this provision in the Schedule of Fees established by the court, viz: "Transcripts of cases made by the official stenographer and printed copies, certified by the clerk to the Law Court, may be taxed in the bill of costs at the rate actually paid to the stenographers for transcripts not exceeding the rate established by statute and at the rate actually paid to the printers for the printing, not exceeding however ninety cents per page for pages averaging two hundred and fifty words each (exclusive of initials "Q" and "A", for "Question" and "Answer") together with compensation to the clerks for preparing manuscripts for the printer when necessary, and for correcting proof and certifying at the rate of ten cents per printed page, for pages averaging two hundred and fifty words each. If a party prints his own case, there may be taxed, also, compensation paid to the clerk for copies for the printer of writs, pleadings, and exhibits which are in his official custody, but not of the transcript of testimony." *Amendment to Schedule of Fees*, 110 Maine, 544.

The facts are meagrely stated in the bill of exceptions, but it contains enough to disclose that the court declined to allow the printing bill because the stenographer's transcript was not filed in the office of the Clerk of Court of Lincoln County and the proof was not read and the printed case not certified by that clerk to the Law Court.

There can be no doubt that the proper course to be followed in preparing printed copies for the Law Court is that prescribed in the Schedule of Fees. The stenographer's transcript of the evidence should be filed in the clerk's office of the county where the cause is tried, and whether the case is printed under the immediate supervision of the clerk or by the party himself, the printed copies should be certified by the clerk to the Law Court. That is the practice. No other clerk can properly certify the record. But it is common knowledge that not infrequently, through oversight or otherwise, the printed copies lack the proper certification, and when the Law Court discovers that fact or it is called to their attention, the case is not dismissed from the docket, nor even are the arguments suspended, but the omission is subsequently supplied.

Had the learned counsel for the defendant called attention to the lack of proper certification at the time this case was argued in the Law Court in July, 1918, the clerical defect could and would have been remedied. He did not however, nor did the court discover it. It was however merely a clerical defect. The court still had jurisdiction of the cause and of the parties. Counsel on both sides argued the cause fully and the court entertained and decided the case. *Reed* v. *Reed*, 117 Maine, 579. After an adverse decision we think it is too late under the circumstances as stated, for the defendant to ask to be relieved of the payment of a bill actually paid by the plaintiff in printing the testimony which formed the very basis of the defendant's argument in the Law Court.

But this is not all. This court cannot shut its eyes to its own decisions and records in a matter of this kind. From the decision in this case, 117 Maine, 579, detailing the history of this litigation, it appears that at the third trial of this protracted case a verdict was rendered in favor of the defendant, and the case was brought to this court on plaintiff's motion for new trial. The record was printed and the cause argued at the Portland term of the Law Court, 1917. Decision was rendered sustaining the motion and granting a new trial. *Reed* v. *Reed*, 117 Maine, 281. The case then came on for the fourth trial, at the October Term, 1918, Lincoln County. "At that trial, by agreement of counsel, the evidence taken at the third trial was used as the evidence in the fourth." That is, the printed record which had been prepared and paid for by the plaintiff after the third trial, was adopted and used as the record of the fourth trial without change. This saved the defendant the expense of printing anew and furnished the basis of the defendant's argument in presenting the case to the Law Court. Without it the defendant could not have argued in the Law Court, the presiding Justice having ordered a verdict for plaintiff. It is the printing bill for that record to which the defendant now objects. That record was not certified by the Clerk of Court of Lincoln County, but through some mistake or oversight was certified by the Clerk of Court of Cumberland County who was also the Clerk of the Law Court. The error was not called to the attention of the court in 1917. If it had been it could and would have been corrected. But both parties accepted it and argued from it, and on it the decision was rendered. Then after the fourth trial this same wrongly certified record was used by the defendant as the basis

of his argument to the Law Court, and again the mistake in certification was not discovered, and again the decision of this court was rendered and final judgment ordered.

To raise the point for the first time on the taxation of costs after the record had passed through the Law Court twice, once as the foundation of plaintiff's argument as the moving party, and once as the basis of the defendant's argument as the moving party, does not appeal to us with sufficient force to warrant the disallowance of the expense of printing which was actually paid by the plaintiff.

The plaintiff's bill of costs as taxed by the clerk, $391.84, reduced by $7.50 the error in the attorney's fee, leaving a balance of $384.34, will stand as the correct taxation.

Exceptions sustained.
Bill of costs to be corrected in accordance with opinion.

ELI NADEAU *vs.* CARIBOU WATER, LIGHT & POWER COMPANY.

Aroostook. Opinion November 20, 1919.

Action at common law by servant for negligence of master. Defenses open to master or employer. Workmen's Compensation Act. Defenses under common law actions qualified or limited by Workmen's Compensation Act. How Workmen's Compensation Act effects employer of five or less workmen. Rule where the employer has more than five workmen regularly employed. Limitations of servant's right of action where a master is an assenting employer. Rule where master is not an assenting employer. General rule as to allegations necessary in declaration where plaintiff claims that defendant employer is not entitled to his common law defenses.

Action on the case for negligence brought by an employee against his employer. The action is in common law form alleging the plaintiff's due care. The defendant requested the presiding Justice to rule in substance that the burden was on

the plaintiff to prove his own due care or, in conformity to the Workman's Compensation Act, to allege and prove that he was one of more than five workmen employed by the same employer regularly in the same business. The presiding Justice refused to give the instruction asked and charged the jury that "in this case it is not a defense that the employee was negligent."

In the course of the trial the plaintiff twice offered evidence to prove the number of workmen employed by the defendant corporation. This evidence was on the defendant's objection excluded upon the ground stated by the presiding Justice and acquiesced in by the defendant's counsel that the burden was on the defendant to prove that it had five or less employees and thus to show that the plaintiff's due care was material. The verdict was for the plaintiff in the sum of $2412.50.

The case was brought to the Law Court on motion and exceptions.

Held:

That the verdict is not against the evidence and not so clearly excessive as to justify a new trial. The motion must therefore be overruled.

That in asmuch as the declaration does not set forth the number of workmen and does contain an allegation of the plaintiff's due care the burden was on the plaintiff to support such allegation by proof; and

That the instruction requested by the defendant's counsel and refused was in substance correct, but

Held further:

That it is not clearly shown that the error was prejudicial; and

That even if prejudicial a new trial should not be granted.

The defendant's counsel complained of a lack of evidence which at the trial would have been supplied but for his objection. He asked a ruling that testimony which was excluded at his instance was material and necessary to the plaintiff's case. Upon one theory he secured the exclusion of testimony offered by the plaintiff. Then upon the opposite theory he asked the court to rule in substance that the want of such testimony was fatal to the plaintiff's case. It is a case of an error invited and procured by the defendant and which, as held by numerous authorities, cannot be made the ground for setting aside a verdict for the plaintiff.

Action on the case to recover damages for injuries sustained by plaintiff through the alleged negligence of defendant company. Defendant company filed plea of general issue. Verdict for plaintiff in the sum of $2412.50. Defendant filed motion for new trial also exceptions to certain rulings of presiding Justice. Motion overruled. Exceptions overruled.

HANSON, J., DUNN, J., WILSON, J., Concur.

SPEAR, J., concurs in the result.

MORRILL, J., concurs in the result in an opinion holding that there was no error in the ruling and refusal to rule of the presiding Justice.

CORNISH, C. J., concurs in the latter opinion.

W. P. Hamilton, Shaw & Thornton, for plaintiff.

Cyrus F. Small, Powers & Guild, for defendant.

SITTING: CORNISH, C. J., SPEAR, HANSON, DUNN, MORRILL, WILSON, DEASY, JJ.

DEASY, J. The plaintiff, an employee of the defendant, brought an action for personal injuries alleged to have been caused by the defendant's negligence. The declaration was in common law form, setting forth the plaintiff's due care. The defendant seasonably requested the presiding Justice to give the following instructions to the jury:

"I. The burden of proof is on the Plaintiff to show that he was himself free from contributory negligence and he cannot recover in this action unless he was free from the contributory negligence.

II. If the Plaintiff would preclude the Defendant from making the defense of contributory negligence, he must show that the Defendant had more than five workmen or operatives employed in the same business in which the Plaintiff was employed at the time of the injury."

The instructions the presiding Justice refused to give, either in form or in substance and charged that "In this case it is not a defense that the employee was negligent."

A verdict was rendered for the plaintiff in the sum of $2412.50 and the case comes here on exceptions to this ruling and refusal to rule and also on a motion for a new trial.

MOTION:

The defendant undertook to thaw, by electric process, certain frozen water pipes for Jerry Smith, of Caribou. The plaintiff, an employee of the defendant, was directed to do this work. The thawing machine was set up about five hundred feet from the main power line in the street. The plaintiff was directed to string the necessary transmission wires on temporary posts four or five feet high which had been previously set in the ground. After the plaintiff had strung the wires and started the thawing machine he discovered that one of

the posts carrying the wires was leaning and in danger of falling so that the wire would come in contact with the ground, a situation that he had been instructed to avoid. He restored the post to its former upright position and turned to find something to use to make it more secure. The post again fell. The wire carried upon it came in contact with the plaintiff's hand and caused the injury sued for.

The plaintiff was not an electrician but had had some experience in the kind of work he was engaged in doing at the time of the accident. He charges in his writ that the defendant was negligent in not properly instructing him as to the work and warning him of its perils and also and chiefly that the defendant was negligent in that the posts were "carelessly, negligently and unsecurely set up and established on the ground so that the same were not suitable for the carrying of electric wires charged with electric current."

The jury found upon full and appropriate instructions that the defendant was negligent and that its negligence was the proximate cause of the accident. This finding was abundantly justified by the evidence.

The jury did not determine that the plaintiff was in the exercise of due care. Nor did they find the contrary. This question was not submitted to them. The presiding Justice ruled that contributory negligence was not a defense to this action. Under the head of "Exceptions" we consider this ruling as to its correctness and as to whether if erroneous the exceptions to it should be sustained.

The defendant contends that the verdict is excessive. The plaintiff received a severe electric shock. His hand was cruelly burned. He was totally disabled about four months. One of his fingers had to be amputated. Another is stiff and useless and peculiarly sensitive so that he has to wear a mitten or glove when the weather is at all cold. His earning capacity is in a considerable degree impaired. He gained some part of his livelihood by playing the violin. This source of income is lost.

If the facts had been submitted to the court it might have awarded a smaller sum. But should the verdict for this reason be set aside?

The expenses incurred by the plaintiff can be determined with precision. His loss of earning capacity to the time of trial may be computed with approximate exactness. But his loss in future earnings cannot be made certain. Compensation for pain and suffering must be based on an exercise of judgment the correctness of which cannot be tested by any known process of analysis.

As to the remuneration which will make this plaintiff whole the judgment of one man or one jury or one court may differ very widely from that of another and no human intelligence can decide which is right. The law submits this question and other questions of fact to the judgment of a jury. The jury's judgment honestly and understandingly exercised is conclusive. The court's judgment cannot be substituted for that of the jury. When satisfied that the jury did not understand the case or the evidence or made inadvertent errors in computation, or otherwise, or based its verdict on prejudice or sympathy rather than on reason or judgment it is the duty of the court to order a new trial. In this case the verdict though large is not so grossly excessive as to warrant the conclusion that it represents anything but the deliberate and honest judgment of the jury.

EXCEPTIONS:

Before the happening of the accident resulting in the plaintiff's injuries The Workman's Compensation Law had been enacted. This was embodied in R. S., Chap. 50, as Secs. 1 to 48. Since the accident occurred it has been reenacted with modifications as Chap. 238 of the Public Laws of 1919. The ruling and refusal were in accordance with the Justice's construction of certain of the provisions of The Workman's Compensation Act. The main purpose of this Act is the creation of a new and wider remedy for victims of industrial accidents and a new tribunal for the administration of such remedy. It is involved in this case only in respect to its influence upon common law actions. The statute is new and makes under certain conditions radical changes in legal theory and practice. For this reason the court deems it proper that this opinion take a somewhat wider range than a determination of the precise point involved would require.

The Act provides that masters by the adoption of defined procedure may become "assenting employers." It makes assenting employers, so long as their status as such continues, immune to actions in the courts by employees injured in their employment. In actions by employees it deprives large non-assenting employers of certain common law defenses.

Remedy of Employees against Assenting Employers.

Subject to one exception, hereinafter noted, assenting employers, irrespective of the number of workmen employed, are exempt from actions at law by employees injured in their service. The remedy

by petition to the Industrial Accident Commission, a new remedy created by the act, is exclsuive. R. S., Chap. 50, Sec. 5.

The exemption is created by the following language:

"In the case of personal injury sustained by an employee in the course of his employment or of death resulting from personal injury so sustained, assenting employers shall be exempt from suits either at common law or under section nine of chapter ninety-two or under sections forty-nine to fifty-six, both inclusive, of this chapter."

To avail himself of his exemption an assenting employer must plead and prove it. *Solvuca* v. *Ryan & Reilly Co.*, 129 Md., 235, 98 Atl., 675; *Spotsville* v. *Western States Portland Cement Company*, 94 Kan., 258, 146 Pac., 356.

But an employee may elect to claim his common law rights, giving due and seasonable notice of such election. R. S., Chap. 50, Sec. 7.

The remedy of such an employee is by common law action simply.

Remedy of Servants who are not Employees within the meaning of the Statute.

The immunity of assenting employers as guaranteed by the statute is only from actions by "employees". R. S., Chap. 50, Sec. 5. There are several classes of servants who are not employees within the purview of the Act. These classes are: (a) Farm laborers. (b) Domestic servants. (c) Masters of and seamen on vessels engaged in interstate or foreign commerce. (d) Casual employees. (e) Officials of the State and municipal or quasi-municipal corporations (with certain modifications and exceptions). R. S., Chap. 50, Sec. 1, paragraph 2.

These excepted classes are not employees within the meaning of the Act. Their remedy is by common law action, except as the common law has been modified by statutes other than The Workman's Compensation Act. Whether an employer of these excepted classes who has become an assenting employer may in a proceeding before the Industrial Accident Commission disclaim the status thus assumed, we do not now determine.

Remedy of Employees against Non-assenting Employers.

The Act in effect divides non-assenting employers into two classes, to wit: Those who employ five or less workmen or operatives regularly in the same business and who may be called small employers and those who employ more than five workmen or operatives regularly in the same business and who may be called large employers. R. S., Chap. 50, Secs. 2 and 3.

In any case, regardless of the number of workmen employed, the employee injured by the negligence of a non-assenting employer may bring and maintain his common law action alleging due care on his own part. He need not allege the employer to be non-assenting. As above stated, an assenting employer who desires to avail himself of his exemption must plead and prove that he is entitled to such exemption.

But in cases where the suit is against a large employer the injured employee may omit the allegation of due care on his own part, R. S., Chap. 50, Secs. 2 and 3. In such case, however, the declaration must show that the defendant belongs to the class of employers to which Section 2 applies, to wit, large employers. The plaintiff should allege and prove that he is an employee of the defendant in a specified occupation and that the defendant employs more than five workmen or operatives regularly in the same business in which the plaintiff is employed.

"It follows we think that the defense of assumed risk is not available to employers who have in their employment more than five employees. This being true, the plaintiffs, if they desired to bring their case in the class of cases in which such defense is denied should have alleged the necessary facts." *Hodges* v. *Swastika Oil Co.*, (Texas) 185 S. W., 369; See also *Hight* v. *Quinn*, 86 Maine, 493.

In a proceeding before the Industrial Accident Commission against an assenting employer evidence of negligence is irrelevant. But negligence is the basis of all actions in the courts for injuries suffered by employees. The plaintiff must allege and prove that his injury was in whole or in part caused by the negligence of his employer or of some person (in the case of large employers including fellow servants) for whose care the employer is responsible. The plaintiff must also allege and prove either that he was himself in the exercise of due care or that the defendant belongs to a class of employers in actions against whom the plaintiff's care is not material. It is obviously not inconsistent to join both allegations in separate counts in one declaration.

It is urged that as the defendant has the burden of proving that he is an assenting employer under Section 5 he should also and for the same reason have the burden of proving that he is a small employer so that Section 2 does not apply to him. The two cases are entirely different. Section 5 absolves the employer from the common law

consequences of his negligence. Sections 2 and 3 absolve the employee of the large employer from the consequences of his contributory negligence. The employer and employee should each be required to use the shield which the law provides for him.

In the pending case the declaration sets forth common law liability and nothing more. It neither originally nor by amendment gave the defendant notice that Section 2 of the Workman's Compensation Act would be relied upon as applicable to the case. Under the pleadings the burden was upon the plaintiff to prove due care. The instructions prayed for by the defendant's counsel were substantially accurate. The presiding Justice construing a new statute in the stress of trial gave it a different construction than that which the full court holds to be correct.

It does not follow that the exceptions should be sustained. If the ruling or refusal to rule complained of were erroneous and prejudicial and if the party excepting is not barred by his own acts or omissions from taking advantage of the error the exceptions should be sustained.

The jury have in effect found under appropriate instruction that the defendant was negligent and that its negligence was the proximate cause of the accident and have determined the damages suffered. This finding was justified. The error related to the plaintiff's negligence only. It is not clear that the excepting party has shown that the ruling objected to was prejudicial.

But for another reason the exceptions cannot be sustained:

The case was tried upon the theory that the defendant had the burden of proving the non-applicability of Section 2. Evidence twice offered by the plaintiff to show the number of the defendant's employees was excluded on the defendant's objection. The ground of the objection, as stated by the court in a ruling acquiesced in by the defendant, was that the burden is on the defendant to prove that he is a small employer.

The defendant's counsel complains of a lack of evidence which at the trial would have been supplied but for his objection. He asked a ruling that testimony which was excluded at his instance was material and necessary to the plaintiff's case. Upon one theory he secured the exclusion of testimony offered by the plaintiff. Then upon the opposite theory he asked the court to rule in substance that the want of such testimony was fatal to the plaintiff's case.

"It is a clear case of an error to which appellant (defendant) at least contributed if he (it) did not procure and of which, therefore, he (it) is not now entitled to complain." *Pantall* v. *R. & P. Coal & Iron Co.*, 204 Pa., 158, 53 Atl., 751; See also to same effect: *Dugan* v. *Railway Co.*, 193 Mass., 431; *Way* v. *Greer*, 196 Mass., 237; *Smith* v. *Ford*, 82 Conn., 653, 74 Atl., 910; *Howey* v. *N. E. Navigation Co.*, 83 Conn., 278, 76 Atl., 469; *Citizens Gas Co.* v. *Whitney*, 232 Pa., 592, 81 Atl., 804; *Boatmen's Bank* v. *Fritzlen*, 221 Fed., 145.

Motion overruled.
Exceptions overruled.

MORRILL, J. I concur in overruling the motion for a new trial. The verdict was fully justified by the evidence as disclosed by the entire record; and no evidence offered in defense was excluded.

I also concur in overruling the exceptions, but not for the reasons stated in the opinion.

As the case was presented upon the pleadings, I think that the rulings of the presiding Justice were correct. The declaration sets forth a cause of action at common law and contains all the allegations necessary to sustain such action. The defendant pleaded the general issue without a brief statement. The record shows that the evidence which the defendant contended by his second requested instruction, and now contends, should have been offered by the plaintiff, was twice offered by the plaintiff (pages 26 and 73 of the record), and was excluded upon objections by defendant's counsel. The application of the "The Workmens' Compensation Act," as enacted in this State, to this action, was thus twice distinctly raised by the interrogatories of plaintiff's counsel, the objections of defendant's counsel, and the rulings of the presiding Justice.

That Act did not create any new cause or form of action; it did not give an injured employee a new remedy in the courts of the State; but it did give a new and wider remedy for securing compensation for industrial injuries, by a procedure in which negligence has no place

and which is designed to charge compensation for injuries received by employees in industry upon the industry itself. That procedure is entirely outside the common law courts, and is only reviewable in equity to a limited extent. R. S., Chap. 50, Sec. 34.

Nor did the Act abolish any existing forms of action. An existing common law right of action is not to be deemed abolished except by express enactment or necessary implication, *C. & O. Canal Corp.* v. *Hitchings*, 59 Maine, 206; *King* v. *Viscoloid Co.*, 219 Mass., 420. If the plaintiff so elects, an action to recover damages for injuries received in the course of employment may still be brought at common law, or under the provisions of R. S., Chap. 92, Sec. 9, or under "The Employer's Liability Law," R. S., Chap. 50, Secs. 49-57; but whether an employee, or the representative of a deceased employee, electing to bring such action, can recover therein depends upon other considerations.

Sec. 2 of Chap. 50 provides: "In an action to recover damages for personal injuries sustained by an employee in the course of his employment, or for death, resulting from personal injury so sustained, it shall not be a defense (a) that the employee was negligent; (b) that the injury was caused by the negligence of a fellow servant; (c) that the employee had assumed the risk of the injury."

This section is complete in itself and general in its terms; applies to all actions to recover damages for personal injuries sustained by an employee in the course of his employment, or for death, resulting from personal injury so sustained; it absolutely denies to a defendant three important grounds of defense, and to that extent imposes a burden upon the employer, with the manifest object of inducing that employer to become an assenting employer under Section 6, and thus under the provision of Section 5, obtain exemption from suits at law.

But the employer may not be subject to the burden so imposed; (a) the plaintiff may not be an employee within the terms of the act; (b) the defendant may be an assenting employer, within the terms of the act, in which case the majority opinion holds, and I think correctly, that he must plead and prove the necessary facts to gain immunity from the action at law; and I apprehend that he must also plead and prove that he is an assenting employer in order to avail himself of the defenses stated in Section 2, in an action at law by an employee who has given notice under Section 7, claiming his right of action at law; (c) he may be a "small employer" (as denominated

in the opinion) under Section 3. Upon this section the defendant apparently relies; in that case I think that it was incumbent on him to plead and prove that he employed five or less workmen or operatives regularly in the same business, if he would avail himself of any defense specified in Section 2. The facts as to the number of employees are always within the knowledge of the employer.

If the declaration shows that the plaintiff's occupation at the time of the injury was an occupation within the terms of the Act, and the defendant pleads neither that he is an assenting employer under Sections five and six, nor a "small employer" under Section 3, he must be held by the express terms of Section 2, to be precluded from the defenses therein specified.

I do not find any language in the Act, which expressly or by necessary implication puts upon an injured employee, or the representative of a deceased injured employee, the burden of alleging and proving that the number of employees in the employer's service exceeds five in order that the defendant may be precluded from the defenses named in Section 2. I think that such was not the intention of the Act; that intention was not to impose new burdens upon the injured employee, but to give him a wider remedy. "It was undoubtedly the intention of the Legislature by that statute to take away from employees who should become subject to its provisions all other remedies that they had against their employers for injuries happening in the course of their employment and arising therefrom, and to substitute for such remedies the wider right of compensation given by the Act. But we find in the Act nothing which goes further than this for the protection of the employer." *King* v. *Viscoloid Co.*, supra. Nor do I find anything further in the Maine Act, except the provision in Section 7 as to any right of action by others than the minor for injuries to a minor "working at an age illegally permitted" under the laws of the State. The excepting language in Section 5 is the same as in Section 3—"The provisions of section two shall not apply"—and the same language is used in Section 4 of the new act. Public Laws, 1919, Chap. 238. In my view the same rules of pleading and evidence should apply under Section 3 as under Section 5.

As I read it, the act (Section 3) does not divide non-assenting employers alone into two classes; it does divide all employers into two classes, denominated in the opinion "small employers" and "large employers"; to the former, Section 2 does not apply; they

need not become assenting employers to avail themselves of the defenses there specified; the latter must become assenting employers if they would have the benefits of Section 5. A Texas case is cited; but the right of action against non-subscribing employers is expressly given by the Texas statute and the provisions restricting defenses are by the same section expressly made applicable thereto; the court might well hold that the plaintiff bringing an action under that section and desiring the benefit of those restrictions, should allege the necessary facts to bring himself within the statute. In this State the rights of action of an injured employee, or of the representatives of a deceased injured employee, existed before the statute and are not abolished by it; the defenses thereto are restricted. In my opinion the distinction is material and the Texas case is not applicable here; if in fact it is not opposed in principle to the cases from Maryland and Kansas, cited in the opinion.

In the instant case the declaration shows that the plaintiff's occupation at the time of the injury was an occupation within the terms of the Act. The case is entirely barren of any allegations or facts which render Section 2 inapplicable. Therefore the only issue was the negligence of the defendant. *Dooley* v. *Sullivan,* 218 Mass., 597; *Pope* v. *Heywood Bros. & Wakefield Co.,* 221 Mass., 143.

LENORA M. WALBRIDGE *vs.* GEORGE P. WALBRIDGE, et al.

Kennebec. Opinion November 20, 1919.

R. S., Chap. 66, Sec. 6 interpreted. Husband and wife. Rule as to disturbing the findings of facts of single Justice sitting in equity unless said findings are clearly wrong.

Only when property is entrusted or advanced by husband to wife or *vice versa*, under conditions where it is apparent that it was regarded by the parties not as a joint or common interest, or as a gift, but as the separate property of the party advancing it for which the recipient ought in equity and good conscience to account, can the remedy provided in Sec. 6, Chap. 66, R. S., be invoked.

Each case of this nature must be determined by itself. It is the intent of the parties which governs. The sitting Justice in this case having determined that the plaintiff was entitled to judgment against her husband for the amount claimed in her bill and that the mortgage given to his father was fraudulent as to the plaintiff, the court is unable to say that the findings of the sitting Justice cannot be maintained from the evidence in the case and that they are clearly wrong.

Bill in equity brought under R. S., Chap. 66, Sec. 6. Cause was heard upon Bill, Answer, Replication, and Proof. From the findings and decree of single Justice defendant filed an appeal. Judgment in accordance with opinion.

Case stated in opinion.

George W. Heselton, for plaintiff.

Benedict F. Maher, for defendants.

SITTING: CORNISH, C. J., SPEAR, HANSON, DUNN, WILSON, DEASY, JJ.

WILSON, J. A bill in equity brought by the plaintiff against her husband, George P. Walbridge, and her father-in-law, James P. Walbridge, under Sec. 6 of Chap. 66, R. S., to recover money received from her by her husband which she claims that in equity and good

conscience he ought to return, and to declare void as to the plaintiff a mortgage given by the husband to his father. It comes before this court on appeal from the decree of the sitting Justice.

It is alleged in the bill that the plaintiff from time to time advanced money to her husband to be used in the construction, alteration and repairs of certain buildings which he was erecting on land the title to which was in the defendants jointly, in all amounting to twelve hundred and twenty-nine dollars and sixty cents; that the plaintiff advanced the several amounts with the expectation of having a home for themselves; that after completing the house her husband abused and mistreated her and finally left her, returning to his father's house, and refused longer to live with her or return the money she had advanced, and with intent to defraud her of the moneys so advanced mortgaged the buildings and his interest in the land to his father, the other defendant, to secure an alleged indebtedness of three thousand three hundred and twenty-four dollars, and which, the evidence discloses, was for board of the defendant George P. Walbridge and the plaintiff while they were living with the father after their marriage.

The defendants contended that the money was a gift or a contribution by the wife in the usual course of domestic relations, and for their mutual benefit and with no expectation of return, and that no obligation between husband and wife similar to that of debtor and creditor was thereby created.

If such were the facts we think Sec. 6, Chap. 66, R. S., was not intended to apply. *Stone* v. *Curtis*, 115 Maine, 63. It could not have been the intent of the Legislature, we think, to provide for the adjustment of all the financial relations between husband and wife under this statute. No end of litigation would arise, and domestic infelicities be increased ten-fold.

But only when property is entrusted or advanced by one to the other under conditions that it is apparent that it was regarded not as a joint or common interest, or as a gift, but as separate property of the party advancing it, for which the recipient was expected, and ought in equity and good conscience, to account, may this remedy be invoked. *Greenwood* v. *Greenwood*, 113 Maine, 226; *Whiting* v. *Whiting*, 114 Maine, 382; *Stone* v. *Curtis*, 115 Maine, 63.

In the case at bar, however, the sitting Justice found that the evidence sustained the plaintiff's bill, that the plaintiff was entitled to judgment against the defendant George P. Walbridge for the sum of

twelve hundred and twenty-nine dollars and sixty cents, and that the mortgage given to James P. Walbridge was fraudulent and void as to the plaintiff.

We may not disturb the findings of fact of a single Justice sitting in equity unless they are clearly wrong. *Stewart* v. *Gilbert,* 115 Maine, 262. Each case of this nature must be determined by itself. It is the intent of the parties that must govern, and we cannot say that the findings in this case were clearly wrong.

Entry will be:
Appeal dismissed.
Decree of sitting Justice affirmed.

JOHN H. LOOK *vs.* C. A. WATSON.

Franklin. Opinion November 22, 1919.

Principal and agent. Rule as to liability of one who holds himself out as a partner even though such partnership does not exist.

1. The court adheres to its decision as reported in *Look* v. *Watson & Sons,* 117 Maine, 476, that 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.
2. Upon defendant's contention that the barrels of apples were misbranded in violation of R. S., Chap. 36, Sec. 29, the court is of the opinion that defendant has not sustained his contention.
3. If the apples, when packed, were graded according to the Maine standard, the defendant has no cause of complaint, even if that standard might be below the local standard in the Chicago market.

Action of assumpsit to recover the value of certain merchandise sold to defendant. Defendant filed plea of general issue and also brief statement denying individual liability. The principal contention of defendant was set forth particularly in the case of *Look* v.

Watson & Sons reported in 117 Maine, page 476. At close of testimony in the present case it was reported by agreement of counsel to the Law Court to decide all questions of law and fact involved. Judgment in accordance with opinion.

Case stated in opinion.

Frank W. Butler, for plaintiff.

Elmer E. Richards, Sumner P. Mills, for defendant.

SITTING: CORNISH, C. J., HANSON, PHILBROOK, DUNN, MORRILL, DEASY, JJ.

MORRILL, J. When this cause was before us on a former occasion (117 Maine, 476) we held that the liability of C. A. Watson was established, applying to this case the principle that "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, we said, "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 exceptions were sustained, however, because the verdict was directed against C. A. Watson, R. A. Watson and George Watson, and, whatever might be the status of R. A. Watson, the evidence showed that George Watson was not a partner, and failed to show that he held himself out as such.

The plaintiff has now amended his writ by striking out the names of R. A. Watson and George Watson and proceeds against C. A. Watson alone. Upon a careful consideration of the evidence now presented we have no reason to change our former conclusion. The liability of C. A. Watson is again abundantly shown.

But defendant's counsel strenuously insists that the contract to buy apples was made by the plaintiff during the last of October or the first of November, 1917; that the apples were bought before the plaintiff ever saw C. A. Watson; that at the only interview between the plaintiff and C. A. Watson the purchase of the apples was not considered, only the shipping of apples already purchased; consequently, counsel says, the plaintiff could not have given credit to C. A. Watson. This might be material, if the name of C. A. Watson had not appeared in the business name and style of C. A. Watson & Sons, which now

appears to be the name of an Illinois corporation. *Smith* v. *Hill et als.*, 45 Vt., 90. The important facts are that the defendant loaned his name for use in the corporate name of a corporation for which he worked and which, in some degree at least, he represented; the latter 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 dealt with C. A. Watson & Sons through their agent; he bought the apples for C. A. Watson & Sons; he knew C. A. Watson & Sons, only as indicated by the name; he relied upon that name, not as the name of a corporation, but, as it appeared, as the name of a partnership; and neither the agent, J. P. Barrett, if, in fact, he knew to the contrary, nor the defendant himself informed him otherwise. The defendant must be held liable to the plaintiff. Cases cited in former opinion; *Benedict* v. *Davis*, 2 McLean, 347; 3 Fed. Cases, No. 1293.

The number of barrels stated in the writ, and the price charged therefor, is conceded to be correct; the item of $108.75 for work at Dixfield is not disputed; but defendant claims that the apples did not answer the description marked upon the barrels; that they were misbranded in violation of R. S., Chap. 36, Sec. 29; and he claims a deduction of $237.25. Here the burden is upon the defendant. *Lyons* v. *Jordan*. 117 Maine, 117.

In the car in question were 182 barrels of apples. The plaintiff says, "they were very nice quality; as good a car as I shipped during the year." The quality of the apples to be furnished by plaintiff does not appear; hence the only requirement was that they should be merchantable and correctly graded, and the barrels marked as required by law. It appears from the testimony of both Mr. Look and J. P. Barrett, the agent of C. A. Watson & Sons, that the consignees had not found fault with previous shipments; Mr. Barrett says, however, that "they said that the Maine standard was below what they expected." The defendant personally directed that the car lot in question should be shipped. When the apples arrived in Chicago eight of the barrels were examined, and those marked No. 1 were graded Fair No. 2, and those marked No. 2 were graded, Fair No. 3. It does not appear that this grading was or was not according to the Maine standard, which calls for Fancy, Number one or class one, Number two or class two, and unclassified. R. S., Chap. 36, Sec. 27. If the apples, when packed, were graded according to the

Maine standard, the defendant has no cause of complaint, even if that standard might be below the local standard in the Chicago market. We think that defendant has not sustained the burden of showing that the barrels were misbranded.

Judgment for the plaintiff for $763.95 with interest from date of writ.

ALLEN A. FISKE *vs.* H. E. DUNBAR & COMPANY.

Hancock. Opinion November 24, 1919.

General rule of the law of sales that delivery of personal property at the place agreed upon or designated by the vendee is a completed delivery and operates as a perfected transfer of the property. Rule as to right of inspection by buyer or vendee even though property is delivered at place agreed upon. General rules covering the right of rejection by vendee or buyer. When the right of rejection must be exercised. Rule as to silence and delay in rejecting being evidence of acceptance. Burden of proof. Remedies of vendee of personal property after receiving possession of same.

Action of assumpsit to recover the balance due for certain wood. The defendant claimed that the wood was not of the contract quality and had never been accepted. The jury found for the plaintiff.

On defendant's motion for new trial it is,

Held:

1. Whether defendant's agent had the right to accept the wood in its behalf was a question of fact for the determination of the jury.
2. Delivery of personal property at the place agreed upon operates as a perfected transfer, but such delivery does not preclude the buyer from the right of examination in order to ascertain whether the goods are of the contract quality and to reject them in case they are not.
3. The right of rejection however must be exercised within a reasonable time or it is lost, and the sale becomes absolute. Silence and delay for an unreasonable time are conclusive evidence of acceptance.
4. The jury were justified under the facts in this case in finding that the right of rejection, if one had existed, had been lost.

Action of assumpsit to recover the value of certain stave wood sold and delivered to defendant. Defendant filed plea of general issue. Verdict for plaintiff in the sum of $175.62. Defendant filed motion for new trial. Motion overruled.

Case stated in opinion.

W. E. Whiting, for plaintiff.

W. C. Conary, for defendants.

SITTING: CORNISH, C. J., HANSON, PHILBROOK, MORRILL, DEASY, JJ.

CORNISH, C. J. Action of assumpsit to recover the balance due for certain stave wood sold to the defendants under a verbal contract made in the Fall of 1917. The quantity was to be one hundred cords more or less, the quality according to the plaintiff's testimony was to be anything that staves could be made out of, including hemlock, cedar and poplar if good; according to the defendant, "Extra spar growth wood;" the size not less than four inches in diameter at the top; the price, five dollars per cord, the place of delivery, Toddy Pond. Sixty and one-eighth cords were cut, hauled and landed at the specified place during the ensuing Winter of 1917-18. Of this, forty-seven and one-eighth cords were of spruce, fir, pine and cedar, twelve cords of poplar, one cord of hard wood and about three cords were under four inches at the top. Three payments aggregating $105 were made on account of the purchase price during the progress of the work. The work was completed about the last of March, 1918. In June the parties met and the plaintiff demanded the balance due while the defendant Dunbar demanded the return of the $105 already paid. This suit followed and the plaintiff having secured a verdict of one hundred and seventy dollars and sixty-two cents the defendants brought the case to this court on general motion.

The contention which the defendants urge most strongly is that there was no acceptance of the wood by them and therefore this action cannot lie.

In answer to this the plaintiff says in the first place that there was a virtual acceptance in fact; that Mr. Grindal who was in the employ of the defendants as a foreman in woods operations, and who represented them in designating the landing place of this particular lot,

was familiar with its quality, placed the caps upon the piles so that they might float, never made the slightest objection, and on the contrary sent word to the defendant, Dunbar, that it was all right. The defendants reply that Grindal had no authority to accept the wood in their behalf. This then became a question of disputed fact, which the jury were obliged to pass upon.

In the second place, it is a general rule of the law of sales that delivery of personal property at the place agreed upon or designated by the vendee is a completed delivery, and operates as a perfected transfer of the property. *Lombard* v. *Paper Co.*, 101 Maine, 114-119. There is some evidence in this case as to whether this wood was landed at the proper place, but it is clear that the landing was approved by the defendants' foreman, Mr. Grindal, and in their brief the defendants now state that that question is not raised in this court.

Delivery however at the designated place does not absolutely preclude the buyer from the right of examination in order to ascertain whether the goods are of the contract quality and to reject them in case they are not. The acceptance implied from such delivery may be considered as conditional to that extent. There are limitations however upon that right of rejection. The rule of law which governs under such conditions has been stated by this court as follows: "But the right of rejection must be for good cause and not upon false or frivolous grounds. And the right must be exercised within a reasonable time or it is lost and the sale becomes absolute. Silence and delay for an unreasonable time are conclusive evidence of acceptance. The burden of action is upon the buyer and he must seasonably notify the seller of his refusal to accept the goods." *White* v. *Harvey*, 85 Maine, 212; *Greenleaf* v. *Hamilton*, 94 Maine, 118-121.

Under this rule the jury were amply justified in finding the right of rejection here to have been lost. The work was completed by March 27th and the wood all landed on Toddy Pond. The plaintiff, as he says, then requested the defendant, Dunbar, to measure the wood, and on the day before the plaintiff moved away, which was about the first of April, Dunbar did go to the landing and examine the wood, but did not stop at the plaintiff's house, which was nearby, nor did he notify him by letter or otherwise that he would not accept the wood. It was not until early in June that he so notified him. That was the first intimation that the plaintiff had that the quality was unsatisfactory and the wood rejected.

Surely this silence and delay were for an unreasonable time, and are strong if not conclusive evidence of acceptance. At least the defendants led the plaintiff to so believe and he had a right to act on that belief. Actual acceptance may be inferred from the conduct of the parties and such inference was legitimate here.

The defendants refer to the fact that the verdict although for the plaintiff was not for the full amount claimed, a compromise verdict as they term it, and urge that it should have been either for the plaintiff for the full amount or else for the defendants. Not necessarily so. The vendee after receiving possession of goods has three remedies against the vendor for a breach of warranty of quality; first, the right to reject the goods if the title has not passed; second, a cross action for damages for the breach; third, a right to set up the breach in an action for the purchase price and thereby diminish the amount recoverable. *Morse* v. *Moore*, 83 Maine, 473-483. In this case the last remedy was adopted and the defendants introduced considerable evidence tending to show inferior quality. The jury seem to have been influenced to some extent thereby, because their verdict shows a reduction from the full amount claimed.

The entry should be,

Motion overruled.

CORA L. KALLOCH *vs.* MARY ELWARD.

Knox. Opinion November 25, 1919.

Rule as to married women being exempt from arrest under R. S., Chap. 66, Sec. 4. Rule as to this exemption being a personal privilege that may be lost by waiver or estoppel.

The plaintiff brought this action to recover damages from the defendant because of her alleged alienation of the affections of the plaintiff's husband. The defendant was arrested on a capias writ and gave a bail bond in the sum of eight thousand dollars, with two sureties. The writ was entered at the September Term, 1918, Knox County, and an attorney appeared for the defendant at that term. The case was then continued to the January Term, 1919, and again to the April Term, 1919, when trial was had and a verdict rendered in favor of the plaintiff.

During the trial it appeared to the utter surprise of the plaintiff that the defendant was a married woman, Mrs. Mary L. Davis, and that she had held herself out as a single woman on coming to Maine from another State, in accordance with a prearranged plan with her husband who in the meantime had gone to Pennsylvania.

At the same term, after verdict against her and before judgment, the defendant filed a motion asking that she and her sureties on the bail bond be exonerated and discharged because she was a married woman and under the statutes of this State was exempt from arrest. The presiding Justice granted the motion "as a matter of legal right," and to this ruling exceptions were taken by the plaintiff.

Held:

1. That exemption of a married woman from arrest is granted by R. S., Chap. 66, Sec. 4.
2. That exemption from arrest is a personal privilege and as such may be lost by either waiver or estoppel.
3. That under all the facts and circumstances of this case the defendant was equitably estopped from claiming an exoneretur.

Action on the case for alienation of the affections of the plaintiff's husband. The defendant was arrested as a single woman upon a capias writ and gave bail for her appearance. During trial of the

case the plaintiff, for the first time, had knowledge that the defendant was a married woman at the time of her arrest. Verdict was rendered for plaintiff, and defendant filed motion before judgment asking that the bail be exonerated. The presiding Justice granted the motion as a matter of legal right; to which ruling plaintiff filed exceptions. Judgment in accordance with opinion.

Case stated in opinion.

Frank H. Ingraham, and A. S. Littlefield, for plaintiff.

E. C. Payson, for defendant.

SITTING: CORNISH, C. J., HANSON, PHILBROOK, DUNN, MORRILL, DEASY, JJ.

CORNISH, C. J. This case is before the Law Court on plaintiff's exceptions to the order of the presiding Justice granting the defendant's motion and ordering an exoneretur on a bail bond.

The facts are these. On July 19, 1918, an action was brought by the plaintiff under R. S., Chap. 66, Sec. 7, to recover damages of the defendant because of her alienation of the affections of the plaintiff's husband. A capias writ was issued returnable at the September Term, 1918, of the Supreme Judicial Court for Knox County, and in accordance with its commands, the defendant was arrested and held to bail in the sum of eight thousand dollars. The bail bond was signed by Mary L. Elword as principal and C. E. Bicknell and A. B. Crockett as sureties, was accepted by the sheriff, and the defendant was released from custody. The condition of the bail bond was as follows: "Now therefore if the above bounden defendant shall appear and answer unto said suit and abide final judgment thereon and not avoid, then this obligation shall be void" etc.

The writ was duly entered at the September Term, 1918, the bail bond was filed in court, an attorney appeared for the defendant, and the action was continued to the January Term and again to the April Term, 1919, when the case was tried and a verdict rendered in favor of the plaintiff. Early in the trial it appeared, to the surprise of the plaintiff, that the defendant was a married woman, Mrs. Mary L. Davis, and that she had held herself out as a single woman on coming to Maine in accordance with a prearranged plan with her

husband who in the meantime had gone to Pennsylvania. The defendant's attorney stated that he had received no information in regard to the marriage until about one month before the trial.

At the same term, after verdict against her and before judgment, the defendant filed a motion asking that she and her sureties on the bail bond be exonerated and discharged because she was a married woman, and under the statute of this State was exempt from arrest. The presiding Justice granted the motion "as a matter of legal right" and to this ruling exceptions were taken by the plaintiff.

The statute in this State granting a married woman exemption from arrest is as follows:

"A husband married since April 26, 1852, is not liable for the debts of his wife contracted before marriage, nor for those contracted afterward in her own name, for any lawful purpose; nor is he liable for her torts committed after April 26, 1883, in which he takes no part; but she is liable in all such cases; a suit may be maintained against her therefor, and her property may be attached and taken on execution for such debts and for damages for such torts, as if she were sole; but she cannot be arrested." R. S., Chap. 66, Sec. 4.

Exemption from arrest however is a personal privilege and as such may be lost either by waiver or by estoppel. Thus at common law a party or a witness duly summoned in a process then pending is immune from arrest while in attendance upon court, but the privilege may be waived. *Brown* v. *Getchell*, 11 Mass., 11; *Smith* v. *Jones*, 76 Maine, 138. So under the constitution of Maine, senators and representatives, except in certain cases, are privileged from arrest "during their attendance at, going to and returning from each session of the Legislature." Art. IV, Part 3, Sec. 8. And yet it has been held that this privilege, though guaranteed by the organic law of the State, may be waived. The jury found such a waiver in *Chase* v. *Fish*, 16 Maine, 132, and this court sustained the finding.

In the case at bar the exemption is created by statute, but there is no reason why the doctrines of waiver and estoppel should not apply and work their legitimate effects the same as if the exemption were created at common law or under the constitution. A statute cannot stand in the way of waiver or equitable estoppel when the facts demand their application in the interest of justice and right. Thus it has been held in an elaborate opinion in which the doctrine is fully discussed that a statute providing that "No waiver of demand or

notice by an indorser of a promissory note is valid unless it is in writing signed by him or his lawful agent," may be waived or the conduct of the indorser may have been such that he is estopped to set up the statute. *Hallowell Bank* v. *Marston*, 85 Maine, 488. "A statutory or even a constitutional provision, made for ones benefit is not so sacred that he may not waive it, and having once waived it he is estopped from thereafter claiming it," says the court in that case.

It remains therefore to ascertain whether the conduct of the defendant has been such in this case that she is estopped from now claiming the privilege of immunity from arrest. Has she so acted as to induce the plaintiff, relying upon her acts, to take steps which otherwise he would not have taken, and to change his course to his own disadvantage, so that, having remained silent when she should have spoken, to allow her now to speak, even to allege and prove the truth, would be contrary to equity and good conscience?

That the defendant was in fact a married woman, Mrs. Mary L. Davis, at the time of her arrest sufficiently appears from the bill of exceptions. She was masquerading as a single woman under the name of Mary L. Elword, or Mary L. Elward, or Mary Elwood. The reason for this subterfuge is best known to the defendant and her husband, but it is admitted that it was in accordance with a preconcerted plan between them when she came to Maine and he went to Pennsylvania. The plaintiff was therefore justified in suing her as a feme sole and in making the arrest on mesne process. Had she then told the truth, the proceedings would immediately have been dropped, because the object of the service by arrest was undoubtedly to secure if possible a guaranty of the payment of judgment through the sureties on the bail bond, and if she were a married woman so that coverture would prevent the taking of such a bond, it is fair to presume that the unnecessary expense of costs and counsel fees would have been avoided by the plaintiff. The bail bond was supposed to take the place of attached property, and as security for the judgment if one were obtained.

But the defendant did not disclose the true situation, which she knew and which the plaintiff did not know and had no means of knowing, and the defendant was aware of his ignorance. Instead she gave the bail bond. That of itself has been held not to constitute a waiver, *Baker* v. *Copeland*, 140 Mass., 342; *Dickinson* v. *Farwell*, 71 N. H., 213, but in the latter case the court said by way of dictum:

"If the plaintiff does not know of the facts which create the privilege, —of the defendant's attendance upon court as a witness for example, —and the defendant is aware of the plaintiff's ignorance he may possibly waive the privilege by omitting to disclose the facts. But it is not necessary to decide that question, for it is not claimed that the plaintiff was ignorant of the reason why the defendant happened to be within the jurisdiction at the time of his arrest."

We would not rest our decision therefore merely upon the defendant's failure to disclose the facts at the time of arrest, because it is undoubtedly true as a general principle that if a person deprives another of his liberty, he does so at his peril. But that is one link in the chain. The action was entered in court and the bail bond was filed. At the April Term, 1919, pleadings were filed. The general issue was pleaded with a brief statement that the affections of the plaintiff's husband for the plaintiff were destroyed before he met the defendant. Up to that point the plaintiff had been kept in utter darkness as to the true situation. The plaintiff's attorney opened the case to the jury, and after he had concluded he asked counsel for the defendant if he would admit the marriage and identity of the parties, referring of course to the plaintiff and her husband. The defendant's attorney replied, "if you mean that Miss Elward is Mrs. Mary L. Davis, yes." This was the first intimation that the plaintiff or her counsel had that the defendant was a married woman. The trial then proceeded, and after a verdict against her this motion for an exoneretur was made by the defendant. We think this came too late. To permit such a scheme to succeed is to put a premium on wilful deception, the practice of which had involved the plaintiff in useless cost and expense, and worked gross injustice.

It is true, as claimed by the defendant, that the status of the petitioner for discharge at the time when application is made is the test, and it might happen that although the arrest had been valid when made, through intervening circumstances a discharge should be granted, as for instance, if the debtor had received his discharge in bankruptcy before judgment rendered. The reason is that if the principal were surrendered by the bail, the court could not commit him, or if committed he would be entitled to immediate discharge. *Beers* v. *Haughton*, 9 Pet., 329; *White* v. *Blake*, 22 Wend., 162; *Washburn* v. *Phelps*, 24 Vt., 506; *Champion* v. *Noyes*, 2 Mass., 481, cited in *Fogg Co.* v. *Bartlett*, 106 Maine, 122, 124. That however is

not this case. Here if the bail should surrender the principal she would not be entitled to a discharge because through her own conduct she has deprived herself of this privilege she had once possessed, and having once waived it, she is estopped from thereafter claiming it.

Authorities for the position taken are not lacking.

In *Moses* v. *Richardson*, 8 B. & C., 421, the court of Kings Bench declined to discharge a married woman from arrest on execution where she had been sued as a feme sole, and suffered judgment to go by default. "She must be left to her writ of error," said Lord Chief Justice Tenterden. In *Poole* v. *Canning*, L. R., 2, P. C., 241, a married woman, sued as a feme sole, pleaded coverture but offered no evidence in support of the plea. A verdict was found against her and she was afterwards arrested upon the execution. She then applied for a discharge. The discharge was refused. Keating J. said, "She comes to ask for her discharge on the ground that she is that which by the judgment of the Court she is pronounced not to be." Willes J. said there was no authority for extending the power of discharge "to the case of one sued as a feme sole suffering judgment by default, or to the case of a married woman who has pleaded her coverture and has allowed the verdict to go against her on the trial of that issue and so has created a sort of estoppel of the advantage to which it would be unjust to deprive a creditor without at least indemnifying him against the costs which he has been unnecessarily put to."

These two cases were cited and quoted in *Winchester* v. *Everett*, 80 Maine, 535, 541, where it was held that a judgment creditor is not liable in trespass for refusing on notice that his judgment debtor is a married woman, to release her from arrest already made by an officer on an execution regularly issued on a judgment rendered against her on default.

In *Weston* v. *Palmer*, 51 Maine, 73, the two defendants were in fact husband and wife, but there was nothing in the writ to indicate that relation and the court held that the wife was sued as a feme sole. Coverture was not pleaded. Judgment was rendered on default and the court refused a writ of error. The ground of the decision is stated as follows:

"They now claim that because they had a legal defense . . . . which they chose not to avail themselves of, the judgment is erroneous and ought to be reversed. We think otherwise. They had their

day in court. They have once had a fair opportunity to try the same questions which are now presented. They chose not to avail themselves of it, and the law will not allow them another."

The same principle of equitable estoppel runs through all these cases. It obtains here. The defendant in this legal battle voluntarily laid down or designedly concealed a weapon which she might have successfully used. It is too late now for her to resume it and thereby unjustly deprive the plaintiff of the fruits of her victory.

Exceptions sustained.

MARK MERROW

vs.

INHABITANTS OF NORWAY VILLAGE CORPORATION.

Oxford. Opinion November 25, 1919.

Real actions. Rule as to definiteness of description of property under R. S., Chap. 109, Sec. 21. General rule in regard to necessary description in writs of entry.

On agreed statement. Plaintiff brought a real action against the defendants at the May Term, 1918, Oxford County, demanding "against the said defendants the possession of the lot of land in Norway Village Corporation which is known as the Fordyce McAllister place" &c. On the second day of the return term the defendants filed a disclaimer of the entire tract and of all interest therein. At the February Term, 1919, they filed a special demurrer to the writ on the ground that the description of the demanded premises was not sufficiently definite and was not so certain that seizin could be delivered to the sheriff without reference to some description dehors the writ.

Held:

1. The description is sufficiently precise to meet the requirement specified in the demurrer. It is not expected that the officer can identify the premises any more than he could identify a stranger whom he is directed to arrest, without inquiry.

2. The true test of clearness of description however is that stated in the original statute, (Public Laws, 1826, Chap. 34, Sec. 1) of which R. S., Chap. 109, Sec. 21, is a condensation, viz: they "shall be so defined and described in the declaration that the defendant may know with reasonable certainty what lands and tenements are demanded."

3. Applying this criterion the description is adequate. The defendants have admitted the fact by filing the disclaimer. They had no difficulty then in determining what premises were demanded, but said that they were not in possession of them and had no title or interest therein.

Writ of entry. Defendant filed disclaimer and also brief statement setting forth that the defendant was not a tenant of the freehold and not in possession of the premises described in plaintiff's writ. At a later term, the defendant filed a demurrer, which was overruled by presiding Justice; to which ruling defendant filed exceptions, and by agreement the case was submitted to the Law Court upon the record and pleadings filed. Judgment in accordance with opinion.

Case stated in opinion.

Alton C. Wheeler, for plaintiff.

Albert J. Stearns, and William W. Gallagher, for defendant.

SITTING: CORNISH, C. J., HANSON, PHILBROOK, DUNN, MORRILL, DEASY, JJ.

CORNISH, C. J. On agreed statement. At the May Term, 1918, of the Supreme Judicial Court for Oxford County the plaintiff brought this writ of entry demanding "against the said defendant the possession of the lot of land in Norway Village Corporation which is known as the Fordyce McAllister place" &c. On the second day of the return term the defendants filed a disclaimer of the entire tract and of all interest therein. At the February Term, 1919, the defendants filed a special demurrer to the writ on the ground that the description of the demanded premises was not sufficiently definite and precise and was not so certain that seizin could be delivered to the sheriff without reference to some description dehors the writ. The presiding Justice overruled the demurrer and gave judgment for the plaintiff. To this ruling the defendant took exceptions, but did not seasonably perfect them. At the May Term, 1919, counsel agreed that the case should not be prejudiced thereby but that the cause should be reported to the Law Court upon an agreed statement

"to be decided by said Law Court in like manner and with like results as is provided in the case of appeals, ... the Law Court to render such judgment as the legal rights of the parties require."

The point at issue is the sufficiency of the description in the writ, viz: "the lot of land in Norway Village Corporation which is known as the Fordyce McAllister place."

The criterion as to definiteness in description is fixed by the statute governing real actions. "In such action the demanded premises shall be clearly described in the declaration, otherwise the Court may direct a nonsuit." R. S., Chap. 109, Sec. 21. If this should be construed to mean that the premises must be so clearly defined that the officer having the execution in his possession may find them, we think in the case at bar that requisite is met. It is not expected that the officer can identify them, any more than he could identify a stranger whom he is directed to arrest, without inquiry. *Willey* v. *Nichols*, 59 Maine, 253-4. On inquiry this lot could be readily found. It is "the" lot, not "a" lot, thereby implying that there is only one. That one is known as the Fordyce McAllister place and is situated in Norway Village Corporation. This description falls well within the rule followed in *Willey* v. *Nichols*, 59 Maine, 253, supra, and *Bragg* v. *White*, 66 Maine, 157. "If the officer fails to find it, the tenant will receive no harm. We apprehend the fear is that he may find it," is the trenchant language of Chief Justice Appleton in the case last cited.

If however, the true test of clearness of description is that stated in the original statute of which the sentence above quoted in our present revision is a condensation, we reach the same conclusion. The words of the original statute are these: "The premises demanded shall be so defined and described in the declaration that the defendant may know with reasonable certainty what lands and tenements are demanded; otherwise the Court before whom any such action shall be pending shall, on motion of the defendant direct a nonsuit against the demandant with costs of suit; unless they shall, for sufficient reasons, see fit, on equitable terms to order an amendment." Public Laws 1826, Chap. 344, Sec. 1. This was preserved in almost its entirety in the revision of 1841, Chap. 145, Sec. 24, but was condensed to its present form in the revision of 1857, Chap. 104, Sec. 21, and this condensation has been since maintained.

We think the test therein prescribed is the correct and reasonable one by which to judge the sufficiency of the description. It must be such as to enable the defendant to know with reasonable certainty what lands or tenements are intended, so that he may intelligently protect his rights by pleadings or disclaimer. He, not the sheriff, is the party needing a clear description in order that he may not be obliged to act in the dark. A study of the original statutory provision leads to no other conclusion.

Applying this test, we find that the defendants themselves have admitted the adequacy of description. They had no difficulty in determining what property was covered by the declaration, because on the second day of the return term they did not ask for a non suit because of indefinite description, but filed a disclaimer in which they say that they were not on the date of the plaintiff's writ, nor at the time of disclaimer, "tenant of the freehold therein described, and that they were not in possession of the premises described in the plaintiff's writ when said action was commenced, and they disclaim any right, title or interest therein." The description was sufficiently clear to enable the defendants to comprehend what premises were meant, and to declare that they were not in possession of them. That is sufficient.

Under the broad powers given by the agreed statement, the entry will be,

Judgment for demandant with costs.

LOUIS W. HARRIS, Appellant from Award of Damages

vs.

CITY OF SOUTH PORTLAND.

Cumberland. Opinion November 25, 1919.

Dedication of streets. Rule where lots are sold according to certain plans or plottings. Rule where that part laid out as a street has not been accepted by the municipality and has been occupied adversely. Rights of way for which damages have been paid being lost by adverse possession.

In 1863 one Day owning a large tract of land in what is now South Portland, plotted it into several hundred lots and caused a plan to be made with several avenues delineated thereon, one of which was Adams Avenue. At or about the time of plotting he sold several lots by reference to the plan, five of which abutted on Adams Avenue. The plotted streets were never accepted by the municipality.

Between 1863 and 1866 Day sold about ninety lots, all with reference to this plan, and then conveyed the balance of the tract as an entirety by warranty deed without reserving any of the delineated streets, but excepting the lots previously sold. The entire tract, with no streets opened, remained practically unchanged until 1918.

In 1869, one Merriam, the plaintiff's predecessor in title, obtained by warranty deed title and possession of two of the five lots abutting on Adams Avenue which had been sold by Day previous to his sale of the remainder of the tract, and at some time prior to 1875 erected a fence enclosing said two lots and that part of Adams Avenue lying opposite thereto, using the whole as one lot. From that time until 1918, a period of forty-five years, Merriam, and later the appellant, his grantee, have had open, notorious, continuous and exclusive possession of the fenced portion of Adams Avenue in connection with their lots.

In 1918, the defendant laid out a street over what had been plotted as Adams Avenue, but the municipal officers refused to award the appellant any damages for the taking. From that decision this appeal was taken.

Held:

1. The conveyance by Day of these two lots abutting on Adams Avenue, so-called, carried with it to the grantee a right of way in the proposed street which neither Day nor his successors in title could afterwards destroy or interfere with; and to the public an incipient dedication of the street which neither Day nor his successors in title could afterwards revoke.

2. Such an incomplete dedication imposes no burden upon the municipality until the street is duly accepted by competent authority or the public has used it at least twenty years. Neither of these events happened.
3. The adverse possession by Merriam and his successor ripened into a title as against the successors to Day in the balance of the tract in whom was the fee of the street subject to the inchoate easement of travel in the public.
4. So far as the municipality is concerned such incipient dedication must be accepted within a reasonable time in order to be effective.
5. A period of forty-five years with no movement whatever on the part of the town or city toward acceptance is clearly beyond what could be deemed reasonable on the part of the municipality.
6. In view of all the facts and circumstances the appellant had acquired title to the premises in question by adverse possession against the owners of the fee, and the city had no right of passage therein in 1918 because it had failed seasonably to accept the gift from the dedicators.

Appeal from the decision of Municipal Officers relative to awarding of damages for taking of certain lands for a street. Reported to Law Court upon agreed statement. Judgment in accordance with opinion.

Case stated in opinion.

Frank H. Haskell, for appellant.

Edward H. Wilson, and William A. Connellan, for appellee.

SITTING: CORNISH, C. J., HANSON, PHILBROOK, DUNN, MORRILL, DEASY, JJ.

CORNISH, C. J. This is an appeal from the decision of the municipal officers of the city of South Portland because of their refusal to award any damages for the taking of certain land in said city in 1918 for a street. The proceedings are all admitted to be regular. The single point at issue is the title or interest of the petitioner in the land taken.

From the agreed statement of facts it appears that in 1863 one Day owned a large tract of land in the town of Cape Elizabeth, now South Portland, of which the premises described in the complainant's petition were a part. In that year he plotted the land into several hundred lots, and caused a plan thereof to be made, with several streets or avenues delineated thereon, said plan being marked as "Days plan of East Portland." One of said streets was named

Adams Avenue. At the time of the original plotting in 1863, Day sold several lots by reference to the plan, five of said lots abutting on Adams Avenue, of which the complainant's were two, Nos. 35 and 36 in block 20. The plotted streets were never accepted nor laid out by the town of Cape Elizabeth, nor by the city of South Portland until 1918. Between 1863 and 1866, Day sold about ninety lots, all with reference to the same plan, and then conveyed the balance of the tract as an entirety by warranty deed, without reserving any of the streets plotted on said plan, but excepting the lots previously sold. No lots have been sold since that time. The entire tract, with no streets opened, remained practically unchanged until 1918.

In 1869 one James Merriam, complainant's predecessor in title, received title and possession by warranty deed of said lots 35 and 36, block 20, and at some time prior to 1875 erected a fence enclosing said lots and that part of Adams Avenue described in complainant's petition as being a strip 112 feet in length and 36 feet in width, thereby annexing to his purchased lots that portion of Adams Avenue lying opposite thereto and using the whole as one lot. Merriam and his successors in title ever afterward kept and maintained said fence continuously and used that portion of Adams Avenue as a part of their garden, having open, notorious, continuous and exclusive possession thereof and exercising dominion and control over it as thus fenced, until the laying out of the new street by the city in 1918. Merriam himself so retained and used both the lots and the disputed tract for a period of over 34 years or until March 29, 1909, when he conveyed all of said property, including the disputed piece, by warranty deed to one Hutchins, and on the same day Hutchins conveyed all by warranty deed to the plaintiff, and their possession has been of the same character and to the same extent as Merriam's.

Under this state of facts did the complainant acquire title to that portion of the premises which had been originally delineated on the plan as a part of Adams Avenue? If so, he was entitled to damages, which the parties have agreed should be four hundred dollars; if not, then the decision of the municipal officers awarding no damage should be sustained.

Concerning the legal effect of the conveyance of lots 35 and 36 by Day in 1863 there can be no doubt. His deed referring to the plan of the plotted lots and streets, and bounding the lots conveyed by one of those delineated streets carried with it to the grantee a right of way

in the street which neither Day nor his successors in title could afterwards destroy or interfere with; and to the public an incipient dedication of the streets which neither the grantor nor his successors in title could afterwards revoke. *Bartlett* v. *Bangor*, 67 Maine, 460.

So far as the public is concerned this constitutes, however, only an incomplete dedication or a proposition to dedicate on the part of the owner, and imposes no burden upon the municipality until the street is duly accepted by competent authority or the public has used it for at least twenty years. In this case neither of these events happened. There was no acceptance by the town or city, nor was there any use in fact by the public. The land constituting the proposed street remained the same as when the plan was drafted except that from 1875 at least the portion opposite these two lots was appropriated and used by the grantee and his successors, and so continued to be used by them in connection with the lots until 1918, a period of forty-three years. Such adverse possession ripened into a title as against the successors in title to Day in whom was the fee to the streets subject to the inchoate easement of travel in the public. *Campmeeting Association* v. *Andrews*, 104 Maine, at 349.

So far as the municipality is concerned the doctrine of adverse possession does not apply because the municipality had not taken possession nor exercised any dominion over the land. Their inchoate rights growing out of the incipient dedication were lost under another rule of law, which is that a proposition to dedicate land for a public street, which is at best only an inference of law from the mere fact that sales are made according to a plan, must be accepted within a reasonable time in order to be effective. *Dorman* v. *Bates Mfg. Co.*, 82 Maine, 438-449; *Kelley* v. *Jones*, 110 Maine, 360, 364. What is a reasonable time must be determined by the facts and circumstances of each particular case. A period of forty-three years with no movement whatever on the part of the town or city toward acceptance either by formal vote or by user, that is either by word or by act, is certainly beyond what could be deemed reasonable on the part of the municipality. In fact the city evidently took the same view because it did not proceed to establish this way by accepting the offer of dedication but laid out the street in accordance with the usual practice by metes and bounds, and recited the names of the five owners of the land thus taken, among whom was the complainant.

Under R. S., Chap. 24, Sec. 106, rights of way in streets which have been actually laid out and the damages for which have been paid by the municipality, may be lost by adverse possession arising from the erection and maintenance of buildings or fences for more than forty years. It would hardly seem reasonable to allow a longer time than that for the municipality to determine whether or not it will accept the gift of a street that has been offered by the proprietor of plotted land.

It is the opinion of the court that, in view of all the facts and circumstances, the appellant had acquired title to the premises in question by adverse possession against the owners of the fee, and that the city had no right of passage therein because it had failed seasonably to accept the gift from the dedicators.

Appeal sustained with costs.
Judgment for appellant for $400.

ARTHUR STANLEY *vs.* ELMER J. PRINCE, et als.

Piscataquis. Opinion November 26, 1919.

Actions for libel. Proof of malice, where the libellous words impute the commission of a crime. Necessary elements of crime of larceny. Privileged communication.

Action on the case for libel, by the publication by the defendants, selectmen of the town of Sangerville, in the town report of 1918 among the available assets of the town this item: "Arthur Stanley, Larceny Culvert, $50." The defendants pleaded the truth of the statement and also that the words were privileged because written and published by them in the performance of their official duty. The jury returned a verdict in favor of the plaintiff for $1500.

Upon motion for new trial by defendants it is

Held:

1. The printed words, as imputing a crime, were actionable per se.
2. The plaintiff was not guilty of larceny under the legal definition of that term.

In order to constitute larceny there must be not only a taking and carrying away of the goods of another, but there must also exist contemporaneously a felonious intent on the part of the taker which means a taking without excuse or color of right with the intent to deprive the owner permanently of his property and all compensation therefor.

3. The jury were justified in finding such felonious intent utterly lacking. The plaintiff evidently took the metal culvert in this case after two conferences with the chairman of the selectmen and openly used it in constructing a driveway across a ditch in the highway for his employer, Mr. Coburn, expecting that Mr. Coburn would pay for it if the town officers exacted pay, or if they did not require compensation, that Mr. Coburn would receive it as had many other citizens under like conditions.

4. It is the duty of town officers charged with the expenditure of money to make a full and detailed report of all their financial transactions in behalf of the town, with a full account of receipts and disbursements, of indebtedness and resources, together with a list of all delinquent tax payers and the amount due from each. R. S., Chap. 4, Sec. 45. A report published within the requirements and spirit of that statute would doubtless be regarded as privileged.

5. When, however, the selectmen in this case went further and published the libellous charge of larceny against the plaintiff they transcended their duty, stepped outside the protection of privileged communication and became amenable to the law. The privilege is only commensurate with the duty.

6. The verdict is not excessive. The plaintiff is a reputable citizen holding an important position with a local industry. The defendants by virtue of their official position were also men of influence whose words carried weight. These town reports were distributed among the voters of the town. Copies must be deposited in the office of the selectmen or clerk there to remain as a part of the archives of the town. R. S., Chap. 4, Sec. 45. Such reports are also required by statute to be filed in the State Library there to remain as a part of the archives of the State. R. S., Chap. 3, Sec. 15. Printed defamation is more potent than spoken because more permanent. A criminal charge made under such circumstances is therefore a most serious matter.

Moreover the attitude and conduct of the defendants throughout the whole transaction were such as to warrant the jury in awarding punitive damages if they saw fit to do so.

Action on the case for libel. Verdict for plaintiff. Defendant filed motion for new trial. Judgment in accordance with opinion.

Case stated in opinion.

C. W. Hayes, and Hudson & Hudson, for plaintiff.

W. R. Pattangall, J. S. Williams, and H. E. Locke, for defendants.

SITTING: CORNISH, C. J., HANSON, DUNN, MORRILL, DEASY, JJ.

CORNISH, C. J. Action on the case for libel. Plea, general issue, with brief statement, alleging that the words complained of were true, and also that they were qualifiedly privileged because written and published by the defendants in their capacity as selectmen of the town of Sangerville and in the performance of their official duty. A verdict for the plaintiff in the sum of $1500 the defendants ask to have set aside on a general motion. No exceptions were filed.

The following facts appear from the record:

The plaintiff is a construction engineer in the employ of the Old Colony Woolen Mills Company of Sangerville. Mr. L. J. Coburn is Vice President, Assistant Treasurer and Manager of that Company. In September, 1917, the plaintiff who had been engaged in superintending the remodelling of Mr. Coburn's residence, had a crew of men constructing a concrete driveway from the garage, past the side of the house to the main street. He needed a metal culvert at the ditch, and asked Mr. Coburn where he could secure one. Mr. Coburn said he could obtain one from the town as he understood it was customary for the town to furnish them.

At that time the town had two metal culverts on hand. The plaintiff asked Mr. Prince, the first selectman, if he could have one for Mr. Coburn's driveway. Mr. Prince replied that he would take the matter up with the road commissioner and the other selectmen, and the plaintiff testifies that Mr. Prince also said that "it was customary but not compulsory to let people have culverts." Mr. Prince's account of this interview is that the plaintiff said "he was putting in a driveway for Mr. Coburn and wanted to know if the town furnished driveways or culverts for folks, culverts to put under driveways. . . . . I told him we had in some cases and some they had not." There is no material difference in these two statements. Within a day or two the plaintiff spoke to Mr. Prince again about the matter and Mr. Prince told him that he had been busy and had not seen his associates. When the work had progressed so far that the culvert was needed immediately, the plaintiff went to the town hall where the culverts were stored, took one, carried it to the Coburn residence, placed it in the ditch and embedded it in concrete. The road commissioner, Mr. Hill, shortly after this asked the plaintiff if he had taken the culvert and he told him that he had and the reason for so doing. The next step was a consultation between the three selectmen, the road commissioner and their attorney,

followed by a letter from the attorney, the original of which was not in evidence and the tenor of which the parties did not agree upon. The plaintiff says the letter demanded $50 in payment of the culvert within three or four days, otherwise the plaintiff would be arrested. The defendants contend that it stated that unless adjustment was made within forty-eight hours the attorney would proceed as he understood the law. No reply was sent. A week later, the plaintiff was arrested for larceny, was tried before the Municipal Court and found guilty. An appeal was taken to the March Term, 1918, of the Supreme Judicial Court for Piscataquis County. At the conclusion of the evidence at that term the presiding Justice ordered the jury to return a verdict in favor of the respondent, Mr. Stanley, and he was accordingly discharged. In January, 1918, the plaintiff was arrested on a special writ in a civil action brought by the selectmen in the name of the town to recover the value of the culvert placed at $50, and gave bond for his release. This suit was settled at the same term the criminal trial was held.

We come now to the alleged libel which was contained in the town report of Sangerville prepared and published by these defendants for the municipal year 1917-1918, and presented at the March meeting, 1918. On page 18 of that report the defendants incorporated under the list of assets available these words "Arthur Stanley larceny, culvert, $50."

This charge forms the basis of the present action.

The law of libel is so well established and so familiar that it needs no discussion. A succinct statement of the several principles involved in this case is sufficient. It cannot be doubted that the printed words impute a crime and are libellous and actionable per se. No other reasonable inference can be drawn by the reader of the report than that Arthur Stanley was guilty of the crime of larceny in stealing a culvert from the town of Sangerville, the value of which was fifty dollars. Actual malice need not therefore be proved. Malice in law is sufficient. Defamatory words imputing a crime are presumed to have been uttered maliciously. If the case stopped here the only question would be one of damages.

We come therefore to the points raised in defense.

1. In the first place the defendants pleaded the truth of the allegation and persisted in the contention before the Law Court. Such a plea if established was a complete justification under the statute

"unless the publication is found to have originated in corrupt and malicious motives." R. S., Chap. 87, Sec. 45. *Pierce* v. *Rodliff* 95 Maine, 346; *Pease* v. *Bamford*, 96 Maine, 23.

The defendants urge that the plaintiff was guilty of larceny under the legal definition of that term. This contention we cannot endorse.

In order to constitute a larceny there must be not only a taking and carrying away of the goods of another, but there must also exist contemporaneously the felonious intent, the animus furandi, on the part of the taker, which means a taking without excuse or color of right with the intent to deprive the owner permanently of his property and all compensation therefor. This felonious intent is the very gist of the offense. Here that essential element is entirely lacking. The plaintiff had a justifiable excuse. He testified that he had no purpose to deprive the town of their compensation. He expected that Mr. Coburn would pay for the culvert if the town officers exacted pay; or if they did not require compensation, that Mr. Coburn would receive it as had many other citizens under like conditions. All the circumstances bear this out. . The jury were justified in finding that the delay or hesitancy on the part of the Chairman of the Selectmen did not arise over the question of allowing Mr. Coburn to have the culvert, but whether he should have it free of charge. That was undoubtedly the idea in the mind of Mr. Stanley and theft was farthest from his thought. To take an article of the size of this metal culvert, eighteen feet long, transport it in broad daylight through the streets from the town hall to the Coburn residence, leave it there over night, and then the next day to embed it in the concrete driveway at the ditch, in the face and eyes of Mr. Prince, the Chairman of the Board, who lived directly across the street from the Coburn residence, hardly comports with the crime of larceny or the practices of a thief. The jury must have found that the defense of truth could not be sustained and their conclusion is clearly correct.

2. In the second place the defendants claim that believing the charge of larceny to be true, they published it in their report as selectmen without malice toward the plaintiff and that therefore it was privileged.

"A publication is conditionally or qualifiedly privileged where circumstances exist, or are reasonably believed by the defendant to exist, which cast on him the duty of making a communication to certain other persons to whom he makes such communication in the

performance of such duty." 17 R. C. L., page 341. That is the settled rule. *Bradford* v. *Clark*, 90 Maine, 298; *Sweeney* v. *Higgins*, 117 Maine, 415.

It is the duty of town officers charged with the expenditure of money to make a full and detailed report of all their financial transactions in behalf of the town, with a full account of receipts and disbursements, of indebtedness and resources, together with a list of all delinquent tax payers and the amount due from each. This is required by statute. R. S., Chap. 4, Sec. 45. A report published within the requirements and spirit of that statute would doubtless be regarded as privileged. The defendants complied with that statute and were free from blame, when under the heading, "Financial Statement" they itemized the resources of the town and inserted this item, "Due from Arthur Stanley, culvert, $50." That showed that Mr. Stanley was a debtor to the town in that amount and was properly included among the assets. No suit for libel could be maintained on that charge and none was attempted. That was a privileged communication.

When however the selectmen went further and in another part of their report published the libellous charge of "Arthur Stanley, larceny, culvert $50." they transcended their duty, stepped outside the protection of privileged communication and became amenable to the law. The privilege is only commensurate with the duty. It was their duty to publish the fact of the indebtedness from the plaintiff among the resources of the town. This they did in another place, as we have seen, but they far exceeded their duty when they made an independent entry and charged him with the crime of larceny. It would seem that they sought to avail themselves of the occasion merely as a means of bringing the plaintiff into public disgrace. Under such circumstances the occasion furnishes no justification. Shaw, C. J. in *Bradley* v. *Heath*, 12 Pick., 163 at 165.

The defense of privileged communication cannot avail.

3. This leaves only the question of damages to be considered by the court. The verdict is for $1500 and the defendants argue that this is grossly excessive. We cannot so view it.

The plaintiff was a reputable citizen, holding an important position with the Old Colony Woolen Mills Company. The defendants by virtue of their official position also were men of influence whose words carried weight. These town reports were distributed among the

voters of the town, and copies must be deposited in the office of the selectmen or clerk, R. S., Chap. 4, Sec. 45, there to remain as a part of the archives of the town. Moreover under R. S., Chap. 3, Sec. 15, such reports are required to be filed in the State Library, there to remain as a part of the archives of the State. Printed defamation is more potent than spoken because more permanent. It endures. A criminal charge made under such circumstances is therefore a most serious matter.

Moreover the attitude of the municipal officers from the beginning seems not to have been that of officials endeavoring with fairness and justice to perform their public duties, but rather that of partisans having some grudge to gratify either toward this plaintiff or Mr. Coburn. There is strong inferential evidence of actual malice, malice in fact. The speedy notification for settlement or arrest, the arrest and trial that followed with no delay, the claim of $50 for a metal culvert costing and worth about $20, the service of the civil writ therefor by arrest, instead of the usual course by summons when so far as appears there was no pecuniary necessity therefor, the setting up of the truth in the pleadings by way of justification, *Davis* v. *Starrett*, 97 Maine, at 577, and the adherence to the same in argument, even after the Supreme Judicial Court had discharged the plaintiff from arrest under this same charge, all this reveals a persistent purpose on the part of the defendants to harass and humiliate the plaintiff with respect to a matter which in itself and as among broad-minded business men would be regarded as trivial. It was a case therefore in which punitive damages might well be awarded if the jury saw fit to grant them. In view of all the facts we cannot say that the amount of the verdict is manifestly excessive.

The entry will be,

Motion overruled.
Judgment on the verdict.

In Re Guilford Water Company.

Piscataquis. Opinion December 1, 1919.

Right of Public Utilities Commission to inquire into, revise and regulate rates of service for water companies or other public service corporations, even though certain definite contracts for said service are then in force. General rule as to the right of the State to regulate the charges of public service corporations, and also right of State to alter, change or revise contracts or agreements entered into by said public service corporations.

Having been authorized by the Legislature to "contract for a supply of water for fire or other purposes for a term of years," the town of Guilford, in the year 1910, entered into an agreement with the Guilford Water Company whereby, among other things, the latter stipulated that, for a period of twenty years from that time, it would furnish water for domestic purposes to dwellers in Guilford village, at an annual first faucet rate of $6.00.

Without legislative permission, the Water Company soon afterward agreed with another company that, for an annual payment of $300.00, it would function successively with the latter in providing a public service in the nearby village of Sangerville,—the one to collect and furnish a supply of water, and the other to distribute and sell it. Later on, the Legislature gave leave to the one company to supply the other, at a rental, proportional within defined limits, to the number of faucets and hydrants in the respective towns, but the companies never have changed the terms of their original agreement.

After supplying water to individual takers, in conformity to its contract with Guilford, for somewhat more than one-third of the stated term, the Guilford Water Company petitioned the Public Utilities Commission to approve and allow a revision of rates uniformly increasing the charge for the first faucet from $6.00 to $8.00. The town in its corporate capacity, and citizens in their own behalf, protested that such increase would be in violation of a valid contract. Moreover, they insisted that the rental or charge against the Sangerville Company should be increased.

Upon hearing and investigation, an increase of faucet rate was granted, less in amount than applied for. The Commission ruled, that though inadequacy of compensation for water supplied the Sangerville Company was patent, yet it was powerless to say what sum that Company rightly should pay to the other

On exceptions to this court, the town, renewing its attack, contended that as to private takers, the contract rates were controlling; and that the Commission had power to determine what quantity of money the Sangerville Company should pay for its supply.

Held:

That the State, as an attribute of sovereignty, is endowed with authority, in the appropriate exercise of the police power, to regulate the charges of public utilities. Regulation in such cases is not an unwarranted interference with the right of contract which the constitutional guaranty of the enjoyment of liberty includes. Private contracts, concerning property rights, are inviolable, but no obligation of a contract can extend to the defeat of legitimate governmental power. Contract rights, which affect the public safety and welfare, must yield to that which is essential to the general good. The Legislature, in the exercise of the police power, is unrestricted by the provisions of contracts between individuals or corporations, or between individuals and municipal corporations.

The State may decrease or increase the contract specified rates for public utility services as justness and reasonableness may require. Underlying such right of regulation is the fundamental doctrine that the utility for the adequate doing of that which it was chartered to do, should receive tolls sufficient to enable it to meet the exacted requirement. Rates neither should be so low as to deprive the utility of means of appropriately discharging duty nor so high as to unduly burden the public. Safe and efficient service, with substantial equality of treatment in like situations, is the essential.

In creating the Public Utilities Commission, the Legislature conferred upon that body powers of great scope, and imposed upon it great responsibilities. Subject to review on questions of law, the Commission has authority, inclusive of quasi-legislative and quasi-judicial power, to fix rates for all public utility services.

This determination is not repugnant to the proviso of Section 34 of the Utilities Act respecting contracts existent January 1, 1913, but interpretation of that proviso is not involved here. The question of the presented case is, not whether there shall be discrimination concerning first faucet rates in Guilford, but whether all such rates uniformly shall be increased, the contract notwithstanding.

With reference to the supply of water to the Sangerville Company, the unjust discrimination clause of the statute is of consequence. The existing arrangement between the two corporations never has enjoyed the approval of the State. The Guilford Company may not rightfully supply the Sangerville Company on any other than the statutory terms. It is the duty of the Public Utilities Commission to see to it that the statute is observed.

The first exception of the remonstrants is overruled. Their second exception, that relative to the ruling respecting the amount paid by the Sangerville Water Supply Company to the Guilford Water Company is sustained. The clerk of the Law Court will so certify to the clerk of the Public Utilities Commission.

Exceptions under R. S., Chap. 55, Sec. 55, from the ruling and findings of Public Utilities Commission. Judgment in accordance with opinion.

Case stated in opinion.

Hudson & Hudson, for town of Guilford.

J. S. Williams, for Guilford Water Company.

SITTING: CORNISH, C. J., SPEAR, HANSON, PHILBROOK, DUNN, MORRILL, WILSON, DEASY, JJ.

DUNN, J. The corporation of the Guilford Water Company owes its existence to a charter specially granted in the year of 1909. P. & S. L., Chap. 226. Its powers were broadened by an act of 1911. P. & S. L., Chap. 249. So far as relevant to the issues of this case, the original grant of authority limited the Company to conveying to and supplying the inhabitants of the town of Guilford "with water for all domestic, sanitary, municipal, and commercial purposes." The town was empowered "to contract with said corporation for a supply of water for fire or other purposes for a term of years, and at the expiration of such contract to renew or change the same."

On August 10, 1910, the Water Company and the town entered into a written agreement, whereby the Company obligated itself, for the period of twenty years then next ensuing, to construct, maintain and operate a system of water works, for the purposes, in brief:

(a) of constantly providing, at hydrants in certain of the public streets in Guilford, enough water for the protection of property against loss or damage by fire;

(b) of furnishing to the inhabitants of Guilford dwelling in the village, "a sufficient supply of pure water for domestic purposes on the following terms and rates: Six dollars per year for the first faucet for each family. . . . ."

When that agreement was made, the works of the Guilford Company already were in process of construction. About two months later, by promotion of the contractor installing the Guilford system, a corporation was formed under the provisions of the general incorporation statute, to supply water to the nearby village of Sangerville, in the town of that name. For convenience, this corporation, organized as the Sangerville Water Supply Company, will be referred to as the Sangerville Company. Its main extends to the stand-pipe of the

Guilford Company. From the beginning, (though for a time going beyond the extent of rightful corporate power,) the two companies have functioned successively in providing a public service in Sangerville,—the one, collecting and furnishing a supply of water,—and the other distributing and selling it. For the supply, the Guilford Company invariably has charged the Sangerville Company $300.00 a year.

In 1911, the Guilford Water District was chartered by the Legislature to acquire by purchase the property owned by the Guilford Water Company, and used by the latter in supplying water to Guilford. P. & S. L., 1911, Chap. 201. The charter imposed, that the District assume and carry out all then existing authorized contracts of the Guilford Company, and extended permission to furnish water to the Sangerville Company at a rental, proportional within defined limits, to the number of faucets and hydrants in the respective towns. The District never was organized. At the same session, the Legislature invested the Guilford Company with right to supply water to the Sangerville Company "according to the terms and conditions set out in the charter of the Guilford Water District." P. & S. L., 1911, Chap. 249.

After supplying water, in conformity to its contract with Guilford, for a period extending over somewhat more than one-third of the stated term, the Guilford Company petitioned the Public Utilities Commission to approve and allow a revision of rates, uniformly increasing the annual charge for the "first faucet" from $6.00 to $8.00. The town of Guilford, and individual citizens of that town, remonstrated that such increase palpably would be in violation of a valid contract. They contended that the Commission could neither order nor permit it. Moreover, they argued that the amount of the rental or charge against the Sangerville Company should be made greater. Following hearing, and upon extensive investigation, the Utilities Commission granted an increase of faucet rate, less in amount than applied for. With regard to the charge for the Sangerville supply, the Commission held, that though inadequacy of compensation was manifest, yet it was powerless to regulate what sum the one company rightly should pay to the other. The case is here on exceptions by the town of Guilford. Renewing its attack, the town emphatically asserts: (1) that in view of the contract the Commission cannot, either directly or by acquiesence, sanction any change in the rates therein set out; (2) that the Commission had

plenary power to determine what quantity of money should be paid by the Sangerville Company to the Guilford Company for water to be supplied the former by the latter.

That the State, as an attribute of sovereignty, is endowed with authority to regulate the rates of charges of Public Utilities, is past dispute. *Munn* v. *Illinois*, 94 U. S., 113; *Home Teleph. & Teleg. Co.* v. *Los Angeles*, 211 U. S., 265; *Minnesota Rates Cases*, 230 U. S., 352. It acts, in such connection, either immediately through legislative act or mediately through a subordinate body, in the exercise of the police powers; those powers which "are nothing more or less than the powers of government inherent in every sovereignty, ... the power to govern men and things." License Cases, 5 How., 583; *Veazie* v. *Mayo*, 45 Maine, 560; *B. & M. R. R. Co.* v. *County Commrs.*, 79 Maine, 386; *Skowhegan* v. *Heselton*, 117 Maine, 17. That there is a power, which has never been surrendered by the States, in virtue of which they may ,within certain limits, control everything within their respective territories, and upon the proper exercise of which, under some circumstances, may depend the public health, the public morals, or the public safety, is conceded in all the cases. *New Orleans Gas Light Company* v. *Louisiana Light &c. Co.*, 115 U. S., 650. Regulation in such cases is not an unwarranted interference with the right of contract which the constitutional guaranty of liberty includes. Private contracts, concerning property rights, are inviolable. Con. U. S., Art. 1, Sec. 10; Con. of Maine, Art. 1., Sec. 11. The constitutional inhibitions do not go to contracts touching governmental functions. *Stone* v. *Mississippi*, 101 U. S., 814. No obligation of a contract can extend to the defeat of legitimate governmental power. *Legal Tender Cases*, 12 Wall., 457; *Stone* v. *Mississippi*, supra; *Butchers' Union Company* v. *Cresent City Company*, 111 U. S., 746; *Chicago, Burlington & Quincy R. Co.* v. *Nebraska*, 170 U. S., 57. Contract rights, which affect the public safety and welfare, must yield to that which is essential to the general good. *Union Dry Goods Company* v. *Georgia Public Service Corp.*, 248 U. S., 372. In *Atlantic Coast Line R. R. Co.* v. *Goldsboro*, 232 U. S., 548, it is said: "Neither the 'contract clause' nor the 'due process' clause has the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by

express grant; and that all contract and property rights are held subject to its fair exercise." The Legislature, in the exercise of the police power, is unrestricted by the provisions of contracts between individuals or corporations, or between individuals and municipal corporations. *Manigault* v. *Springs*, 199 U. S., 473.

The rule is general, that every contract touching matters within the police power, must be held to have been entered into with the distinct understanding that the continuing supremacy of the State, if exerted for the common good and welfare, can modify the contract when and as the benefit of that interest properly may require. While not competent for the State entirely to abandon the highly important governmental function of regulating public service rates, nevertheless, it temporarily may suspend exercise of the power. It has been settled that a state may authorize one of its municipalities to establish, by an inviolable contract, the rates to be charged, for a definite term, not unreasonable in point of time, by a public utility. *Home Teleph. & Teleg. Co.* v. *Los Angeles*, supra; *Detroit* v. *Detroit Citizens' Street Ry. Co.*, 184 U. S., 368, 382; *Vicksburg* v. *Vicksburg Waterworks Company*, 206 U. S., 496, 508; *Minneapolis* v. *Minneapolis Street Ry. Co.*, 215 U. S., 417. But the authority to make such contract must be expressly and specifically bestowed. It is beyond the recognized general powers of a municipal corporation to make that kind of a contract. Doubts must be resolved in favor of the continuance of the governmental prerogative of regulating rates and charges. *Railroad Commission Cases*, 116 U. S., 307, 325; *Freeport Water Company* v. *Freeport*, 180 U. S., 587; *Rogers Park Water Company* v. *Fergus*, 180 U. S., 624; *Knoxville Water Company* v. *Knoxville*, 189 U. S., 434; *Union Dry Goods Company* v. *Georgia Public Service Corp.*, supra; *City of Englewood* v. *Denver & South Platte Ry. Co.*, 248 U. S., 294. Exoneration from state control is neither to be presumed nor implied. The grant, or, what is equivalent thereto, the ratification, must be in express and not to be mistaken terms. It is only when the right is very clearly conferred that the State will be held to have relinquished the power to regulate rates. *Chicago, M. & St. P. Ry. Co.* v. *Minnesota*, 134 U. S., 418, 456; *Stanislaus County* v. *San Joaquin Company*, 192 U. S., 201; *Home Teleph. & Teleg. Co.* v. *Los Angeles*, supra; *Milwaukee Electric &c. Co.* v. *Railroad Com.*, 238 U. S., 174. In *Georgia Railroad Co.* v. *Smith*, 128 U. S., 174, the Legislature chartered a railroad and authorized it to charge rates of fare "not exceeding"

certain specified sums. The contention of the company that thereby it was exempted from legislative interference with its rates within the designated limits for all time, was rejected. The court said: "To effect this result, the exemption must appear by such clear and unmistakable language that it cannot be reasonably construed consistently with the reservation of the power (i. e., the power to regulate rates) by the state." The general provision in a railroad company's charter that it may make all needful rates, regulations, and by-laws touching the rates of toll does not constitute an irrepealable contract with the company that it shall have the right for all future time to prescribe the rates of toll free from legislative control. *Chicago, M. & St. P. R. Co.* v. *Minnesota*, supra. Speaking for the court, in *Englewood* v. *Denver, &c. Ry. Co.*, supra, where it was contended that the matter of rates of fare in controversy was unalterably embraced in a contract between the town and the company, Mr. Justice Holmes said: "clearer language than can be found in the state laws and this ordinance must be used before a public service is withdrawn from public control."

In the case at bar, the State did not directly surrender the regulatory power. It gave to the Company authority to supply Guilford with water for all domestic, sanitary, municipal, and commercial purposes, with all the rights and privileges and subject to the liabilities and obligations of similar corporations under the general laws. That is all. Nor did the State indirectly surrender the power of regulating rates and charges. It gave leave to the town to contract for a supply of water. Nothing was said about the regulation of rates. This legislation is in line with, and not of greater efficacy then, that of the general statute. R. S., Chap. 4, Sec. 63. The permission, as granted to the one or the other, if by any implication it related to the fixing of service rates, was not greater than that of a mere license revocable at the will of the Legislature. Previous decisions of this court are not at variance with this conclusion. In *Robbins* v. *Railway Company*, 100 Maine, 496, a case invoked by the remonstrants, the issue was between a public service corporation and its customer. As between them it was held, in the face of a contract, that the Company could not raise its rates. The right of the State itself, under reserved powers, was not there involved. *Belfast* v. *Water Company*, 115 Maine, 234, was a controversy between the city and the Company, the latter having attempted to repudiate its contract. It was held,

(a) that the defendant, by virtue of having received the benefit from the contract, was estopped from making such a claim; and (b), that ultra vires is a defensive proposition. Said Chief Justice SAVAGE: "We are not called upon to consider now whether the State has reserved authority to regulate and control the terms and conditions of service. The State has not yet undertaken to do it in this case. The State so far has said only that the parties might contract on such terms as they might agree upon." In the instant case, the court is called upon to consider the reserved power which Judge SAVAGE stated was not involved when he wrote.

We do not mean to be understood as saying that the Guilford Company, at its will, could disregard the contract and exact higher charges; or that the town, at its pleasure, might contemn the rates appointed there. But, that the contract is subject to state restriction, and to regulation in the interest of the general public. Decisions, in *Detroit* v. *Detroit Citizens' St. Ry. Co.*, supra, and like cases, holding contracts valid as between the parties, are not opposed to this view. *Milwaukee El. Ry. & Lt. Co.* v. *Railroad Com.*, 238 U. S., 174. The State, in its supervisory sway, may interpose to decrease or increase the specified rates as justness and reasonableness may require. *Union Dry Goods Co.* v. *Georgia Public Service Corp.*, supra; *City of Englewood* v. *Denver &c. Ry. Co.*, supra. Underlying such right of regulation is the fundamental doctrine that the utility, held imperatively, for the preservation of the welfare of the community, to the adequate doing of that which it was chartered to do, for service so performed should receive tolls sufficient in amount to enable it to meet the exacted requirement. Rates neither should be so low as to deprive the utility of means of appropriately discharging duty nor so high as to unduly burden the public. *Winfield* v. *Public Service Com.*, (Ind.), 118 N. E., 531. Safe and efficient service for the public, with substantial equality of treatment in like situations, is the essential. The basic principles of the law of public utilities therefore require, that the rates should provide the utility an equitable reward on its investment devoted to a public use. *Knoxville* v. *Knoxville Water Company*, 212 U. S., 1; *Cedar Rapids Gas Company* v. *Cedar Rapids*, 223 U. S., 655; *Northern Pacific Ry.* v. *North Dakota*, 236 U. S., 585. "The rate shall be reasonable and just, taking into due consideration the fair value of all its property with a fair return thereon." R. S., Chap. 55, Sec. 16. The contract between Guilford and the Water

Company, being a matter of public concern, must be held to have been made in expectation of the possible subsequent exercise by the State of its right to regulate the service rates. "From the very nature of their subject matter," succinctly and correctly states a writer in a recent number of the Harvard Law Review, (November 1918), "all contracts relating to public service entered into between the private person or corporation operating a public utility and the municipality and the private consumer contain an implied reservation of the right of the State lawfully to exercise its police power for the general welfare," citing numerous cases. Nor has the State ratified the doing of what was not at first authorized. Upon the Water District it enjoined that, if organized, it should become responsible for the performance of contracts valid against the Company when the District charter was granted. As the District has not been organized, it is unnecessary to inquire whether there were or not any contracts good in law.

Thus far we have considered the case from the view point of a direct act of the Legislature. There was no such act. In 1913, the Legislature created the Public Utilities Commission. That Commission, with powers of great scope and amplitude, and also with great responsibilities, partially changed the Guilford contract. Shall the legislation that called the Commission into existence be construed as effective both retroactively and prospectively? That a statute shall not have retrospective operation unless its terms are so strong, clear and imperative that no other meaning can be annexed to them, or unless the intention of the Legislature cannot be otherwise satisfied, is settled in an unbroken line of this court's decisions, so familiar they need not be cited. "Every public utility," to repeat from the statute now under consideration, "is required to furnish safe, reasonable and adequate facilities." R. S., Chap. 55, Sec. 16. About this positive expression of the public will, all the other legislative declarations collect together. "The rate, toll or charge—shall be reasonable and just, taking into due consideration the fair value of all its property with a fair return thereon, ..." "Every unjust or unreasonable charge for such service is hereby prohibited and declared unlawful." Idem. "The commission shall have authority to inquire into the management of all public utilities" (Section 4); to "fix a reasonable value upon all the property of any public utility—whenever it deems a valuation thereof to be necessary

for the fixing of fair and reasonable rates" (Section 36); if any "rates, tolls, charges, schedules or joint rates shall be found to be unjust, unreasonable, insufficient, or unjustly discriminatory, or otherwise in violation of the provisions of this chapter— the commission shall have power to fix and order substituted therefor such rate or rates, tolls, charges or schedules as shall be just and reasonable" (Section 46). To what end is the commission clothed with authority to inquire into the management of all public utilities? To see to it that safe, reasonable, and adequate facilities are furnished at fair and reasonable rates. New rates may be substituted for old; for, reads the statute, "if any rates shall be found to be unjust, unreasonable, insufficient, or unjustly discriminatory . . . ," the commission shall establish other regulations. This language is not uncertain. It does not leave the reader's mind to fluctuate between two meanings. It clearly is of broad application. It comprises "the management of the business of all public utilities," (R. S., Chap. 55, Sec. 4) and "any rates . . . or charges . . . . found to be unjust, unreasonable, insufficient, or unjustly discriminatory. . . . ." R. S., Chap. 55, Sec. 46.

It is our decision that, subject to review on questions of law, the Public Utilities Commission has authority, inclusive of both quasi-legislative and quasi-judicial power, to fix rates and charges for all public utility services. This determination is not repugnant to the proviso of Section 34 of the Utilities Act reading:

"nor shall the furnishing by any public utility of any product or service at the rates and upon terms and conditions provided for in any contract in existence January first, nineteen hundred thirteen be construed as constituting a discrimination, or undue or unreasonable preference, or advantage within the meaning specified."

But interpretation of that clause is not involved in this case. The question here presented is, not whether there shall be discrimination concerning first faucet rates in Guilford, but whether all such rates uniformly shall be increased, the contract notwithstanding. As to this, the proviso certainly is without application.

With reference to the supply of water for the Sangerville Company, the unjust discrimination clause of the statute is of consequence. The Guilford Company, though it came into being solely to furnish water in Guilford, at once proceeded to provide water for the Sangerville Company. The existing arrangement between the two corpora-

tions never has enjoyed the approval of the State. When the State authorized these companies to contract it said they could do so "according to the terms and conditions set out in the charter of the Guilford Water District." P. & S. L. 1911, Chap. 249. Those terms and conditions are: "the terms of said contract shall be based upon the expense incurred at Bennett Pond from which said water is taken and the expense in laying the main pipe from said pond to the stand-pipe and the cost of maintenance of the works at the pond, the main line and said stand-pipe. Of all this expense, said Sangerville Water Supply Company in its rental is to pay its proportional part based on the number of faucets and hydrants in each town." P. & S. L., 1911, Chap. 201. The rental of the Sangerville Company is not so based. But it ought to be. The Guilford may not rightfully supply the Sangerville Company on any other than the statutory terms. It is the duty of the Public Utilities Commission to see to it that the statute is observed.

The first exception of the remonstrants is overruled. Their second exception, that relative to the ruling respecting the amount paid by the Sangerville Water Supply Company to the Guilford Water Company, is sustained. The clerk of the Law Court will so certify to the clerk of the Public Utilities Commission.

Exception sustained.

JOSEPH G. BRYER, Petitioner for Mandamus,

vs.

WALTER S. WYMAN.

Androscoggin. Opinion December 3, 1919.

R. S., Chap. 51, Sec. 22, interpreted.

Petition for mandamus by a stockholder to compel the defendant company to open its books to inspection to enable the petitioner to "take copies and minutes therefrom," as provided in R. S., Chap. 51, Sec. 22. The defendant contends that this statute does not apply to a corporation doing business in this State and "having a treasurer's office at some fixed place in the state where a stock-book is kept, giving the names, residence and amount of stock of each stockholder."

Held:

1. Every reason that can be urged for the first part of R. S., Chap. 51, Sec. 22, regarding the right to examine the books of non-resident corporation is equally cogent with respect to the books of a resident corporation.
2. The facts presented fail to show any vexatious, improper or unlawful purpose on the part of the petitioner, and under the decisions of our State petitioner is entitled to have relief prayed for.

Petition for mandamus. Cause was heard upon petition, return to alternative writ, replication and proof. From the ruling of the court granting the petition, defendant filed exceptions. Judgment in accordance with opinion.

Case stated in opinion.

Joseph G. Bryer, and Ralph W. Crockett, for petitioner.

Harvey D. Eaton, for defendant.

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

SPEAR, J. This is a petition for mandamus by a stockholder to compel the defendant company to open its books to inspection to enable the petitioner to "take copies and minutes therefrom," as

provided in R. S., Chap. 51, Sec. 22. The defendant contends that this statute does not apply to a corporation doing business in this State and "having a treasurer's office at some fixed place in the state where a stock book is kept, giving the names, residence and amount of stock of each stockholder."

It is claimed that this language is so clear as not to admit of interpretation, and we concede the claim. It is also equally clear that this provision was made solely for the purpose of differentiating between non-resident and resident corporations. The non-resident is required to keep books at some fixed place showing "a complete list of all stockholders." The only exemption of the resident corporation, is that the "provision as to the list of stockholders" shall not apply, as it already has a fixed place where all its books are kept.

Moreover every reason that can be urged for the first part of the section regarding the right to examine the books of a non-resident corporation is equally cogent with respect to the books of a resident corporation. The language is clear and the meaning plain.

The rights of a stockholder under the above Chapter and Section have been fully considered and construed in *White* v. *Manter,* 109 Maine, 408; *Withington* v. *Bradley,* 111 Maine, 384; *Eaton* v. *Manter,* 114 Maine, 259; and *Knox* v. *Coburn,* 117 Maine, 409.

Upon the question of fact the presiding Justice found as follows: "It is sufficient to say that the facts presented fail to show any vexatious, improper or unlawful purpose on the part of the petitioner, or on the part of his client, Mr. Shea, for whom he is acting in this matter." The case is entirely within the decision in *Knox* v. *Coburn,* supra.

A careful reading of the evidence reveals no error in the finding of facts.

Exceptions overruled.

STATE OF MAINE *vs.* WILLIS F. TOWNSEND.

Penobscot. Opinion December 6, 1919.

Necessary form of indictment under R. S., Chap. 120, Sec. 16. Criminal pleading.

The indictment in this case charges: "that the respondent upon the body of Helen Irene Townsend a female child under the age of fourteen years an assault did make and her the said Helen Irene Townsend did then and there beat, bruise, wound and ill treat and other wrongs to the said Helen Irene Townsend then and there did and did unlawfully and carnally know and abuse said Helen Irene Townsend, against the peace of said State, and contrary to the form of the statute in such case made and provided."

The Exceptions state the case as follows:

"After the State's case was closed, the respondent moved that the indictment be quashed for the following reason, to wit; that the said indictment is for assault and battery; that the last allegation in the said indictment, to wit; 'and did unlawfully and carnally know and abuse said Helen Irene Townsend' is surplusage and that the said respondent could only be tried upon the first allegation in the indictment, to wit; Assault and Battery, and that any testimony introduced by the State in support of their last allegation should not have been allowed; and asked the court to rule that this indictment is an indictment for assault and battery only and that the last allegation is surplusage and of no effect."

The presiding Justice declined to rule as requested,

Held:

1. That assault and battery constitutes a part, though not an essential part, of the offense which the statute defines and punishes.

Held:

2. That the indictment properly described the offense upon which the respondent was tried and convicted.

Indictment under R. S., Chap. 120, Sec. 16. Verdict of guilty. Defendant filed exceptions to certain rulings of presiding Justice. Judgment in accordance with opinion.

Case stated in opinion.

Albert L. Blanchard, County Attorney, for the State.

George E. Thompson, and Abraham M. Rudman, for defendant.

SITTING: CORNISH, C. J., SPEAR, HANSON, DUNN, WILSON, DEASY, JJ.

SPEAR, J. The indictment in this case charges: "that the respondent upon the body of Helen Irene Townsend a female child under the age of fourteen years an assault did make and her the said Helen Irene Townsend did then and there beat, bruise, wound and ill treat and other wrongs to the said Helen Irene Townsend then and there did and did unlawfully and carnally know and abuse said Helen Irene Townsend, against the peace of said State, and contrary to the form of the statute in such case made and provided."

The exceptions state the case as follows:

After the State's case was closed, the respondent moved that the indictment be quashed for the following reason, to wit; that the said indictment is for assault and battery; that the last allegation in the said indictment, to wit; "and did unlawfully and carnally know and abuse said Helen Irene Townsend" is surplusage and that the said respondent could only be tried upon the first allegation in the indictment, to wit: Assault and Battery, and that any testimony introduced by the State in support of their last allegation should not have been allowed; and asked the court to rule that this indictment is an indictment for assault and battery only and that the last allegation is surplusage and of no effect.

The presiding Justice declined to rule as requested and with appropriate instructions, to which no exceptions were taken, submitted to the jury the question of the guilt or innocence of the accused, upon the charge of unlawfully and carnally knowing and abusing a female child under fourteen years of age, as said crime is defined in R. S., Chap. 120, Sec. 16.

The indictment properly described the offense upon which the respondent was tried and convicted. An indictment, similar in all substantial respects, was considered in *Commonwealth* v. *Geo. W. Thompson*, 116 Mass., 346, and declared good.

The court says: Rape necessarily includes assault and battery. To sustain an indictment for assault with intent to commit a rape, under the Massachusetts Gen. Statutes, Chap. 160, Sec. 67, it is not necessary to allege or prove a battery. But a battery may be one of the facts by which the offense is made out. It then constitutes a part though not an essential part of the offense which the statute

defines and punishes. If not alleged there is no variance; if alleged there is no duplicity. See also case cited.

The ruling of the sitting Justice, in submitting the case to the jury was clearly right.

Exceptions overruled.

IN RE SEARSPORT WATER COMPANY.

IN RE LINCOLN WATER COMPANY.

Penobscot. Opinion December 9, 1919.

General scope of authority of Public Utilities Commission.

The control and regulation by the State of the rates of public utilities is a legislative or governmental function and a legitimate exercise of the police powers of the State.

When one devotes his property to a use in which the public has an interest, he must submit to be controlled by the public for the common good to the extent of the public interest he has created.

The public interest in the rates charged for the public service rendered by a Public Utility Company does not cease at the point when the operating expenses of the company is insured, and begin again when the rates result in more than a fair return, or exceed the value of the service rendered. So long as the property is devoted to the public use the State may control the rates at all times. The public cannot be assured of adequate service except upon the basis of a fair return upon a fair value of the property devoted to the public use; the rates in no case, however, to exceed the value of the service rendered.

While all contracts by municipalities or by individuals with a Utility Company for any service are presumed to be entered into with the understanding that the State may at any time regulate the service and the rates to be charged therefor, the State may by appropriate legislation suspend its authority to exercise its power of regulation, and authorize a municipality to enter into an inviolable contract with a utility company for a reasonable period fixing the rates to be charged by such utility for the public service, which contract will be protected against impairment under the Federal and State Constitutions.

The surrender by the State of this important governmental function, however, must be in terms so clear and unequivocal as to admit of no doubt of the intent to surrender. General authority to contract is not sufficient. Express terms are required. All doubts must be resolved in favor of the State.

In the cases at bar no such clear and unmistakable intent to surrender this important function of government is found in the Charter of either of the Water Companies, or in Sec. 63, Chap. 4, R. S.

Unless such surrender is made, the rates for any public service such as the supplying of water or other utility for public or domestic uses are just as fully subject to regulation by the State under its police powers, when fixed by mutual consent in a contract, as when summarily determined by the Utility Company itself.

All contracts relating to the public service must be understood as made in contemplation of the possible exercise at any time by the State of this legitimate governmental power. The duty, once undertaken, to serve the public in a reasonable manner cannot be avoided by a contract.

The general purpose of Chap. 55, R. S., known as the Public Utilities Act, was to place the entire regulation and control of all public service companies in the hands of the Utilities Commission, which is authorized to inquire into the management of *all* public utilities within the State, and whenever *any* rate, toll or charge is found after hearing to be "unjust, unreasonable or insufficient" to substitute therefor just and reasonable rates.

The language of the Act is broad enough to include the control and regulation of eevry rate, toll or charge whether fixed by contract or determined by the Utility Company itself.

Such construction does not give the Act a retroactive effect. All existing contracts relating to the public service remain valid, binding obligations unaffected in their terms, and being voluntarily entered into between the articles, the rates fixed therein are presumed to be reasonable and just, until otherwise determined after hearing, when just and reasonable rates may then be substituted therefor.

No vested rights under such contracts are affected by the Act, as none can be gained against the proper exercise of the police powers of the State.

The power was in the State prior to the enactment of this legislation to require any utility over which the State had not surrendered its regulatory powers to furnish the public service in which it was engaged at just and reasonable rates notwithstanding any contract it may have entered into. No new duties or disabilities, therefore, were imposed on any public utility by the terms of Chap. 55, R. S. And when the Utilities Commission acts, it acts after hearing, and for the future.

There is no implication from the fact of all contracts granting undue preferences or advantage entered into prior to January 1st, 1913, being exempted from the provisions of Secs. 33 and 34, that all other existing contracts are excepted from the operation of the Act. Quite the contrary. If any inference follows from the exception of existing discriminatory contracts from the effects of Secs. 33 and 34, which are penal sections, it is rather that all other existing contracts are included within the general terms of the Act, unless expressly excepted.

From the general purpose of such legislation and by reason of the broad and inclusive terms employed in Chapter 55 in conferring powers on the Utilities Commission and in the light of the Judicial construction of similar Acts by

other courts of last resort it is held, that the Legislature, unless otherwise expressly stating, or it following by necessary implication, intended to delegate to the Utilities Commission as full and complete power of regulation of rates of public utility companies as the State itself then possessed.

The Utilities Commission having determined after hearing that the rates, tolls or charges of any Utility Company whether fixed by the company itself or by contract, are in fact unjust and unreasonable, we must assume in the absence of exceptions to any ruling of law in connection with such finding, that it has so determined upon considerations that affect the public interest. Upon this point the conclusions of the Utilities Commission in the cases at bar must be treated as findings of fact properly determined.

The rates charged by the Searsport and Lincoln Water Companies under their respective contracts with the towns of Searsport and Lincoln having been determined to be unjust, unreasonable and insufficient, and the State not having surrendered its regulatory power over either of these companies, the Utilities Commission had authority to order just and reasonable rates substituted therefor for both the public and domestic service.

Exceptions under R. S., Chap. 55, Sec. 55, from the ruling and findings of Public Utilities Commission. Judgment in accordance with opinion.

Case stated in opinion.

A. S. Littlefield, and G. W. Thombs, for Town of Searsport and Town of Lincoln.

Andrews & Nelson, for Searsport Water Company and Lincoln Water Company.

SITTING: CORNISH, C. J., SPEAR, HANSON, DUNN, WILSON, DEASY, JJ.

WILSON, J. Under special Acts of the Legislature the Searsport Water Company and the Lincoln Water Company were organized to supply the respective towns of Searsport and Lincoln with "water for domestic, sanitary and municipal purposes," each company being expressly authorized to enter into a contract with the town in which it was located to supply it with water for municipal or public uses.

While the language of the respective charters differs in this respect, there can be no doubt of the authority of each company to contract with any corporation or individual in the town in which it was located to supply water for domestic, sanitary or industrial uses. No provision is found in either charter, however, in terms authorizing either town to contract with the Water Company for water for its

inhabitants for domestic uses, or to fix or regulate the rates at which it should be supplied to them.

In 1905 the town of Searsport entered into a contract with the Searsport Water Company, and in 1911 the town of Lincoln entered into a contract with the Lincoln Water Company whereby the respective Water Companies were to construct reservoirs, lay mains, and furnish to the town, water for municipal and fire purposes for a stipulated sum per annum, and also to furnish to the inhabitants of the town, water for domestic and sanitary purposes at a fixed rate or price.

Both contracts were still in force in 1918 when each Water Company filed a new schedule of rates both municipal and private with the Public Utilities Commission under Chap. 55, R. S., known as the Public Utilities Law, by which schedules the rates of each Water Company both for public and private service were increased over those fixed in the contracts with the respective towns. Complaints were filed with the Public Utilities Commission by each town and certain of its inhabitants against the increased rates. A hearing was held. The Commission adjudged the rates both for public and private service as fixed in the respective contracts to be "unjust, unreasonable, and unjustly discriminatory," and ruled as a matter of law that it had authority to change the rates even though fixed by contract and found the rates for private service as fixed in the new schedules of each company to be just and reasonable, but fixed lower rates for the public service in each case than those set forth in the respective schedules filed, though in excess of the rates stipulated in the contracts.

To the ruling of the Commission that it had authority to order new rates substituted for those contained in the contracts, each town and certain of its inhabitants as users of the private service excepted. Both cases come before this court on the exceptions. As the same questions are involved in each case and they were argued together, they are considered in one opinion by this court.

While this court in the recent case of In Re Guilford Water Co., 118 Maine,—laid down certain principles that are, we think, decisive of the issues in the instant cases so far as the rates for the private service are concerned, contentions not raised in that case have been urged by counsel in the cases now at bar, which require a restatement of the principles we deem controlling in this class of cases. In the cases now before us a valid contract for public uses entered into by

legislative authority existed between each town and the utility supplying it, which did not exist in the Guilford case, and which presents questions that require full consideration.

The complainants here contend: (1) that, although contracts harmful to the public health, safety or morals may be subject to regulation at all times under the police powers of the State, the evidence in these cases disclosed that the contracts in question were innocuous so far as the public health or safety is concerned, and that inasmuch as the changes in rates authorized by the Utilities Commission only affected the amount of the stockholders' return, it therefore does not concern the public, and the public interest ceasing to exist, the State's control under its police powers ceases; (2) that when the public health, safety or morals are not involved, the State may authorize a municipality to enter into an inviolable contract fixing the rates for service for a term of years with any public utility, and that the contracts in the instant cases are of that nature; (3) that the supplying of water to a municipality and its inhabitants is a proprietary matter and any contract by the municipality relating thereto is protected against impairment by the State and Federal constitutions; (4) and that finally irrespective of the power of control vested in the State, the Legislature did not under Chap. 55, R. S., delegate to the Public Utilities Commission the authority to regulate rates established by a contract entered into prior to its enactment.

The questions raised here are not new and have in some form been many times considered by both State and Federal Courts, and more recently of necessity by Public Service Commissions in the different states. The decisions taken as a whole, however, can not be said to have contributed to clarity, but rather to obscurity of view as to the stature and scope of the police powers, particularly in their application to the regulation of rates where contracts fixing them have been entered into under legislative authority.

In a recent case before it, *Clifton Forge* v. *Virginia Western Power Co.*, P. U. R., 1918, F. 791, 803, the Corporation Commission of Virginia commented on the seeming inconsistencies in the conclusions of some of the decided cases in the Federal Supreme Court, citing *Cleveland* v. *Cleveland City Ry. Co.*, 194 U. S., 517 and *Home Tel. & Tel. Co.* v. *Los Angeles*, 211 U. S., 265; and of which *Freeport Water Co.* v. *Freeport City*, 180 U. S., 587, and *Vicksburg* v. *Vicksburg Water Works Co.*, 206 U. S., 496 are perhaps, even more conspicuous examples.

An analysis of these and the many other decisions in the Federal and State Courts in which these questions have been considered discloses that many of the seeming inconsistencies are more apparent than real; and in the Federal Court at least are the result of having followed the construction by the State Courts of the statutes involved. See *Home Tel. & Tel. Co.* v. *Los Angeles, supra,* page 277. *Milwaukee Ry. Co.* v. *Wisconsin R. R. Com.,* 238 U. S., 174, 182. However, neither the conclusions nor the reasoning can be said to be harmonious in all the decisions.

Certain principles are no longer questioned. The control or regulation of rates by public utilities is a legislative or governmental function and a legitimate exercise of the police powers of the state. *Munn* v. *Illinois,* 94 U. S., 113. *Minnesota Rate Cases,* 230 U. S., 352, 413-415, 433. *Kennebec Water Dist.* v. *Waterville,* 97 Maine, 185, 201. Where the public health, safety or morals are concerned the power of the State to control under its police powers is supreme and cannot be bargained or granted away by the Legislature. The exercise of the police power in such cases violates no constitutional guarantee against the impairment of vested rights or contracts. *Fertilizing Co.* v. *Hyde Park,* 97 U. S., 659. *Butchers' Union Co.* v. *Crescent City Co.,* 111 U. S., 746, 751. *New Orleans Gas Co.* v. *Louisiana Light Co.,* 115, U. S., 650, 672. *New Orleans Water Works* v. *Rivers,* 115, U. S., 674. *Walla Walla* v. *Walla Walla Water Co.,* 172 U. S., 1, 15. *Atlantic Coast Line R. R. Co.* v. *Goldsboro,* 232 U. S., 548. *Dirken* v. *Great Northern Paper Co.,* 110 Maine, 374, 388. *State* v. *Mayo,* 106 Maine, 62, 66.

The power to regulate the rates of public utilities, however, is not dependent on the immediate concern of the public health or safety therein.

"When one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use and must submit to be controlled by the public for the common good to the extent of the interest he has created."

Munn v. *Illinois, supra,* page 126. *Union Dry Goods Co.* v. *Ga. Pub. Ser. Corp.,* 248 U. S., 372, 375. *Woodburn* v. *Pub. Ser. Com.,* 82 Or., 114, 120. *Boston and Maine R. R. Co.* v. *County Commissioners,* 79 Maine, 386.

The State requires every public utility to "furnish safe, reasonable and adequate facilities" and its rates and charges to be reasonable and

just, based upon a fair return on the fair value of the property devoted to the public use. Sec. 16, Chap. 55, R. S. Its power to do so cannot be questioned. To assume that a Public Utilities Commission will in any case order the rates of a utility increased upon the sole consideration of increasing the returns of stockholders appears to us like begging the question. The public interest does not cease at the point where the rates ensure merely the operating expenses of the company and begin again when they result in more than a "fair return" or exceed the value of the service rendered. The continued existence of the utility and the performance of its public obligations cannot be maintained on this basis. So long as the property is devoted to the public use the State may control the rates at all times, as well when they are unfair to the utility because of failure to produce a "fair return," as when they are unfair to the public because too high. *Winfield* v. *Public Ser. Com.*, Ind., P. U. R., 1918, B. 747, 752. *Collingswood Sew. Co.* v. *Collingswood*, (N. J.), P. U. R., 1918, C. 261, 268. The whole theory of rate regulation by the State is based on these principles.

Thus far we have considered the general powers of the State where no contract fixing the rates exists. In what respect may these powers be controlled by contracts between municipalities or the individual consumer and the utility?

Where the public health, morals or safety is involved the power to control vested rights whether obtained by contract or otherwise, must prevail. All must yield in these respects to the common welfare. *Fertilizer Co.* v. *Hyde Park*, 97 U. S., 659. *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S., 650. *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S., 1, 15.

The Utilities Commission, however, having based its orders in these cases upon the fact that the rates fixed by the contracts with the respective towns were unjust and unreasonable, and not having found that the public health or safety was jeopardized, the supreme necessity for the exercise of the police powers does not appear to exist. We must, therefore, inquire into that broader field of police powers, outlined in *B. & M. R. R.* v, *County Commissioners*, 79 Maine, 386, 395, beyond the immediate concern of the public health, morals or safety, and determine under what conditions, if any, contracts may preclude the State from the full exercise of its powers of rate regulation.

It is frequently laid down in the books that the exercise of the police powers is a governmental function, continuing in its existence, and cannot be granted or bargained away. *Stone* v. *Mississippi*, 101 U. S., 814, 817. *Texas No. R. R. Co.* v. *Miller*, 221 U. S., 408. *Atlantic Coast Line R. R. Co.* v. *Goldsboro*, 232 U. S., 548. *Dirken* v. *Great Northern Paper Co.*, 110 Maine, 374, 388. The power of rate making being recognized as an exercise of the police powers and a legislative or governmental function, we might in all cases, on principle, expect it to remain vested in the State. This we apprehend has been the view of some of the State Courts. *Danville* v. *Danville Water Co.*, 178 Ill., 299. *Yeatman* v. *Public Service Com.*, 126 Md., 513.

However, the Federal Supreme Court which finally determines when contracts have been impaired, has adopted the view, which now appears to be generally accepted by the State Courts, and which we feel constrained to follow, that the state may in its discretion vest in one of its municipalities the authority to enter into an inviolable contract for a reasonable period regulating the rates to be charged by a public utility for its service. That in this respect, at least, it may suspend its authority during the life of such contract to exercise this important governmental function, and that such a contract is protected against impairment by the State under Sec. 10, Art. 1 of the Federal Constitution. *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S., 1. *Los Angeles* v. *Los Angeles Water Co.*, 177 U. S., 558. *Freeport* v. *Freeport City Water Co.*, 180 U. S., 587. *Vicksburg* v. *Vicksburg Water Works Co.*, 206 U. S., 496, 508. *Home Tel. & Tel. Co.* v. *Los Angeles, supra*. *Milwaukee* v. *Wisconsin R. R. Com.*, 238 U. S., 174, 180. *Winfield* v. *Public Ser. Com.*, (Ind.), P. U. R., 1918, B. 747. *Benwood* v. *West Va. Public Service Com.*, 75 W. Va., 127.

This view is concisely stated in *Milwaukee* v. *Wisconsin R. R. Com.*, *supra*, page 180.

"The fixing of rates which may be charged by public service corporations of the character here involved is a legislative function of the state, and while the right to make contracts which shall prevent the state during a given period from exercising this important function has been recognized and approved by judicial decisions, it has uniformly been held in this Court that the renunciation of a sovereign right of this character must be evidenced by terms so clear and unequivocal as to permit of no doubt as to their proper construction."

Franchise contracts, so-called, and contracts for the supply of water or other utility to a municipality in which the rates are fixed for the public service rendered are valid and binding between the parties. *Detroit* v. *Detroit Citizen Ry.*, 184 U. S., 368. *Cleveland v. Cleveland City Ry. Co.*, 194 U. S., 517. *Minneapolis* v. *Minneapolis St. Ry. Co.*, 215 U. S., 417. In the last cited cases, however, and in the case of *Columbus Ry. P. & Lt. Co.* v. *Columbus*, 249 U. S., P. U. R., 1919, D. 239, referred to in the complainant's brief, the authority of the State to control under the police powers was not in question.

The supplying of water to a municipality and its inhabitants is without doubt a proprietary matter, as is also the fixing by contract the price at which it is to be supplied; but a distinction exists, we think, between fixing such price by mutual consent in a contract, and the summary control under the police powers of rates and charges for performing a public service. One is a proprietary matter, the other a governmental function. The right to make a contract concerning a proprietary matter constitutes no authority to perform a governmental function. Prices fixed by agreement, and rates and tolls determined by a fair return on the fair value of the property devoted to the public use, are based on different considerations. *Woodburn* v. *Pub. Ser. Com.*, 82 Or., 114. *Traverse City* v. *Mich. R. R. Com.*, P. U. R., 1918, F. 752, 760, 761. To preclude the State from the exercise of this power the surrender must be so clear and unequivocal as to permit of no doubt of the legislative intent. All doubts should be resolved in favor of the continuance of the power. General authority is not sufficient; special authority is required. *Home Tel. & Tel. Co.* v. *Los Angeles, supra,* page 273. *Englewood* v. *So. Platte Ry. Co.*, 248 U. S., 294.

To apply these principles to the instant cases, we find no such clear and unmistakable surrender of this important function of government in the charter of either of the Water Companies, or in Sec. 63, Chap. 4, R. S.

By its charter each company was authorized to contract with corporations, the inhabitants of said towns and village corporations located therein for supplying water as contemplated by the Act. Under Sec. 63, Chap. 4, R. S., each town, and the town of Searsport under the charter of the Searsport Water Company, was authorized to enter into a contract for the supply of water for public uses upon such terms and conditions as the parties may agree. The fixing or regula-

tion of charges by contract is nowhere mentioned in either charter. Nothing, we think, can be implied except the proprietary right of determining by agreement the compensation to be received by the Companies for the supply of water furnished.

These grants, in such general terms, of the right to contract should not be construed as a surrender of an important function of government. All doubts must be resolved in favor of the retention of this power in the State. Complainants contend that similar language in the case of *Vicksburg* v. *Vicksburg Water Works Co.*, 206 U. S., 496, was held to authorize the city to enter into an inviolable contract as to rates. True, but in *Freeport Water Co.* v. *Freeport City*, 180 U. S., 587, and in *Home Tel. & Tel. Co.* v. *Los Angeles, supra*, much stronger language was construed against such a grant. The Federal Court followed the construction of the State Courts in each case. The majority of the State Courts will be found to construe such statutes strictly and in favor of the State. Such contracts may bind the parties, but as against the State they must be regarded as entered into in contemplation of the State's authority to regulate all rates for the public service. Such regulation does not constitute an impairment of contracts within the meaning of the constitution. As said in *Knox* v. *Lee*, 12 Wall., 457, 550: "Contracts must be understood as made in reference to the possible exercise of the rightful authority of government, and no obligation of a contract can extend to defeat legitimate government authority."

Louisville & Nashville R. R. Co. v. *Mottley*, 219 U. S., 467, 482. *Union Dry Goods Co.* v. *Ga. Public Service Corp.*, 248 U. S., 372.

Having concluded that the State has not surrendered its regulatory powers in the cases at bar, it is unnecessary to determine the limits within which the public health, safety or morals are concerned to such an extent as to preclude the Legislature from surrendering or suspending this important function of government; nor to invoke any doctrine of waiver or reclaiming of authority, in the support of which *Worcester* v. *Worcester St. Ry.*, 196 U. S., 539, *Collingswood Sewage Co.* v. *Borough of Collingswood*, 92 N. J., L. 509; *Borough of No. Wildwood* v. *Bd. of Pub. Util. Com.*, 88 N. J. L., 81, *Arlington Bd. of Survey* v. *Bay St. Ry.*, 224 Mass., 463, 471 are cited. Such doctrine, however, only applies to governmental or public and not to proprietary obligations. Nor do we deem it necessary to consider separately the status of the individual taker under these contracts Considering them as

having some enforceable rights in contract under the views expressed in *Robbins* v. *Railway Co.*, 100 Maine, 496, they are entitled to no greater protection than the municipality under its contract. In neither case does the language of the acts warrant our construing it as a surrender of the state control.

Thus far we have considered the complainants' contentions as between them and the State. We now come to the question of whether the State, even though it retained this power in respect to these complainants, has vested it in the Public Utilities Commission under Chap. 55, R. S. The general purpose of legislation of this nature, which has been enacted in many of the States, is, we think, to place the entire regulation and control of all public service corporations (or individuals engaged in supplying a public utility) in the hands of a Board or Commission which can investigate conditions, hear parties, and grant relief much more expeditiously and fairly than the Legislature itself. *Benwood* v. *Pub. Ser. Com.*, 75 W. Va., 127, 129.

By the Act the Utilities Commission is expressly authorized to inquire into the management of the business of *all* public utilities which are by its express terms made subject to the jurisdiction, control and regulation of the Commission. *Every* unjust and unreasonable charge for such service is prohibited. Whenever, upon hearing, *any* rate, toll, charge or schedule or joint rates are found to be unjust, unreasonable, insufficient, or unjustly discriminatory, or otherwise in violation of the Act, the Commission is given full power to substitute therefor such rates, toll, charges or schedules as may be just and reasonable.

Such language is clearly broad enough to include the regulation and control of every rate, toll, charge or schedule of every public utility whether fixed by contract or by the utility itself, unless limited in some manner by the terms of the Act, or the State has previously suspended its regulatory powers in respect to the rates or charges in question.

But it is suggested that to so construe it would give the Act a retroactive effect, and as such an intent is not clearly expressed, it must be construed prospectively, and all existing contracts therefore, be excluded from its operation. We do not think, however, that either the Act itself, or Sec. 16 of Chap. 55 prohibiting unjust and unreasonable rates, affects the validity of any existing contract. All such con-

tracts remain valid, binding obligations unaffected in their terms, until the Utilities Commission has found that the rates contained therein are "unjust, unreasonable or insufficient," when just and reasonable rates may then be substituted therefor. *Winfield* v. *Pub. Ser. Com.*, (Ind.) P. U. R., 1918, B. 747, 761; *Manitowoc* v. *Manitowoc N. & T. Co.*, 145 Wis., 13, 30. As said by the court in the last cited case:

"Until that determination is made, the contract is in force. When it is made, the contract is superseded, if the rate is changed."

Such contracts having been voluntarily entered into and their terms and rates agreed upon by all parties, in distinction from rates arbitrarily imposed by the utility, the rates fixed therein are presumed to be reasonable and just until otherwise determined by the Utilities Commission after hearing, either upon complaint of the consumer under Section 43, or of the utility under Section 50, or upon its own motion under Sec. 48 of Chap. 55. It is the rates at the time of the hearing that are adjudicated by the Commission. If then found to be unjust and unreasonable, they are from that time unlawful.

A utility cannot repudiate such a contract at will. Nor does the filing of new schedules under Section 28 have the effect of changing the rates fixed by contract. To obtain a change in such rates, except, of course, by mutual consent and with the approval of the Utilities Commission, the utility should proceed under Sec. 50 of Chap. 55 and first obtain, a finding by the Utilities Commission that the rates and charges fixed in such contract are "unjust, unreasonable or insufficient," whereupon the Commission may then substitute such rates as it shall deem to be just and reasonable in the premises.

Vested rights under existing contracts are, therefore, in no way affected by the terms of the Act itself, nor, as we view it, by its operation. All contracts relating to the public service are entered into in contemplation of the exercise of the right of the State's regulatory powers whenever the public interests may require. No vested rights can be gained by contract or otherwise as against the proper exercise of the police powers of the State. Nor does legislation vesting the police power in a subordinate body or commission create any new obligations or duties, or impose any new disabilities with reference to past transactions. *City of New York* v. *Foster*, 133 N. Y. S., 152. The duty to serve the public in a reasonable manner cannot be avoided by a contract. *Louisville N. R. Co.* v. *Mottley*, 219 U. S., 467, 485;

Hudson Co. W. Co. v. *McCarter*, 209, U. S., 349. Such duties and obligations as are required to be performed by Chapter 55 in respect to serving the public at just and reasonable rates, or such disabilities as are therein imposed on public service companies in this respect, have always existed whenever the State saw fit to exercise its powers. Such legislation in this respect, therefore, may be properly considered as prospective and not retroactive in its operation.

It is also urged that the exception of contracts entered into prior to January 1st 1913, in Sec. 34, of Chap. 55, indicates that it was the intent of the Legislature that all existing contracts should remain unaffected by this Act. But Sections 33 and 34 are penal sections. It was to remove any doubt as to the guilt of those giving or receiving any undue preference or advantage under contracts already existing that it was provided that continued service under such contracts should not be construed as constituting a discrimination within the meaning of these sections. *State ex rel* v. *Billings Gas Co.*, 55 Mont., 102, 112.

If the Legislature had intended to exclude from the operation of this Act all existing contracts over which the State had not already suspended its regulatory powers, we think it would have said so in express terms. Since there is nothing in the fact that rates have been mutually agreed upon in a contract, which renders them any less subject to regulation by the State than when arbitrarily determined by the utility itself, if any inference at all arises from the excepting of existing discriminatory contracts in Section 34, we think it is that all other existing contracts are included within the general terms of the Act. The main purpose of such legislation, viz: to secure adqeuate service to the public at just and reasonable rates, might, in a large measure, be defeated by the exemption from the operation of such laws of all rates fixed by contract entered into prior to their taking effect. No rates, however fixed, should, we think, be regarded as exempted from such general regulatory powers as are contained in Chapter 55, unless excepted in express terms or by necessary implication.

We, therefore, conclude from the general purpose of such legislation, and the broad and inclusive terms employed in Chapter 55 in conferring powers upon the Utilities Commission, and in the light of the judicial construction of similar Acts by other courts of last resort, that the Legislature intended to delegate to the Utilities

Commission of this State as complete power over rates fixed by prior contracts that have been determined to be "unjust and unreasonable" as the State itself then possessed. *Board of Survey of Arlington* v. *Bay St. Ry.*, 224 Mass., 463, 469. We think no rule of statutory construction is violated in so construing this Act. Black on Interpretation of Laws, pages 136, 137. As to whether rates in a prior contract that may be classed as discriminatory under Sections 33 and 34, may upon any grounds be modified by the Utilities Commission after hearing is not raised in these proceedings.

The cases of *Interurban R. & T. Co.* v. *Public Utility Co.*, 98 Ohio St., 287; and *Quimby* v. *Public Service Corp.*, 223 N. Y., 244, are cited by complainants as the most recent decisions by courts of high standing in support of their contention that authority over rates fixed by contracts will not be construed as vested in a regulatory commission unless clearly conferred in express terms. The New York Court of Appeals, however, has since differentiated the case of *Quimby* v. *Pub. Ser. Corp.*, and held in *People ex rel* v. *N. Y. Pub. Ser. Com.*, 225 N. Y., 216, a case now being followed by the Public Service Commissions of that State, (*Sag Harbor* v. *Long Island Gas Corp.*, P. U. R. 1919, E. 163,) under similar language to that contained in Chapter 55, that the power to regulate rates for gas fixed by prior contracts was vested by the New York statute in its Public Service Commission. Also see *Koehn* v. *Pub. Ser. Com.*, 176 N. Y. S., 147.

We are confirmed in our views by the reasoning and conclusions in the following cases in addition to those already cited: *Atlantic Coast El. R. Co.* v. *Bd. of Pub. Util. Comrs.*, 92, N. J. L. 168. *O'Brien* v. *Bd. of P. U. Com.*, 92 N. J. L. 44; *Pawhuska* v. *Pawhuska Oil & Gas Co.*, (Okla.) P. U. R. 1917, F. 226. *State ex rel City of Sedalia* v. *Pub. Service Com.*, 275 Mo., 201. *Leiper* v. *Balt. & Phila R. R. Co.*, 262 Pa. St., 328. *Milwaukee El. R. & Light Co.* v. *Railroad Com.*, 153 Wis., 592. *Dawson* v. *Dawson Telegraph Co.*, 137 Ga. 62. *Traverse City* v. *Mich. Railroad Com.*, 202 Mich., 575. *Salt Lake City et al.* v. *Utah Light & Traction Co.*, (Utah), P. U. R. 1918, F. 377. *Raymond Lumber Co.* v. *Raymond Lt. & W. Co.*, 92 Wash., 330. *Sandpoint W. & L. Co.* v. *Sandpoint*, 31 Idaho, 498.

While conclusions in some of the above cases have been reached under constitutional provisions peculiar to the State, in which the decision was rendered the reasoning is not entirely inapplicable. On the other hand, the result reached by the Ohio and Virginia Courts,

Interurban Terminal & Ry. Co. v. *Public Utilities* (Ohio), *supra. Virginia-Western P. Co.* v. *Com. ex rel Clifton Forge,* P. U. R. 1919, E. 766, were determined or, at least, the judgment of the court was influenced by special provisions of their State Constitutions not found in our own Constitution.

The only question raised by the exceptions is the authority of the Public Utilities Commission to regulate or change the rates for service by any public utility that have previously been fixed in a contract between such utility and a municipality or a private consumer, if such rates are or have become unjust or unreasonable. The Utilities Commission, a body specially clothed with all the authority of the State for the performance of an important governmental function, having determined, after hearing, that the rates, tolls, or charges of any utility, whether fixed by contract or by the utility itself, are in fact unreasonable and unjust, we must assume, at least in the absence of exceptions to any rulings of law in connection with such findings, that it has so determined upon considerations that affect the public interest. Upon this point we must treat the conclusions of the Commission in the cases at bar as a finding of fact properly determined. The rates fixed in the contracts between the towns of Searsport and Lincoln and the respondent Companies, then, being or having become unjust and unreasonable, the question before this court under the exceptions is: Did the Public Utilities Commission have the power and authority to order reasonable and just rates substituted therefor. We think it had.

Entry must be,
Exceptions overruled.
Result to be certified by the Clerk of this Court to the Clerk of the Commission.

In Re Island Falls Water Company.

Aroostook. Opinion December 12, 1919.

Right of Public Utilities Commission to inquire into, revise and regulate rates of service for water companies or other public service corporations, even though certain definite contracts for said service are then in force.

Judicial review, in cases of this kind, goes only to questions of law. Fixing of rates by the Commission did not impair the obligation of the contract. Nor did it deprive individual inhabitants of Island Falls or the town itself of property without due process of law. It was a legitimate result of a valid exercise of the police power. More distinct language than that of the statute (P. & S. L. 1905, Chapter 22) invoked as sustaining the contract relied upon must be used before a public service is withdrawn from the regulatory power of the State.

Exceptions from the decision of Public Utilities Commission in the matter of fixing rates for water service. Exceptions overruled.

Case stated in opinion.

John E. Nelson, for Island Falls Water Company.

Seth T. Campbell, and Bernard Archibald, for the Town of Is'and Falls and other remonstrants.

Sitting: Spear, Hanson, Dunn, Wilson, Deasy, JJ.

Dunn, J. Notwithstanding remonstrance by citizens of Island Falls that such action would be unnecessary, unjust and unlawful, and particularly that it would be violative of an existing contract entered into, in virtue of previous legislative permission, between that town and the Island Falls Water Company, a public service corporation doing business there, the Public Utilities commission, under date of January 30, 1919, after hearing and investigation, fixed reasonable rates effective at a later date, and applying equally to all receiving a like service, to be charged by said company for supplying water for certain private uses. The commission also fixed and put into subse-

quent effect, rates to be paid by the municipality to the company, for furnishing water for general fire protection. In both instances, the rates fixed by the commission superseded lower ones agreed to in the contract.

Judicial review, in cases of this kind, goes only to questions of law. Fixing of rates by the commission did not impair the obligation of the contract. Nor did it deprive individual inhabitants of Island Falls or the town itself of property without due process of law. It was a legitimate result of a valid exercise of the police power. More distinct language than that of the statute (P. & S. L. 1905, Chap. 22) invoked as sustaining the contract relied upon must be used before a public service is withdrawn from the regulatory power of the state. *Englewood* v. *Denver & South Platte Ry. Co.*, 248 U. S., 294, 296; *In Re Guilford Water Company's Service Rates*, 118 Maine,367; *In Re Lincoln Water Company*, 118 Maine, 382.

The entry to be certified to the clerk of the Public Utilities Commission, must be,

Exceptions overruled.

GREENWOOD C. ARNOLD *vs.* CITY OF AUGUSTA.

Kennebec. Opinion December 15, 1919.

General rule relative to right of purchasers of tax deeds or titles to recover money paid for same when title proves defective.

Action for money had and received to recover a sum paid by plaintiff to defendant as consideration for a tax deed, which deed conveyed no title because of irregularities in assessing the tax.

Held:

1. In many states provision by statute has been made so that the purchase money paid at a tax sale shall be refunded to the purchaser if the title conveyed proves to be invalid, and a right of action against the municipality is provided if the refund is refused, but at common law the purchaser at a tax sale assumes the risks of his purchase. Therefore, in the absence of special legislation to the contrary he comes within the rule of caveat emptor, and if his title proves worthless he cannot recover the money from the municipality.
2. Our Legislature has provided no statute requiring a refund of money paid for a tax deed, based on defective proceedings in assessing a tax, nor is there any statutory authority in this State, for bringing an action against a municipality to compel such refund. The motion to set aside the verdict, as against law, must be sustained, but the exceptions need no consideration.

Action for money had and received. Defendant filed plea of general issue. Verdict for plaintiff. Defendant filed motion for new trial; also exceptions to certain rulings of presiding Justice. Judgment in accordance with opinion.

Case stated in opinion.

William H. Fisher, for plaintiff.

Melvin E. Sawtelle, for defendant.

SITTING: CORNISH, C. J., PHILBROOK, DUNN, MORRILL, DEASY, JJ.

PHILBROOK, J. Previous to the year nineteen hundred twelve a real estate tax was assessed, by the proper officers of the defendant city, upon a certain piece of land within its borders. In March of

that year, the tax remaining unpaid, the plaintiff interviewed the City Treasurer to ascertain whether the municipality would sell the land to him, and give him what is commonly known as a tax deed. As a result of that interview the City Council, on May 20, 1912, voted "That the city treasurer be authorized and directed, upon payment to him for the use of the city a sum of not less than two hundred dollars, to execute on behalf of the city a quitclaim of all its right, title and interest in and to" the land in question. On May 27, 1912, such conveyance was made and executed in behalf of the city by its then existing Treasurer. The plaintiff paid two hundred dollars to the City Treasurer and in due time received the tax deed. Subsequently it appeared that there were irregularities in the assessment of the taxes, of such a nature that the assessment was void, and hence the city had no authority to sell the land, for the purpose of enforcing the collection of the assessed tax. The plaintiff then brought this action against the city for money had and received and obtained a favorable verdict from a jury. The defendant presents a motion for a new trial and exceptions to certain rulings of the learned justice in the court below. The fundamental question is whether the plaintiff can maintain this action.

In many states provision by statute has been made so that the purchase money paid at a tax sale shall be refunded to the purchaser if the title conveyed proves to be invalid, and a right of action against the municipality is provided if the refund is refused, but at common law the purchaser at a tax sale assumes the risks of his purchase. Moreover the power of an officer to sell is a naked power, statutory, and not coupled with an interest, and the purchaser is bound to inquire whether it is rightly exercised. Therefore, in the absence of special legislation to the contrary he comes within the rule of caveat emptor, and if his title proves worthless he cannot recover the money from the municipality.

These principles have become so firmly established by the decisions of various courts that there is no longer left any doubt as to the fixed law upon the subject. "It is a firmly settled general rule that the purchaser at a tax sale buys at his own risk, and that, if the sale proves ineffectual, he cannot, in the absence of an express statute, recover from the county the money paid by him. The payment is regarded as a voluntary one, and he assumes all risks; for, as in judicial sales, there is no warranty in tax sales. Where an action is

brought to recover money paid on the purchase of property at a sale, the party asking that it be refunded must show a statute providing that it shall be paid back to him." *State* v. *Castee!*, 11 N. E., (Indiana) 219, citing various cases.

In *City of Logansport* v. *Humphrey*, 84 Indiana, 467, it was said "The general rule is beyond dispute that the purchaser at a tax sale assumes all risk, and, except as he may be vested by force of statutory provision with a lien which the city or municipality holds against the property of the delinquent tax payer, he is without remedy if he fails to obtain a good title under his purchase. The doctrine of caveat emptor applies to such sales in its fullest force."

The Nebraska Court in *Martin* v. *Kearney County*, 87 N. W. 351, holds that the rule of caveat emptor applies to purchasers of real estate at tax sales, and quoting from *McCague* v. *City of Omaha*, 78 N. W., 463, says "He (the purchaser) was not required to either pay the special taxes against the lots in question nor to purchase the property at tax sale. He voluntarily purchased the lots for the amount of the illegal taxes imposed thereon, and he has no one but himself to blame for the loss. He cannot recover the amount back."

A leading case is that of *Pennock* v. *Douglas County*, 39 Neb., 293, made the subject of an extensive note in 42 Am. St. Rep., 579, where the authorities upon this subject are collected and discussed with much clearness and conclusiveness. The annotater, from a review of the cases, says "There seems to be no common law liability of either town, city, county or state for money received at a void tax sale, and therefore no obligation to refund it . . . . The purchaser at a tax sale, buying, as he does, property from a person who is not the owner of it, comes strictly and rigidly within the rule of caveat emptor; and if his title fails he cannot, except by virtue of some statutory provision, recover either the amount paid upon his purchase or damages for the illegal sale after he has been ejected by the owner, and the maxim applies to all tax sales whether made for the benefit of a town, city, county or state."

Our own court appears to have given sanction to this doctrine in at least two early cases.

In *Treat* v. *Orono*, 26 Maine, 217, when discussing the right to recover consideration paid for a tax deed, the court said, "To allow a person to purchase at such a sale, as he often may, a valuable estate for a trifling sum, and to take a deed from the collector without coven-

ants of title, and to become the absolute owner of the estate, if the title thus acquired should prove to be good, and if not good to recover back the consideration paid, with interest, and thus to derive all possible advantage from the contingency, without being subjected in any event to a loss, would present a case anomalous as a business transaction, showing that it could not have been the intention of the parties."

In *Packard* v. *New Limerick*, 34 Maine, 266, Chief Justice Shepley speaking for the court says, "When the purchaser acquires a good title, he is compensated for his risk by being allowed at the rate of twenty per cent for the use of his money, if the lands are redeemed, and if they are not, by becoming the owner of the lands, usually for a small part of their value. When the title does not prove to be good he may be subjected to a loss of the amount paid for it. The town assumes no part of the risk and does not become responsible for the goodness of the title conveyed to the purchaser, who must rely upon the covenants contained in the deed of the collector. The lands sold not being the property of the town, it can derive no benefit from the failure of the title to the purchaser. If required to compensate the purchaser for his loss of title, it would lose the amount of the taxes assessed upon the lands, and the risk respecting the title would be shifted from the purchaser, who had been paid for assuming it, to the town, which might be subjected to numerous suits, and be unable to know the actual condition of its financial concerns."

Our Legislature has provided no statute requiring a refund of money paid for a tax deed, based on defective proceedings in assessing a tax, nor is there any statutory authority in this State, for bringing an action against a municipality to compel such refund. The motion to set aside the verdict, as against law, must be sustained, but the exceptions need no consideration.

Exceptions not considered.
Motion sustained.

THE M. STEINERT & SONS COMPANY *vs.* HENRY E. REED.

Washington. Opinion December 19, 1919.

Rule as to mortgagee of personal property waiving his mortgage or lien on property in cases where action is brought by mortgagee on note secured. Rule where the mortgaged property is attached in the action on the note.

Replevin by the holder of a Holmes note to recover a piano described therein as the chattel securing the debt. The defense was that the plaintiff had brought suit on the note, recovered judgment, and thereby waived his lien.

Held:

That no attachment on the piano having been made in the suit there was no waiver of lien.

Action of replevin. Reported to Law Court upon agreed statement of facts. Judgment in accordance with opinion.

Case stated in opinion.

Howard M. Cook, and Harold H. Murchie, for plaintiff.

R. J. McGarrigle, for defendant.

SITTING: CORNISH, C. J., HANSON, PHILBROOK, DUNN, MORRILL, DEASY, JJ.

DEASY, J. The case comes to this court on agreed statement.

Defendant received a piano from the plaintiff and gave for it a note payable in installments.

The note contained an agreement that it was given for rental of the piano which "is to remain the property of the said The M. Steinert & Sons Co. until this note is paid in full at which time the title to said instrument is to vest in the maker of this note."

The plaintiff brought suit on note, recovered judgment and execution, but not satisfaction. Then the plaintiff replevied the piano.

The defendant claims that by its unsuccessful attempt to collect the note of the maker the plaintiff waived its right to or lien on the property. He sets up no other defense.

While there is some conflict of authority in other jurisdictions it is settled law in this State that "Practically x x the right of the vendor is that and only that of a mortgagee of personal property under a chattel mortgage given as security for a debt. He can attempt the collection of his debt by suit and also by enforcing his mortgage security concurrently or successively." *Westinghouse* v. *R. R. Co.* 106 Maine, 349; *Arthur E. Guth Co.* v. *Adams*, 114 Maine, 390.

An attachment of mortgaged chattels in a suit to enforce the mortgage debt is a waiver of the lien. *Libby* v. *Cushman*, 29 Maine, 429; *Whitney* v. *Farrar*, 51 Maine, 418.

But in this case no attachment appears to have been made.

Judgment for plaintiff.
By stipulation damages to be assessed at one dollar.

OREN HOOPER'S SONS

vs.

STERLING-COX SHOE CO., et al.

Cumberland. Opinion December 19, 1919.

Lease. Renewal clause. Rule as to continuance of tenancy beyond the specified time and the payment of rent being strong and in many cases conclusive evidence of intention of lessee to avail himself of a further term.

On appeal by defendant from a decree of the sitting Justice enjoining it from interfering with the plaintiff's possession of certain leased premises the issue is whether the lease had been renewed or had expired.

The lease provided for a term of one year from September 1, 1916, the lessee to "have the right of renewal to July 1, 1921."

Held:

1. That this was not a lease from year to year, but a lease for one year with the right of renewal for the entire balance of the term, that is until July 1, 1921, a period of three years and ten months.

2. The plaintiff legally and seasonably exercised its right of renewal before the expiration of the first year by a written notice which, although somewhat ambiguous, was deemed sufficient by both parties at the time.

3. Apart from this notice, the continuance of the tenancy beyond the specified term and the payment of rent, are strong and convincing evidence of the lessee's intention to avail itself of the further term, especially in view of the fact that the lessee had sublet a portion of the premises with the knowledge and consent of the lessor.

Bill in equity asking for an injunction restraining defendant from interfering with plaintiff's possession of a certain building or part thereof. Cause was heard upon bill, answer, replication and proof. From decree of Justice granting prayer of petitioner, defendant entered an appeal to Law Court. Judgment in accordance with opinion.

Case stated in opinion.

Maurice E. Rosen, for plaintiff.

Ernest M. White, for defendants.

SITTING: CORNISH, C. J., HANSON, PHILBROOK, DUNN, MORRILL, DEASY, JJ.

CORNISH, C. J. This is an appeal by defendant corporation from a decree of the sitting Justice enjoining it from interfering with the plaintiff's possession of certain leased premises. The issue is whether the lease had been renewed or had expired.

The essential facts may be stated as follows: J. B. Brown & Sons, being the owners of a certain building located on Commercial Street in the city of Portland, on July 1, 1916, leased the easterly half thereof to the defendant for a term of five years. That lease therefore will expire on July 1, 1921.

On August 29, 1916, the Sterling-Cox Shoe Company sublet the ground floor of this building to the plaintiff corporation for the term of one year from September 1, 1916, at the rental of twenty-five dollars per month payable monthly, the first payment to be made on October 1, 1916. That lease contained the following renewal clause: "The lessee shall have the right of renewal to July 1, 1921." The Hooper Company entered into possession under the lease.

On October 2, 1916, a supplementary arrangement was made between the plaintiff and the defendant by which in consideration of

the space turned over by the plaintiff to the defendant on the lower floor of the building, the latter agreed to give the plaintiff twice the amount of floor space on the top floor, together with access thereto and elevator service without charge. On August 3, 1917, before the expiration of the first year, the plaintiff wrote the defendant: "We enclose herewith our check for July rent and wish to give you notice herewith that we desire to renew our lease for another year in accordance with the terms of our present lease." No written acknowledgment of this letter, although requested, appears in the case, but in a conversation between the representatives of the parties a few days later, Mr. Cox was asked by Mr. Hooper why he had not acknowledged receipt of this communication and replied, as he says, that they did not wish to renew the lease, that the conditions had been violated repeatedly and they did not care for the plaintiff as a tenant. However he did not refuse to renew the lease, and nothing was done to that end by the defendant. The plaintiff continued to occupy during the second year, the same as during the first.

In June and July, 1918, arrangements were made by the plaintiff to sublet the lower floor for restaurant purposes. This necessitated certain alterations in the interior of the building, the installation of restaurant fixtures, etc.

On June 25, 1918, a written agreement was entered into between the plaintiff and the defendant under which the plaintiff agreed to take care of all claims made by the owners of the building against the defendant for alterations or damages done to the property, and also to pay the defendant all sums for additional insurance caused thereby.

This agreement was sent to the plaintiff by the defendant enclosed in a letter of the same date, June 25, 1918, in which the defendant also asked the plaintiff to rearrange the goods on the upper floor and stated that in moving the plaintiff's goods from the lower to the upper floor to make room for the restaurant it would be obliged to make a small charge for elevator service. This letter speaks of "alterations and added insurance due to your subletting portions of "your" floor space." On July 1, 1918, the lease was made from the plaintiff to the sublessee. On September 20, 1918, in answer to the plaintiff's letter of September 16, 1918, which is not in evidence, the defendant wrote: "In reply to yours of the 16th, I believe I have remedied your difficulty in getting to our top floor by explaining to your foreman who usually calls here for goods stored, how he can at all times reach the upper

story. He has no doubt explained to you before this." On October 1, 1918, the defendant wrote the plaintiff, stating that owing to war conditions it had been obliged to discontinue shoe manufacturing and had been forced to make new arrangements for the lease of the building; that the concern taking it over would need the lower floor and therefore the plaintiff must leave the building clear of its property by November 1, 1918.

This was followed by a notice to the plaintiff, dated November 12, 1918, signed by Neal W. Cox, to the effect that the Sterling-Cox Shoe Company had assigned to him its lease of the building and immediate possession of the ground floor was demanded. An assignment appears in the evidence dated November 9, 1918, and is signed by Sterling-Cox Shoe Company by Neal W. Cox, Treasurer, and the assignee named is Neal W. Cox in his individual capacity. This bill in equity praying for an injunction was brought on November 14, 1918. The injunction was granted by the sitting Justice and the cause is before this court on appeal.

From the foregoing statement of facts which is designedly made quite full, the correctness of the ruling below is apparent. The rights of the parties can be readily determined in accordance with settled principles of law.

The lease of August 29, 1916, from defendant to plaintiff was in proper form and demised the premises for a term of one year from September 1, 1916, to September 1, 1917, with the right of renewal to July 1, 1921, the terse language being, "the lessee shall have the right of renewal to July 1, 1921." The meaning of this renewal clause is obvious. The five year term of the lease which the Shoe Company held from the Browns would expire on July 1, 1921. The Shoe Company therefore gave to the plaintiff a sublease for one year, and if the plaintiff after one year's trial should desire to renew for the balance of the term held by the Shoe Company, that is to July 1, 1921, it had the absolute right to do so. It was not a lease from year to year. Had it been, the last year would run to September 1, 1921, which would be two months beyond the term held and controlled by the Shoe Company. There were two separate terms and only two, an absolute term of one year and at its expiration an optional term of three years and ten months. It is a lease and not a mere agreement to lease. A lease may create a term to commence in futuro and the additional

term is regarded as arising from the original demise. *Weed* v. *Crocker*, 13 Gray, 219; *Willoughby* v. *Atkinson Co.*, 93 Maine, 185; *Perry* v. *Lime Co.*, 94 Maine, 325-334.

Such being the construction of the instrument did the plaintiff legally and seasonably exercise its right of renewal? We think it did and in two ways, the one by words, the other by acts, either of which methods would constitute an election.

In the first place, on August 3, 1917, which was before the expiration of the first year, the plaintiff wrote to the defendant that it desired to renew its lease for another year, in accordance with the terms of the existing lease. This language is somewhat ambiguous. The terms of the lease did not permit that it should be renewed for a single year, nor on the other hand did it require that if renewed for the whole term notice should be given to the defendant annually. The plaintiff testified that he desired to renew till July 1, 1921, but gave the notice in this form because he thought he was obliged to do so. He gave no further notice, however, because on consulting his attorney he ascertained that it was unnecessary. Mr. Hooper's statement of intention seems reasonable, and the defendant apparently took the same view because it made no reply to the plaintiff's letter and never afterward, until this litigation arose, raised the point that the renewal notice was insufficient. In the conversation between the parties, already referred to, Mr. Cox did not base his partial disinclination to renewal upon the inadequacy of the notice but upon the unsatisfactory character of the plaintiff's occupation.

But apart from this notice, it is firmly settled in this State, whatever the rule may be in some other jurisdictions, that continuance of tenancy beyond the specified term, and the payment of rent are strong and in many cases conclusive evidence of the lessee's intention to avail himself of the further term, and obviate the necessity of written notice. *Sweetser* v. *McKenney*, 65 Maine, 225; *Holly* v. *Young*, 66 Maine, 520; *Briggs* v. *Chase*, 105 Maine, 317; *Kelleher* v. *Fong*, 108 Maine, 181. The right granted is wholly in the interest of the lessee and to be exercised by him as a matter of choice. In the case at bar no written notice was required and the continued occupation was strongly probative of the plaintiff's election to renew. The specific term ended September 1, 1917, but the plaintiff continued to occupy and pay rent until October 1, 1918, when the defendant notified it for the first time that the lease was terminated.

The plaintiff's intention is further evidenced by the fact of its subletting the ground floor for a restaurant as late as July 1, 1918, with the knowledge and consent of the defendant and by the agreement which the parties made as to the expense of the changes and the increased insurance. It is unreasonable to suppose that the plaintiff would have entered into this arrangement and subjected itself to this additional expense unless it expected to hold during the balance of the term. And the defendant must have so understood it. Moreover every motive of self interest would lead the plaintiff to renew because it received from the sublessee of a portion of the premises the same amount it paid the defendant for the whole, so that it was enabled by the sublease to use the upper floor for storage purposes without any cost whatever. The evidentiary strength of continued occupation is reinforced by all the circumstances in the case.

Appeal dismissed with costs.
Decree of sitting Justice affirmed.
Temporary injunction made perpetual.

GRAND LODGE OF A. O. U. W. OF MAINE.

vs.

FOREST L. MARTIN AND GEORGIE A. PENNEY.

Penobscot. Opinion December 23, 1919.

Rule as to the By-Laws of an Insurance Association becoming a part of the contract of insurance. Necessity of complying with By-Laws relative to changing of beneficiary in insurance policy. Revocation of beneficiary. Purpose of having same made in the manner required by the By-Laws.

The By-Laws of the plaintiff corporation provide that assignments of its beneficiary certificates shall be executed before, and attested by a local lodge Recorder or under certain circumstances a notary or court officer.

George A. Martin, Jr. holding such a certificate payable to his daughter signed an assignment of same to his brother, not however in the presence of any such Recorder or officer, and sent it to the local Recorder.

The latter signed the attestation clause but deferred sending it to the Grand Lodge until he could see the assured, verify his signature and obtain his assent.

The following morning before the assent could be obtained George A. Martin, Jr. died.

The pending process is brought to determine whether the amount of the certificate which has been paid into court belongs to the daughter or the brother.

The decree of the sitting Justice holds that the attempted substitution was ineffectual. From this decree the brother appeals to this court.

Held that:—

The By-Laws of the corporation read themselves into and become a part of its contracts of insurance.

A provision contained in a beneficiary certificate prescribing that a substitution must be made in the presence of a designated official is a material and substantial requirement, without conformity to which, or waiver by the member during his lifetime, no substitution can be legally effected.

The requirement that a revocation shall be executed in the presence of an official is not solely for the benefit of the society nor for that of the beneficiary. One of its objects, and perhaps its priminary object is to guard against the frustration of the member's purpose.

The member has the unqualified right to change the beneficiary. He also has the right to determine how, when he can no longer speak, the fact of the change shall be ascertained and verified.

Counsel further contends that when the local Recorder signed the attestation clause in the revocation, he waived the requirement of the member's personal presence.

But it does not appear that the local Recorder was authorized to waive any rights.

Moreover the signing by the Recorder was tentative. Whether his signature was to stand as an attestation depended on the result of his intended interview with the member.

It is also claimed that a waiver results from the act of the plaintiff in paying the money into court. It is true the plaintiff has thus waived rights of its own but it has not and cannot waive rights of other interested parties.

Bill of interpleader. Defendants each filed answer. From the decision of the sitting Justice, an appeal was entered by Forest L. Martin, one of defendants. Judgment in accordance with opinion. Case stated in opinion.

W. H. Waterhouse, and Morse & Cook, for Forest L. Martin.

Walton & Walton, for Georgie A. Penney.

SITTING: CORNISH, C. J., HANSON, PHILBROOK, WILSON, DEASY, JJ.

DEASY J. Bill of interpleader. The sum of two thousand dollars being the amount of a beneficiary certificate issued by the complainant corporation to George A. Martin, Jr., deceased has been paid into the Clerk of Courts for the County of Penobscot to be disposed of under direction of court.

Georgie A. Penney, daughter, and Forest L. Martin brother of the deceased each claims the fund, the former as original, the latter as substituted beneficiary.

George A. Martin, Jr. on Feb. 26, 1917, the day before his death, signed a formal instrument purporting to substitute the name of his brother for that of his daughter as beneficiary.

The question to be determined is whether such substitution was legally effectual.

The By-Laws of the corporation read themselves into and become a part of its contracts of insurance.

Grand Lodge v. *Edwards*, 111 Maine, 361; *Grand Lodge* v. *Connor*, 116 Maine, 224; *Shuman* v. *A. O. U. W.*, (Iowa), 82 N. W., 331; *Grand Lodge* v. *Connolly*, 58 N. J., Eq., 183; *Lahey* v. *Lahey*, 174 N. Y., 152.

The provision of the plaintiff's by-laws relating to change of beneficiaries is as follows:—

"Sect. 10. A member may, at any time, when in good standing, revoke his directions as to the payment of his Beneficiary Certificate, and a new Beneficiary Certificate shall thereafter be issued, payable to such beneficiary or beneficiaries as such member may direct in accordance with these Laws, upon the payment of a fee of fifty cents. Said revocation and direction must be made in the form prescribed, signed by the member in presence of and attested by the Recorder of his Lodge, and accompanied by the required certificate of the Subordinate Lodge, under its seal, shall be forwarded with the Beneficiary certificate to the Grand Recorder. If it is impracticable to have said revocation and direction signed in the presence and attested by the Recorder, attestation may be made by a notary public or an officer of a court of record, with his official seal attached. When such revocation, direction and certificate, made in accordance with these Laws, shall have been received by the Grand Recorder, any previous direction in regard to the payment of the benefit shall thereby be rendered null and void."

The reservation and direction in the pending case was not signed in the presence of the Recorder nor in the presence of a notary or court officer.

It was signed by George A. Martin, Jr. and in his absence delivered to the Recorder who signed the attestation clause. The latter did not then forward the revocation to the Grand Lodge, but kept it intending to see the insured who was ill at a hospital in Bangor, ascertain if the signature was his voluntary act and obtain his assent thereto. His assent was not obtained. Before the Recorder reached the hospital the following morning George A. Martin, Jr. had died.

When the corporation by the voluntary direction of the assured has actually changed the beneficiary by the issuance of a new certificate in lieu of the original, such substitution is valid and effectual though the formalities provided by the by-laws have not been observed.

Delaney v. *Delaney*, (Ill.), 51 N. E., 966; *Bowman* v. *Moore*, (Cal.), 25 Pac.,409; *Simcoke* v. *Grand Lodge* (Iowa), 51 N. W., 9; *Lamont* v. *Hotel Asso.*, 30 Fed., 817; *Faubel* v. *Eckhart*, (Wis.), 138 N. W., 615.

Several courts have also decided that a substitution is valid and effectual though not completed by the issuance of a new certificate, if the assured has done everything in his power to effectuate it, and nothing remains to be done but some ministerial act on the part of the society.

Holden v. *Modern Brotherhood*, (Iowa), 132 N. W., 332; *Sanborn* v. *Black*, 67 N. H., 538; *Eatman* v. *Eatman*, (Tex.), 135 S. W., 165; *Luhrs* v. *Luhrs*, 123 N. Y., 367.

A substitution may be effectual where complete conformity by the assured to the prescribed method has been prevented by the fraudulent act of the beneficiary.

Lahey v. *Lahey*, 174 N. Y., 146; *Marsh* v. *American Legion*, 149 Mass., 512; *Supreme Conclave* v. *Cappella*, 41 Fed., 1.

But none of these authorities are applicable to the facts in the pending case. The substitution was not complete. No new certificate had been issued. A condition remained unperformed which the contract required the assured to perform. It required that he execute his revocation in the presence of the specified officer. This he failed to do. The completion of the substitution may have been prevented

or interrupted by the illness of the member, but not by the fault of the society or the fraud of the beneficiary.

The attorney for Forest L. Martin contends that the requirement of the by-laws that the revocation and direction must be in the presence of the Recorder is solely for the benefit of the corporation, and that failure to conform to it is not available to any other party. While there are cases sustaining this contention the preponderance of authority and the better reasoning is to the contrary.

A provision contained in a beneficiary certificate prescribing that a substitution must be made in the presence of a designated official is a material and substantial requirement, without conformity to which, or waiver by the member during his lifetime, no substitution can be legally effected.

Abbott v. *United Order of Pilgrim Fathers,* 190 Mass., 67; *Mutual Aid So.* v. *Lupold,* 101 Pa. St., 118; *Grand Lodge* v. *Connolly,* 58 N. J. Eq., 180.

The requirement that a revocation shall be executed in the presence of an official is not solely for the benefit of the society nor for that of the beneficiary. One of its objects, and perhaps its primary object is to guard against the frustration of the member's purpose.

The member has the unqualified right to change the beneficiary. He also has the right to determine how, when he can no longer speak, the fact of the change shall be ascertained and verified.

Counsel further contends that when the local Recorder signed the attestation clause in the revocation, he waived the requirement of the member's personal presence.

But it does not appear that the local Recorder was authorized to waive any rights.

Dean v. *Dean* (Wis.), 156 N. W., 136; *Grand Lodge* v. *Connolly* 58 N. J. Eq. 183.

Moreover the signing by the Recorder was tentative. Whether his signature was to stand as an attestation depended on the result of his intended interview with the member.

It is also claimed that a waiver results from the act of the plaintiff in paying the money into court. It is true the plaintiff has thus waived rights of its own but it has not and cannot waive rights of other interested parties.

A. O. U. W. v. *Connor,* 116 Maine, 229.

The decree of the sitting Justice holds that the attempted substitution of Forest L. Martin for Georgie A. Penney as beneficiary was ineffectual. From this decree Forest L. Martin has appealed. The entry must be,

Appeal dismissed.
Decree affirmed.

ANELIOUS O. CHICKERING, Admr.

vs.

LINCOLN COUNTY POWER COMPANY.

Lincoln. Opinion December 27, 1919.

Rule of pleading in actions of tort relative to alleging the duty owed plaintiff by defendant. Rule where declaration contains direct and positive averments of fact from which the law may imply an existence of duty. General rule holding that a person must have, or in the exercise of ordinary care should have, knowledge of the dangerous conditions to which he has exposed himself before he can be held guilty of contributory negligence.

Action brought under the provisions of R. S., Chap. 92, Secs. 9-10 by the administrator of the estate of Alton A. Chickering, to recover pecuniary damages resulting from the immedate death of the intestate in consequence of alleged wrongful acts or neglect of the defendant. Defendant filed general demurrer, which was overruled by presiding Justice.

Held:

1. By interposing a general demurrer, defendant did not raise any question of fact, but advanced an issue challenging the legal vitality of the case.
2. It is good pleading in an action of tort, founded on a defendant's negligence, for the declaration to allege what duty was owing by the one to the other, together with its breach and the consequential injury.
3. A declaration will not be intrinsically bad for want of such averments, for a plaintiff may make direct and positive averments of fact from which the law

will imply the existence of duty, and by like averments he may show wherein the defendant left duty undischarged

4. It would be difficult in an acceptable general rule to set bounds to the extent to which ownership makes it possible for one to use his own property without incurring liability for injury to the person or property of another in consequence of such use. The test is not whether the use caused the injury, or whether the injury was a natural result, but whether the use was a reasonable exercise of that dominion which the owner of property has, having regard to his own interests, the rights of others, and having too in view public policy.
5. As a general proposition, a person takes a risk of accident, or contributes negligently to his own injury, as the case and relation may be, only where he voluntarily exposes himself to a danger of the existence of which he knows, or, in the exercise of that degree of care which an ordinarily prudent person would exercise, he ought to know.
6. The law discriminates between children and adults, the feeble and the strong, and only requires of each the exercise of that degree of care to be reasonably expected in view of his age and condition. There is a radical difference in the degree of care to be exercised by one reasonably approaching a lurking, injurious element of which he does not know, and by one approaching an obvious or known source of danger where he realizes that lack of heed on his part may impend disaster.
7. On the record here presented it is held that the averments of the plaintiff's declaration set out a state of facts which can be held to impose liability on the defendant.

Action on the case brought under R. S., Chap. 93, Secs. 9-10. Defendant filed demurrer to plaintiff's writ and his amended declaration, and from the ruling of the presiding Justice overruling the demurrer, exceptions were filed. Judgment in accordance with opinion.

Case stated in opinion.

George A. Cowan, for plaintiff.

A. S. Littlefield, for defendant.

SITTING: CORNISH, C. J., HANSON, PHILBROOK, DUNN, MORRILL, DEASY, JJ.

DUNN, J. This action was brought, under the provisions of R. S., Chap. 92, Secs. 9 and 10, by the administrator of the estate of Alton A. Chickering, deceased, for the benefit of an only heir at law, to recover the pecuniary damages resulting from the immediate death

of the intestate, in consequence of alleged wrongful neglect of the defendant.

After setting forth plaintiff's appointment and qualification as administrator, and that he brought the suit for a statutory beneficiary, the substance of the declaration is that, on May 23rd, 1918, for transmitting electricity at high voltage from its generating plant at Damariscotta Mills, the defendant owned and operated a line of posts and wires, extending in and along a highway called the River Road in Newcastle; that defendant "wrongfully, negligently and carelessly maintained said wires, with no insulation whatever, or any other protection therefrom, along said highway and past the plaintiff's residence, situated on the east side of and adjoining said highway;" that said wires were "wrongfully, negligently and carelessly strung from the cross-arms on the poles" among the branches of a shade-tree in plaintiff's yard, "said wires being hidden from view by the foliage thereof, and being less than sixteen feet from the ground;" that intestate, a minor of the age of 12 years, playing that day, as he was entitled to, about plaintiff's premises, where also intestate lived, climbed the tree where the wires were run, "and while in said tree said wires came in contact with his body, without fault on his own part, and he was electrocuted and instantly killed thereby." Other allegations of the declaration are not essentially important of recital at this time.

By interposing a general demurrer, the defendant confessed all the facts well pleaded by its opponent to be true; but, relying on some predicated defect of substance, by the rules of law arising on those facts, it denied that plaintiff stated a cause of action. In other words, defendant did not raise any question of fact. It raised an issue challenging legal vitality of the case. The question for review is whether demurrer properly was overruled.

Although the line of posts and wires was located in and along a public way, it was, nevertheless, on the record before us, rightful property of the defendant. Granting that the poles and wires were legal structures, the owner would be liable only for carelessness or negligence in their erection or maintenance. R. S., Chap. 60, Sec. 27.

It would be difficult, in an acceptable general rule, to set bounds to the extent to which ownership makes it possible for one to use his own property without incurring liability for injury to the person or

property of another, resulting from such use. The test is not whether the use caused injury, or whether injury was the natural consequence, but whether the use was a reasonable exercise of that dominion which the owner of property has, having regard to his own interests, the rights of others, and having too in view public policy. When a person attempts to do that which is useful, usual or necessary, as well as lawful, if done under proper conditions, and injury unexpectedly results, it would be at variance with legal principles to say that he does it at the peril of being adjudged guilty of inexcusable wrong, if it errs as to fitting manner of performing it. For the doing of an act without right, a person may be adjudged guilty as a trespasser, but if he had a right to do the act, the question of whether he reasonably exercised that right turns upon his negligence, within the latitude for discrimination or distinction which that form of action affords.

"Actionable negligence," said Whitehouse, J. in *Boardman* v. *Creighton*, 95 Maine at page 159, "arises from neglect to perform a legal duty." In the declaration under consideration there is absence of specific allegation of duty owed by defendant to plaintiff's intestate, and of breach of that duty, with resulting injury. It is good pleading in an action of tort, founded on a defendant's negligence, for the declaration to allege what duty was owing by the one to the other, together with the breach of that duty, and the consequential injury. But a declaration would not be intrinsically bad for want of such specific averments. A plaintiff may make direct and positive averments of fact from which the law will imply the existence of duty, and by like averments he may show wherein the defendant left duty undischarged. "When it" (the declaration) is founded on the obligation of law, unconnected with any contract between the parties, it is sufficient to state very concisely the circumstances which give rise to defendant's particular duty or liability." 1 Chitty on Pleadings, Section 397. By direct averment a pleader must at least state facts from which the law will raise a duty, and show an omission of the duty, with injury in consequence thereof. 29 Cyc., 567. It is sufficient to allege facts in a general way, which will give the defendant notice of the character of the proof that would be offered to support the plaintiff's case. There are many cases where, when certain facts are shown, a general allegation of negligence or want of care gives all the information needed. Sufficiency of the pleadings must be determined upon the facts from which the legal duty is

deduced. *Marvin Safe Company* v. *Ward*, 46 N. J. L., 19, 23, citing *Seymour* v. *Maddox*, 16 Q. B., 326. Reasonable certainty in the statement of essential facts is required to the end that defendant may be informed as to what he is called upon to meet on the trial. Facts showing a legal duty, and the neglect thereof on the part of the defendant, and a resulting injury to the plaintiff, should be alleged. 29 Cyc., 565.

This declaration sets out conjoined acts of negligence, both of which may be true, and both of which coalescing as a single act, may have caused the accident. Shorn of technical phraseology, plaintiff charges that defendant negligently had a dangerous wire wrongfully, carelessly, and negligently strung. In reply, the theory of the doctrine of attractive nuisances, familiar in the turntable cases, has been discussed by counsel. That doctrine is that he who creates on his premises or leaves there a dangerous machine or thing alluring to children, thereby impliedly invites children to endangering play; and, if they come, and he fail to exercise due precaution to protect them from injury resulting from their play, liability in damages for negligence attaches. This doctrine never has been adopted in Maine. *McMinn* v. *Telephone Company*, 113 Maine, 519.

In the transmission of electricity high regard must be had to the safety of the public. It cannot be said as a matter of law that it is the duty of an electric company, regardless of where its line may be and as to whom injury may come, to insulate or otherwise extraordinarily guard wires strung, by virtue of a legal location, above the general sphere of hazard. This duty has been held to be limited to points where there is ground to apprehend that a reasonably prudent person may come in close proximity with the wires. *Wetherby* v. *Twin State Company*, (Vt.), 75 Atl., 8. In the case here, it appears that defendant had a high tension transmission line extending along the highway to and beyond the plaintiff's residence, the wires stretching between the branches of a shade-tree in his yard. Intestate, while at play, climbed into the tree, and, as the immediate result of contact there with a naked wire, was instantly killed by an electric shock. Trees growing about a family home are not primarily for boys to play in. But by climbing a tree a boy would not altogether remove himself from the pale of the protection of the law. In constructing and maintaining a line for transmitting the subtle agency of electricity, no one may with impunity totally disregard the natural

habits and the childish inclinations of boys at play to climb the door-yard shade-trees. Human life is short enough, and its burdens and responsibilities come soon enough, at best. To take from boyhood the legitimate pleasures and adventures of tree climbing, would unduly restrict the confines of that memory cherished domain, and lessen life's joys both there and thereafter.

As a general proposition, a person takes the risk of accident, or contributes negligently to his own injury, as the case and relation may be, only where he voluntarily exposes himself to a danger of the existence of which he knows, or, in the exercise of that degree of care which an ordinarily prudent person would exercise, he ought to know. The law imperatively imposes upon everyone that, proportioned with the danger to be avoided, he should use care for his own protection. Yet, as Mr. Justice Harlan approvingly said in *Union P. Ry. Co.* v. *McDonald*, 152 U. S., 262, 38 Law Ed., 434, "the law discriminates between children and adults, the feeble and the strong, and only requires of each the exercise of that degree of care to be reasonably expected in view of his age and condition." *Reynolds* v. *N. Y. Central &c. Railroad*, 58 N. Y., 248. Children are not holden to the same extent of care that adults are. They are bound to use that degree of care which ordinarily prudent children of their age and intelligence are accustomed to use under like circumstances. The age and intelligence of a child are important factors in determining whether due care has been used. *Colomb* v. *Street Railway Company*, 100 Maine, 418, 420. The capacity, the intellignece, the knowledge, the experience and discretion of the individual child are always evidentiary circumstances. There is no absolute standard. Plaintiff's intestate was 12 years of age. A bright, intelligent boy of that age, in the possession of all his faculties, has been held to be sui juris (*Crosby* v. *Railroad Company*, 113 Maine, 270; *Gleason* v. *Smith*, 180 Mass., 6), and his conduct measurable by the standard of that of boys of like age who are ordinarily careful. *Crosby* v. *Railroad Company*, supra.

Presence of the wires might cause a person to surmise them of dangerous character. But, in and of itself, a wire is inoffensive. Many a yard has wire strung through it as a piece of mechanism, to which electricity is ever stranger. Again, wires charged with electric current may be harmless and they may be highly dangerous. The difference is not apparent to ordinary observation. "While an

expert" said Judge Lathrop in *Griffin* v. *United El. Lt. Co.*, 164 Mass., 492, "may consider it dangerous to touch any wire, unless he knows it to be a harmless one, there was evidence that the plaintiff was not an expert, and did not know that an electric light wire would do any hurt.—The question of his due care was for the jury." Electricity gives no warning of its presence in intimate association with wire. It is not visible. It is odorless, colorless, and silent; a violent and mysterious force and power of nature subordinated to the gainful and the highly serviceable use of man. A person seeing a wire that he knows is, or may be, carrying this perilous agency should in duty avoid coming in contact therewith. He is not, however, entirely open to the charge of contributory negligence if he assume that the owner of the wire has discharged positive duty at places where people reasonably may be expected to go for work, business, or pleasure. Failure of the one to perform duty does not relieve the other of all necessity for care. A person may never safely assume that a wire carrying electricity is wholly free from danger. For the reason that a wire may not carry any current at all, or may carry a current that is not dangerous, or carrying a current dangerous to the safety of mankind generally may be sufficiently safeguarded, there is radical difference in the degree of care to be exercised by one reasonably approaching a lurking, injurious element of which he does not know, and by one approaching an obvious or known source of danger where he realizes that lack of heed on his part may impend disaster. Whether intestate had been admonished of the danger hidden in the wire; what opportunity he had had to inform himself as to the existing situation and its dangers; for what length of time to his knowledge the wire had been in place and in use; whether he was equal in capacity and experience to the ordinarily careful boy of his age; whether he was bright, quick, intelligent and active; what care or precaution, if any, he actually took to avoid injury, and other inquiries into which a subject of this nature might broaden out, demurrer to the declaration does not develop.

Courts elsewhere have passed upon cases resembling this. In *Mullen* v. *Wilkes-Barre Gas & Electric Co.*, 229 Pa. St., 54, a boy of tender years while at play climbed a chestnut tree standing in the sidewalk of a public street, and was injured by coming in contact with the defectively insulated wire of a corporation engaged in furnishing electric light. The reviewing court said, that on the main question

of whether danger to anyone was reasonably to be apprehended because of the condition of the wire, the case was close. In other respects, it adopted the reasoning of the trial court and affirmed judgment for the plaintiff.

Temple v. *McComb City El. Lt. & P. Co.*, (Miss.), 42 So., 874, 11 L. R. A., (N. S.), 449, was brought by a child 10 years old to recover for injuries caused by an uninsulated wire which defendant had placed in a tree in a highway. Plaintiff came in contact with the wires while climbing among the branches of the tree. Reversing judgment for defendant, Chief Justice Whitfield, said: "The appellee had the right to such reasonable use of the streets for its poles and wires as the conditions existing at the time in the community warranted. On the other hand, the appellant had the reciprocal right to what was a reasonable use of the streets on his part.—Whether this appellee knew that this particular small boy was in the habit of climbing this tree or not, it is clear from the averments of the declaration that it did know the tree, the kind of tree, and, knowing that, knew what any person of practical common sense would know,—that it was just the kind of a tree that children might climb into to play in the branches."

The limb of a tree on which a boy was sitting broke, and he came in contact with an uninsulated wire passing through the tree, below where he had sat. The court held that lack of insulation of the wires, and not the breaking of the limb, was the proximate cause of the injury, and that defendant reasonably could have anticipated that a boy would climb the tree. *Thompson* v. *Flater*, 197 Mo. App. 247. In *Sweeten* v. *Pacfic Power & Light Co.*, 88 Wash., 679, 153 Pac. 1054, an electric light company permitted its wires from which the insulation had become worn, of which fact its manager was warned, to remain in a large tree in a public alley where children habitually played. That company was held liable for the death of an eight year old boy who came in contact with the wires while in the tree. *Denver Con. El. Co.* v. *Walters*, (Colo.) 89 Pac., 815, was a case where a boy 12 years old sought to recover for injuries caused by contact with defendant's uninsulated wire affixed to his father's house for carrying electricity for lighting purposes there. Judgment in his favor was reversed on other grounds, but the court said, that wherever there was a reasonable probability of accessibility of the appliances to and by children, the strict rule of the highest degree

of care was to be invoked. In *Bent n* v. *North Carolina Service Corp.*, 81 S. E., 448, the electric company was held liable for the death of a boy who came in contact with its high power wires where they passed through a tree in the street, and the insulation had been worn out. Said the court: "Defendant was bound to have reasonably expected small boys in the neighborhood to have climbed that sort of a tree." "Certainly," it added, in answering the contention that the boy's presence in the tree made of him a trespasser, "the boy was not trespassing upon the property of the defendant." In *Thompson* v. *Tilton El. Lt. Co.*, 77 N. H., 92, 88 Atl. 216, it was held that defendant was liable for the death of a boy who was killed while playing in a road, as he leaned against a pole carrying defendant's wires and came in contact with a chain used to raise and lower the electric lamp. The court said that the boy was lawfully in the highway, and that he was guilty of no trespass against the defendant. *McCrea* v. *Beverly Gas & Electric Company*, 216 Mass., 495, was an action by a city employee against a public service corporation maintaining wires transmitting electricity. While climbing a tree in the performance of his duties, plaintiff was injured from an electric shock communicated by a wire of the defendant. It is said in the opinion: "Wires carrying a current with a voltage of five thousand volts are exceptionally dangerous and require extraordinary precautions; and the higher the voltage the greater the precautions that are required." . . . "The necessity of men climbing trees to do the required work on moths was known, and it is possible to insulate electric wires. The wires passed through or by trees at fifty places at least. In spite of that no attempt was made by the defendant to insulate the wires at those points."

It may be that the dangerous character of a wire carrying electricity at high voltage would be unaffected by insulation. A situation is conceivable in which insulation originally adequate might tend, from partial and unnoticed wear, to increase the degree of danger. Perhaps such wires had better be left naked. These questions are not now presented for decision. Plaintiff's contention is that his intestate, exercising due care on his own part, was where he was of legal right entitled to be, and that he was not bound to take the premises as he found them; that a wire apt to inflict injury there negligently placed and negligently maintained by the defendant,

without insulation and without warning or safeguard whatever, cause deplorable accident.

Delivering the opinion of the court in *Wetherby* v. *Twin State Gas & Electric Co.*, supra, Justice Heselton says: "The business of transmitting electricity, while indispensable to society, must be conducted with a very high regard for the safety of the public, and the thoughtlessness, inexperience, lack of judgment, and misjudgment of children of tender years must be taken into account; but the courts cannot make electric companies insurers of the safety of children, more than of others, nor require of such companies, in the circumstances of their business, a degree of care, prudence and foresight beyond that which is given to careful and prudent men to have and exercise in such or like circumstances." Reason and humanity alike approve the rule so well defined by the Vermont jurist. Adopting it in the case at bar, it is our conclusion that the averments of the plaintiff's declaration set out a state of facts which can be held to impose liability on the defendant.

Exceptions overruled.

STATE OF MAINE *vs.* ALEXANDER J. BORDELEAU.

Aroostook. Opinion January 3, 1920.

Dying declarations. General rule as to admissibility of same. Questions to be considered in passing upon the admissibility of such declaration. Massachusetts rule relative to same.

When, in trials for homicide, the declarations of the victim are offered in evidence as dying declarations, it must appear to the presiding Justice that at the time of making the statements, the deceased was conscious of the certainty of approaching speedy death; if any hope of recovery remained, the declarations are inadmissible.

It is not sufficient that the deceased has only the belief that he may ultimately die of his injuries. Death, shortly to ensue, must be an absolute certainty, so far as the consciousness of the person making the declaration is concerned.

The actual period of survival after making the declaration is immaterial. It is the consciousness of almost immediate dissolution, and not the rapid succession of death in point of fact, that renders the testimony admissible.

This consciousness of impending death may be established by any relevant evidence. The range of competent evidence may include evidence of the physical condition of declarant at the time of making the statement, from which the inference may be legitimately drawn that the declarant had a conscious sense of impending death, as well as evidence of the declarant's conduct and declarations.

In the instant case, the State's attorney having stated his intention of offering the statements of the victim as dying declarations, the presiding Justice ordered the jury to retire and heard the evidence of the witnesses as to the condition of the victim and his consciousness of impending death. *Held*, that upon the facts as shown in evidence the presiding Justice was fully justified in admitting the declarations of the deceased, stating the details of the assault upon him and naming the respondent as his assailant.

When evidence of the declarations of the deceased has been admitted by the presiding Justice, its credibility is for the consideration of the jury, who should have the opportunity to weigh all the circumstances under which the declarations were made, including those already proved to the presiding Justice, and may give the testimony and the declarations such credit as they think they may deserve.

Having ruled that the statements of deceased were dying declarations and, as such, competent evidence, the presiding Justice in his charge submitted the same question to the jury; after first fully defining the rule of admissibility of dying declarations, he instructed the jury that they must find that the declarations were made by deceased under the sense of impending death as so defined, before they should consider them as dying declarations.

Held:

That the respondent was not prejudiced by the procedure adopted; it gave the opportunity for his counsel to reargue to the jury the question of fact upon which the presiding Justice had ruled adversely to him on the preliminary hearing; he was thus allowed a second chance to have the declarations excluded from consideration.

Indictment for murder. Respondent was found guilty. To the ruling of the court relative to admissibility of dying declarations of deceased, certain exceptions were filed by respondent. Judgment in accordance with opinion.

Case stated in opinion.

Guy H. Sturgis, Attorney General of the State of Maine, *Bernard Archibald, and William R. Roix,* County Attorney of Aroostook County, for the State.

John P. Deering, and Charles P. Barnes, for respondent.

SITTING: SPEAR, HANSON, DUNN, MORRILL, WILSON, DEASY, JJ.

MORRILL, J. The respondent has been convicted of the murder of one Moses Tozier committed on the sixteenth day of November, 1917. At his trial counsel for the State proposed to offer in evidence certain declarations of the deceased, as dying declarations. The presiding Justice directed the jury to retire, and in their absence heard the testimony of five witnesses, and then ruled that the deceased had, at the time of making the declarations, given up all hope of life, and that the declarations were admissible. To this ruling respondent has exceptions.

The jury was then recalled and the same witnesses, and an additional witness, were examined in the presence of the jury as to the condition of the deceased, his realization of impending death, and were permitted, against objections by respondent's counsel, to give in evidence declarations of deceased as to details of the assault,

naming the respondent as his assailant. To this ruling admitting said declarations in evidence before the jury respondent also has exceptions.

Counsel accept the general principle that the solemnity of the situation of a person under the conviction that he is about to die, with all hope of recovery gone, supplies a circumstantial guaranty that his statements are in accordance with the truth, notwithstanding they are not sanctioned by oath, and that cross-examination is impossible. "As this guaranty consists in the subjective effect of the approach of death," to use the language of Mr. Wigmore, (2 Wigmore on Ev. Sec. 1439,) it must appear to the presiding Justice that at the time of making the statements, the deceased must be conscious of the certainty of approaching speedy death; if any hope of recovery remains, the declarations are inadmissible; nor is it sufficient that the deceased has only the belief that he may ultimately die of his injuries. To quote from a case on respondent's brief: "The person making the declaration shall have a complete conviction that death is at hand. . . . . Death, shortly to ensue, must be an absolute certainty, so far as the consciousness of the person making the declaration is concerned." Beasley, C. J., in *Peak* v. *State,* 50 N. J. L., 222. But the actual period of survival after making the declaration is immaterial. It is the consciousness of almost immediate dissolution, and not the rapid succession of death in point of fact, that renders the testimony admissible. These propositions are supported by the authorities: 1 Greenleaf on Ev., Sec. 158; 1 Phillips on Ev. 2d Amn. Ed., 235, Cowen & Hill's Notes, No. 453; 2 Wigmore on Ev., Sec. 1438, et seq.; 4 Chamberlayne on Ev., Sec. 2831 et seq.

This consciousness of impending death, this phase of mind, may be established by any relevant evidence. The range of competent evidence is wide. It may include evidence of the physical condition of the declarant at the time of making the statement, from which the inference may be legitimately drawn that the declarant had a conscious sense of impending death, as well as evidence of the declarant's conduct and declarations. 1 Greenleaf on Ev., Sec. 158; 4 Chamberlayne on Ev. Sec. 2831 et seq.; 2 Wigmore on Ev., Sec. 1442.

The Attorney General apparently agrees with counsel for respondent that the determination of the presiding Justice, upon the preliminary hearing, that the alleged dying declarations were admissible,

presents a question of law, and may be reviewed on exceptions. *Com.* v. *Roberts*, 108 Mass., 296, 302. We express no opinion thereon, but proceed to consider the case as presented.

Upon the preliminary hearing in the absence of the jury the presiding Justice heard the testimony of five witnesses: Pearl E. Morgan, Daniel H. Perry, Edna Rogerson, Johnson Morgan and Dr. George W. Upton. The bill of exceptions includes a transcript of the testimony of Harold S. Merry and Dr. Frank H. Jackson, the medical examiner; the bill does not affirmatively show when the testimony of Merry and Dr. Jackson was heard; it is stated in the brief for the State, and does not appear to be controverted by the defense, that these witnesses were called and examined before the jury retired; this is plainly to be inferred as to Dr. Jackson from the testimony of Dr. Upton, when re-examined before the jury, that he had heard Dr. Jackson's testimony as to the conditions that he found and the cause of death, and agreed with his conclusions.

What then was the scene as presented to the presiding Justice?

In mid-afternoon of the day following the assault, the deceased, a man about sixty-five years old, spare of figure, about five feet, eight inches tall, is found lying diagonally across a bed in an upstairs bedroom of his house; he was in his shirt sleeves, wearing his trousers and leather-topped lumbermen's rubbers; he was partly covered by the bed clothes; he was conscious. Upon his head were six distinct cuts, such as could be made by a blunt instrument with small striking surface; five of these wounds were complicated by compound fractures of the skull. "These compound fractures," to quote the medical examiner, "were situated chiefly in the top and back part of the head. There was one line of fracture that ran from the most prominent portion of the skull practically through from before, backward through the skull into the frontal bone itself, and from each of these blows there were radiating lines of fractures. Practically the whole top of the skull was more or less broken up." The head and hands of the man were covered with dried blood; his clothes and the bedclothes were smeared with dried blood; upon the floor was a pool of blood, about one foot by two feet, which had dried, and around this spot were spots of dried blood, such as might be made with the hand. Into this room comes Pearl E. Young, an acquaintance of nearly forty years; to the inquiry as to how he felt, the deceased replied "Awfully bad. He pounded me all up. I am all in;" and later he

said that he was going to die. In a few minutes other friends and a physician arrived; as he is held up upon the bed in the arms of a friend and while the doctor is dressing the wounds upon the head, he said, "Let me back, Dan, I am awful sick. I will die anyway. Let me die in peace." Shortly afterwards he told the witnesses the details of the assault and named the respondent as his assailant; this was on Saturday afternoon; he retained consciousness until about ten o'clock Sunday night and died about four o'clock Monday afternoon. No expression from him indicating any hope of recovery appears in the testimony of any witness. Later on Saturday afternoon, after he had been bathed and his clothes were changed, he said to Johnson Morgan, one of the witnesses, "Johnson, you think I am going to get around all right?" Morgan replied, "Yes, we will have you around in a day or two," to which deceased said, "Well, I shan't get around again. I am all done."

In view of such conditions, of the length of time which had elapsed since the assault, of his physical condition so obvious to, and well understood by himself, his positive declarations furnish convincing proof of the declarant's consciousness of speedy, certain death. The evidence meets even the stringent test of proof beyond a reasonable doubt adopted by some courts. *People* v. *White*, 251 Ill., 67, 75. *Guest* v. *State*, 96 Miss., 871, 52 So., 211.

In the opinion of the court the presiding Justice did not err in admitting in evidence the declarations of the deceased stating the details of the assault upon him and naming the respondent as his assailant. The declarations as given by the witnesses fully meet the requirements of completeness; they are free from all indication of malice or desire for revenge.

As a result of this conclusion the exceptions must be overruled. The jury was recalled and the testimony of the five witnesses named, and of a sixth witness, was submitted to them. To their testimony before the jury as to the declarations of the deceased the respondent's counsel has exceptions on the ground that sufficient foundation had not been laid for admitting the declarations. But at that stage of the case the declarations and all the conditions under which they were made were matters for the consideration of the jury. The court had ruled, correctly as we hold, that the declarations were admissible. After the evidence is admitted, its credibility is entirely within the province of the jury, who should have the opportunity to weigh all

the circumstances under which the declarations were made, including those already proved to the presiding Justice, and may give the testimony and the declarations such credit as they think they may deserve. 1 Greenleaf on Ev., Sec. 160; 4 Chamberlayne on Ev., Sec. 2858; 2 Wigmore on Ev., Sec. 1451; 2 Phillips on Ev., Cowen & Hill's notes, page 611, note 457.

Under the procedure adopted by the presiding Justice the evidence admitted was also a matter for the consideration of the jury. In ruling upon the admissibility of the declarations of the deceased the presiding Justice said: "I shall follow the Massachusetts practice, and ask the jury to find as a fact that they do come within the rule of admissibility before they can take them into consideration as dying declarations," and in his charge, to which exceptions do not appear to have been taken, he instructed the jury accordingly. Neither in his bill of exceptions nor in his brief does respondent's counsel question the correctness of this procedure. We have therefore no occasion to consider it. The reasons for the Massachusetts practice are set forth in *Com.* v. *Brewer,* 164 Mass., 577, 582, and the practice, when the evidence is admitted, of allowing the objecting party to reargue to the jury the preliminary question, as well as the truth of the declaration, is recognized in *Com.* v. *Bishop,* 165 Mass., 148, 152.

The reasons for the opposite view are forcibly stated by Mr. Wigmore in 2 Wigmore on Ev., Sec. 1451.

In 1 Greenleaf on Ev., Sec. 160, and in 1 Phillips on Ev., 2d Am., Ed., page 235 and in 2 Russell on Crimes 5th Am. Ed., page 761, it is said to have been decided by all the Judges of England that the question, whether the deceased made the declarations under the apprehension of death, is a question for the Judges, not for the jury to determine; in 4 Chamberlayne on Ev., Sec. 2830 this is said to be the prevailing rule; Judge Andrews in *People* v. *Smith,* 104 N. Y., 491, 58 Am. Rep., 543, says that this has been the generally accepted rule in this country. In *Donnelly* v. *State,* 26 N. J. L., 463, on page 503, it is said, "The jury were told that they were to consider, in the first place, whether Moses, when he made the declarations, was under the belief that he was at the point of death, and every hope of this world gone, and that they were to decide whether each of his declarations were made under the sense of impending death, and entirely to reject all declarations which in their opinion were not made under such apprehension. This instruction we regard is incorrect; and if the

court had themselves avoided the decision of that question and shifted the responsibility to the jury, the instruction would have been fatally erroneous. . . . . The instruction being in favor of the prisoner, giving him not only the judgment of the court but of the jury also, it affords no ground for error." In a later case in the same State, *State* v. *Monich*, 74 N. J. L., 522, 527, (1906) a refusal to give an instruction, permitting the jury to revise the finding of the trial court upon the question of fact whether the declaration was made under a sense of impending death, and to disregard the declaration if they disagreed with the conclusion of the judge upon this point, was upheld. In *Com.* v. *Bishop*, 165 Mass., 148, 152 it is held that if the evidence is excluded, the decision of the trial Judge is conclusive, unless some question of law is reserved.

Without entering into the discussion, it is sufficient to say that the respondent was not prejudiced by the procedure adopted; it gave the opportunity for his counsel to reargue to the jury the question of fact upon which the presiding Justice had ruled adversely to him on the preliminary hearing; he was thus allowed a second chance to have the declarations excluded from consideration. *Com.* v. *Brewer*, 164, Mass., 577, 582; *Com.* v. *Tucker*, 189 Mass., 457, 475; *Donnelly* v. *State*, supra. The entry must be,

Exceptions overruled.
Judgment for the State.

STATE OF MAINE *vs.* HARRY DERRY.

Cumberland. Opinion January 14, 1920.

Right of court, after jury has retired, to recall jury to correct or change instructions to them. Rule of practice where two distinct offenses have been sufficiently described in the same count. Rule as to raising objection on account of duplicity after verdict. When question of duplicity should be raised by respondent.

Complaint for violation of Sec. 38 of Chap. 26, R. S. Verdict guilty.

The case comes to this court on exceptions. After the jury had retired with the case the presiding Justice against the respondent's objection recalled them for a correction in the charge.

After a verdict of guilty had been returned the respondent made a motion in arrest of judgment on the ground that the complaint was bad for duplicity. The presiding Justice overruled the motion.

The exceptions are to the recall of the jury for correction of instructions and to the overruling of the motion in arrest of judgment.

Held:

That the right of the presiding Justice to correct his instructions either before or by recalling the jury after their retirement, directing attention specifically to any part of the original charge withdrawn or qualified, has been determined by so many judicial authorities as to be beyond dispute.

Also held:

That to be tried upon an indictment free from duplicity is a privilege which may be waived.

If the respondent would avail himself of his privilege he should do so when he first feels the hurt of the duplicity. When this is done the prosecutor may, by entering a nol pros as to the objectionable part of the indictment, accord to the respondent his full privilege and proceed with the case. By failing to seasonably object the respondent waives his privilege. He is not permitted to revive it after verdict by a motion in arrest of judgment.

There are authorities several of which are cited in *State* v. *Leavitt*, 87 Maine, 72 holding that joinder in one count of distinct offenses requiring different penalties may be taken advantage of by motion in arrest of judgment. But these authorities are not applicable to the pending case.

Respondent was tried and convicted for violation of R. S., Chap. 26, Sec. 38. After verdict, and before sentence, respondent filed motion in arrest of judgment, which was overruled; to which ruling, respondent filed exceptions. Judgment in accordance with opinion.

Case stated in opinion.

Carroll L. Beedy, and Clement F. Robinson, for the State.

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

SITTING: CORNISH, C. J., HANSON, PHILBROOK, DUNN, MORRILL, DEASY, JJ.

DEASY, J. At the January 1919 term of the Superior Court for Cumberland County, Harry Derry was convicted of a violation of Sec. 38 of Chap. 26, R. S.

The complaint before the Municipal Court brought to the Superior Court by appeal charged that he "did operate and control a certain automobile on the public highway in a reckless manner, while being then and there under the influence of intoxicating liquor so that the lives of the public were in danger."

The statute under which the complaint was drawn reads:—

"Whoever operates a motor vehicle upon any way recklessly or while under the influence of intoxicating liquor so that the lives or safety of the public are in danger . . . . shall be punished" &c. R. S., Chap. 26, Sec. 38.

The presiding Justice instructed the jury in substance that, if they found that the respondent either recklessly or while intoxicated drove a car on a public way so as to endanger the lives of the public, a verdict should be rendered against him.

After the jury had retired they were against the respondent's objection recalled by the presiding Justice who then withdrew from the jury the question of the respondent's intoxication and said "My instructions will accordingly be modified so that it will not be necessary for you to consider and determine the fact as to whether or not the respondent was intoxicated.

You will confine yourselves and within the instructions already given you, to the question whether or not he operated a motor vehicle on that day in a reckless manner so as to endanger the lives or safety of the public and let your verdict depend upon the finding upon that one question."

After the verdict, and before sentence, the respondent filed a motion in arrest of judgment on the ground that the complaint "is bad for duplicity in the following particulars to wit that it attempts to set out two separate and distinct offences."

The respondent seasonably claimed and presents four exceptions: (1) to the part of the original charge above quoted, (2) to the recall of the jury for corrected instructions, (3) to the instructions given after the recall of the jury and (4) to the overruling of the motion in arrest of judgment.

The respondent's counsel does not strenuously argue the first three exceptions. In the second instruction given there was clearly no error. If the respondent operated a motor vehicle in a public way so as to endanger the lives or safety of the public and did so recklessly he is liable to the penalty of the statute without regard to his condition of sobriety or ebriety.

It is unnecessary to pass upon the alleged error in the charge as originally given for the right of the presiding Justice to correct his instructions either before or by recalling the jury after their retirement, directing attention specifically to any part of the original charge withdrawn or qualified, has been determined by so many judicial authorities as to be beyond dispute.

Short v. *State*, (*Ga.*), 80 S. E., 12; *Comm.* v. *Poisson*, 157 Mass., 510; *People* v. *Hoffman*, (Mich.), 105 N. W., 857; *State* v. *Furgerson*, (Mo.), 53 S. W., 427; *People* v. *McKay*, (Cal.), 55 Pac., 594; *Lindsay* v. *State*, (Fla.), 64 So., 501; *State* v. *Hough*, (S. C.), 81 S. E., 187; *Moody* v. *State*, (Okl.), 164 Pac., 676; *Gather* v. *State*, (Tex.), 81 S. W., 717; *State* v. *Miller*, (Wash.), 138 Pac., 896; *Rodermund* v. *State*, (Wis.), 168 N. W., 390; *Hardesty* v. *State*, (Neb.), 146 N. W., 1007.

It is true as said by the Georgia Court in the case of *Rawlins* v. *State*, 52 S. E., 8, that "there may be an error of such a character that nothing done by the judge can correct the harmful effect of it." If however any error was made in the charge in the present case it was not of such character as to be beyond cure.

The first three exceptions must be overruled.

The fourth exception is to the overruling of the respondent's motion in arrest of judgment.

The ground of this motion as therein stated is "that it (the complaint) attempts to set out two separate and distinct offences."

This literally construed points out no error. It is entirely proper to set out two separate and distinct offenses in a complaint, provided they are of the same nature and are set forth in different counts. The prosecutor may be required to make his election; but this is not by reason of any fault or error in the complaint or indictment. Wharton Crim. Proc. Secs. 335-344. Bishop New Crim. Proc. Secs. 424-432.

The whole record sufficiently shows however that what the respondent relies upon is the setting out of two separate and distinct offenses in one *count*. Operating a motor vehicle "recklessly" with the other elements as defined in the statute is one offence; operating such a vehicle "while under the influence of intoxicating liquor" is another and distinct offense, so the respondent claims, and both are set forth in one count.

The position of the State is that (a) duplicity cannot be taken advantage of by motion in arrest of judgment, (b) count not duplicitous and (c) error if any cured by the corrected charge.

The verdict in the instant case was general and the respondent relies upon *State* v. *Leavitt*, 87 Maine, 72. The judgment in the Leavitt case was not arrested, but was ordered on the verdict on the ground however that the verdict was special and not general.

The opinion says "If . . . the verdict had been general the objection (by motion in arrest) would have been well taken."

This is of course mere dicta. Moreover the authorities cited in the case yield but slender support to it.

It cites *State* v. *Smith*, 61 Maine, 386, which merely reiterates the elementary proposition that a duplicitous count is bad on demurrer; *Comm.* v. *Symonds*, 2 Mass., 163; *Comm.* v. *Holmes*, 119 Mass., 195 and *State* v. *Nelson*, 8 N. H., 163, which held that "when one count in an indictment charges two offenses distinct in kind and requiring distinct punishments the objection of duplicity has been allowed in arrest of judgment," and *People* v. *Wright*, 9 Wendell N. Y., 193.

Of this latter case a later opinion of the same court says: "the point whether duplicity was a good ground for arresting the judgment was not particularly considered." *Polinsky* v. *People*, 73 N. Y., 72. Of the cases cited the only one in point is a case in which the question involved, in the Leavitt case and in the present one was confessedly "not particularly considered."

No other authority sustaining the respondent's position has been called to our attention. In case of *State* v. *Berry*, 112 Maine, 501, a motion in arrest of judgment was sustained, but not by reason of duplicity.

The earlier Maine cases, the courts of other States and the text-books with substantial uniformity hold and declare that a motion in arrest of judgment cannot, except under conditions not present in the pending case, be grounded on duplicity.

"If two distinct offences had been sufficiently described in the same count it would seem that the objection should have been taken by motion to quash or by demurrer." *State* v. *Palmer*, 35 Maine, 13.

"If the objection (duplicity) was ever tenable it comes too late after verdict." *State* v. *Dolan*, 69 Maine, 576.

"The objection that an indictment is bad for duplicity should be made by demurrer, by motion to quash, or by motion that the prosecution be required to elect between the offences and a failure to do so waives the objection and it cannot be raised by motion in the arrest of judgment." 12 Cyc., 762.

"It is too late after verdict to object to duplicity in an indictment or information," 14 R. C. L., 212.

"The better view is that it (duplicity) cannot be made the subject of a motion in arrest of judgment." Wharton's Crim. Proc., 10th Ed. Section 304. See also Bishop on Crim. Procedure Sec. 443.

The rule as stated in the earlier Maine cases and by text-books is supported by many authorities a few of which are as follows:—

Kilbourn v. *State*, 9 Conn., 560; *State* v. *Manley*, (Vt.), 74 At., 231; *State* v. *Hicks*, (Mo.), 155 S. W., 482; *State* v. *Calhoun*, (W. Va.), 69, S. E., 1098; *Cornell* v. *State*, (Wis.), 80 N. W., 745; *State* v. *Wilson*, (N. C.), 28 S. E., 416; *Comm.* v. *Tuck*, (Mass.). 20 Pick., 361; *Pooler* v. *U. S.*, 127 Fed., 515; *Irvin* v. *State*, (Fla.), 41 So., 785; *State* v. *Armstrong*, (Mo.), 16 S. W., 609; *White* v. *People*, (Colo.), 45 Pac., 540; *Wilkinson* v. *State*, (Miss.), 27 So., 639.

The authorities with substantial unanimity are opposed to the sustaining of the fourth exception. Reason, independently of direct authority points to the same conclusion. Joinder of offenses in one count of an indictment or complaint violates no fundamental right.

Trial for crime without jurisdiction to try or without a sufficient charge of crime is a denial of due process of law. Bishop's New Crim. Proc. Sec. 77. To be tried upon an indictment free from duplicity is a privilege which may be waived. Bishop Sec. 442.

If a respondent would avail himself of his privilege he should do so when he first feels the hurt of the duplicity. When this is done the prosecutor may, by entering a Nol pros as to the objectionable part of the indictment, accord to the respondent his full privilege and proceed with the case. By failing to seasonably object the respondent waives his privilege. He is not permitted to revive it after verdict by a motion in arrest of judgment. Bishop Sec. 442.

There are authorities several of which are cited in *State* v. *Leavitt*, 87 Maine, 72 holding that joinder in one count of distinct offenses requiring different penalties may be taken advantage of by motion in arrest of judgment. But these authorities are not applicable to the pending case.

This conclusion (that the respondent failed to seasonably set up duplicity), is decisive of the case. We do not need to consider the other points made by the State.

Exceptions overruled.
Judgment for the State.

EZRA A. CARPENTER *vs.* HERBERT C. HADLEY,
Administrator of the Estate of Charles H. Hadley, Deceased.

Waldo. Opinion January 19, 1920.

Right of action by creditors against administrator or executor. Rule as to limitation of actions. General rule as to Statutes having a prospective operation only unless the legislative intent is clearly expressed or necessarily implied from the language used.

This is an action of assumpsit on six promissory notes, and is before the court on report upon an agreed statement of facts. Three notes matured before the debtor's death, and three thereafter.

Held:

1. When this action was brought, the period of eighteen months, provided for in R. S., Chap. 86, Sec. 95, amended by Act of 1917, Chap. 133, for commencing suits against administrators had elapsed.
2. This statute permits the bringing of actions within that period, and "not afterward if barred by the other provisions hereof."
3. The other provisions referred to are those of the general six year statute of limitations.
4. In case of the three notes which matured and actions on which accrued before the debtor's death, the general limitation had expired in 1911 and 1912. As to those three notes therefore the plea of bar by limitation must prevail.
5. The plaintiff, however, is not debarred from now proceeding to collect the three last mentioned notes.

Action of assumpsit against administrator to recover the amount of six notes signed by deceased. Defendant filed plea of general issue; also brief statement alleging that the action was barred by the Statute of Limitations. Case was reported to Law Court upon agreed statement. Judgment in accordance with opinion.

Case stated in opinion.

Dunton & Morse, for plaintiff.

F. W. Brown, Jr., for defendant.

SITTING: CORNISH, C. J., SPEAR, HANSON, WILSON, DEASY, JJ.

HANSON, J. This is an action of assumpsit on six promissory notes, and is before the court on report upon an agreed statement of facts, which, omitting full description of the notes in question, is as follows:

"Charles H. Hadley died November 9, 1906. At the time of his decease Ezra A. Carpenter was the legal owner and holder of the notes described in the writ, viz:

One note $40 and interest dated May 1, 1905, payable on demand. One note $100 and interest dated May 20, 1905, payable on demand. One note $110 and interest dated May 22, 1905, payable in one year. One note $60 and interest dated December 28, 1905, payable in one year. One note $60 and interest dated December 28, 1905, payable in two years. One note $50 and interest, dated December 28, 1905, payable in three years.

These notes were all signed by Charles H. Hadley.

The payments indorsed on said notes after the decease of said Charles H. Hadley were made by his widow.

Herbert C. Hadley was appointed administrator of the estate of Charles H. Hadley, deceased, June 12, 1917, and filed in the Probate Court affidavit of notice of his appointment as such administrator on July 10, 1917.

On August 28, 1917, the plaintiff delivered his claim, supported by affidavit as required by law, to F. W. Brown, Jr., attorney for said Herbert C. Hadley administrator and on the fourth day of January, A. D. 1919, filed his said claim, supported by affidavit, in due form in the Probate Court for said County of Waldo.

The writ in this action is dated February 4, 1919. A real estate attachment was made thereon February 7, 1919, and the writ served on the defendant February 10, 1919.

Interest was paid on all these notes until May 12, 1913, all said payments having been made by the widow of Charles H. Hadley.

The defendant by way of brief statement pleaded the general statute of limitations, and relies upon the same as a defense to this action, and in his brief adds, that "the provisions of Section 13, Chapter 133, Public Laws of 1917, which adds Section 109 to Chapter 86, Revised Statutes, settles this case, if retroactive."

Upon the facts stated it appears that the administrator complied with the statute by filing the affidavit of notice of his appointment, and that the plaintiff delivered his claim to the administrator, and filed the same in the Probate Court as required by law. The action, then, is properly brought and may be maintained unless barred by limitation.

When this action was brought the period of eighteen months, provided for in R. S., Chap. 86, Sec. 95, amended by Act of 1917, Chap. 133, for commencing suits against administrators had elapsed.

This statute permits the bringing of actions within that period and "not afterward if barred by the other provisions hereof."

The other provisions referred to are those of the general six year statute of limitations.

In case of the three notes which matured and actions on which accrued before the debtor's death, the general limitation had expired in 1911 and 1912. As to those three notes therefore the plea of bar by limitation must prevail.

The plaintiff however is not debarred from now proceeding to collect the three last mentioned notes.

In deciding a case of similar import and principle, but on a different state of facts, this court stated what has been recognized as the proper procedure in this class of cases as follows: "If the next of kin decline to administer, any creditor, if he can find property of his deceased debtor, may have administration committed to some suitable person. If he prefers to await the action of the next of kin or others interested, he still has two years after the appointment of an administrator within which he may proceed, but no more, if his claim would be barred had his debtor remained alive." *Lancey* v. *White*, 68 Maine, 28. A creditor now has eighteen months, as above stated.

Sec. 13, Chap. 133, Public Laws of 1917, to which defendant refers, reads as follows: "Where no administration is had upon an estate of a deceased person within six years from the date of death of said decedent, and no petition for administration is pending, all actions upon any claim against said decedent shall be barred."

The defendant's counsel urges that the above section, if retroactive, settles the case in his favor. But even if intended to be retroactive, its provisions do not effect this case, because the Act took effect July 6, 1917, ninety days after the recess of the Legislature by which

it was passed, while the administrator was appointed June 12, 1917, and the statute in terms excepted from its purview cases where a petition for administration is pending.

But it was not the legislative intent to make this section retroactive. There is no express reference therein to estates of persons deceased before its passage, or language used from which an intention to include such estates can be implied. To hold otherwise would be a violation of the fundamental rule for the construction of statutes, "that they will be considered to have a prospective operation only unless the legislative intent to the contrary is clearly expressed or necessarily implied from the language used." *Deposit Co., Applt.*, in re Pope, 103 Maine, 382; *Lambard, Appellant*, 88 Maine, 587; *Dyer* v. *Belfast*, 88 Maine, 140; *Chew Heong* v. *U. S.*, 112 U. S., 559.

In *Soper* v. *Lawrence*, 98 Maine, 283, the court emphasized the doctrine first announced in the *Proprietors of Kennebec Purchase* v. *Laboree*, 2 Maine, 275, that "the allowance of a reasonable time for the prosecution of claims after the passage of an act of limitation made to take effect upon existing rights, is the settled principle by which the constitutionality of all such acts is tested." Lewis' Sutherland Statutory Construction, 2nd ed., Vol. 2, page 1283; *Sanford* v. *Hampden Paint &c. Co.*, 179 Mass., 10, 14.

The Act took effect within thirty days after the appointment of the administrator, and if the defendant's contention is correct, there has never been a time when the plaintiff could have maintained an action against the administrator. R. S., Chap. 92, Sec. 14. Such result was not intended by the Legislature, and therefore Section 13 cannot be so construed.

The entry will be,

Judgment for the plaintiff for the three notes falling due after the death of the debtor.

RUBY MAY FARRELL *vs.* MARIA B. FARRELL, et al.

Aroostook. Opinion January 20, 1920.

R. S., Chap. 66, Sec. 7, interpreted.

The statutory right of action given under R. S., Chap. 66, Sec. 7, to a married woman, enabling her to sue a female person more than eighteen years of age for alienation of the affections of plaintiff's husband, does not authorize such a suit against a male defendant for such alienation.

Action by wife against father and mother of her husband, alleging alienation of his affections. The action was brought under R. S., Chap. 66, Sec. 7. The defendant, Elbridge G. Farrell, filed a petition to dismiss said action as to him, and the motion was sustained by presiding Justice; to which ruling, exceptions were filed. Exceptions overruled.

Case stated in opinion.

Joseph E. Hall, and Shaw & Thornton, for plaintiff.

Pattangall & Locke, and O. L. Keyes, for defendants.

SITTING: SPEAR, HANSON, PHILBROOK, MORRILL, DEASY, JJ.

PHILBROOK, J. This is an action brought by a married woman against the father and mother of her husband alleging alienation of the affections of the husband. The father presented a motion to dismiss as to him on the ground that neither under authority of common law nor statute could such an action by a married woman be maintained against a male defendant. The motion was granted and exceptions were allowed to the plaintiff. The ruling was correct. R. S., Chap. 66, Sec. 7. Prior to the enactment of this statute a married woman could not maintain such an action and it is only to the extent of enlarged powers and rights given by this statute that she may now bring her action against a female defendant. The statute being in derogation of the common law must be strictly construed.

Exceptions overruled.

FRANK R. HAYDEN *vs.* MAINE CENTRAL RAILROAD COMPANY.

Androscoggin. Opinion January 26, 1920.

Pleading and practice. Voluntary and involuntary nonsuit. At what point in proceedings may plaintiff become voluntary nonsuit. Rule as to nonsuit after verdict. Rule where verdict has been set aside as to party becoming nonsuit. General rule permitting plaintiff to invoke new remedy or action where first action was a mistaken form or inefficient to enforce liability.

Action brought under the provisions of the so-called Carmack amendment to the Hepburn Act.

Held:

1. When exceptions are sustained in jury cases, as well as in those tried before a single Justice without the aid of a jury, a trial de novo follows, unless it is otherwise decided and stated in the rescript.
2. The rules governing right of plaintiff to an entry of nonsuit, as given in *Washburn* v. *Allen*, 77 Maine, 344, are affirmed, but the rule, "after verdict there can be no nonsuit," refers to a subsisting verdict.
3. A verdict which has been set aside by sustaining exceptions is not a subsisting verdict, and since the case, after such sustained exceptions, comes up for trial as if no trial had ever been held, *Derrick* v. *Taylor*, 171 Mass., 444, the plaintiff is entitled to voluntary nonsuit, as of right, in accordance with *Washburn* v. *Allen*, supra.
4. The mistaken selection of a remedy that never existed and its fruitless prosecution until it is adjudged inapplicable, does not prevent the exercise of another, if appropriate, even if inconsistent with that first adopted.
5. The requested instruction in this case which would take the decision of a question of fact from the jury was properly refused.

Action to recover damages for alleged injuries to horses shipped by plaintiff to Kentucky, the defendant company being the initial carrier. Defendant filed plea of general issue; also brief statement. Verdict for plaintiff in the sum of $850. Defendant filed motion for new trial; also exceptions to certain rulings of presiding Justice. Judgment in accordance with opinion.

Case stated in opinion.

McGillicuddy & Morey, for plaintiff.

White, Carter & Skelton, for defendant.

SITTING: CORNISH, C. J., PHILBROOK, DUNN, MORRILL, DEASY, JJ.

PHILBROOK, J. The record in this case discloses that the plaintiff was the owner of three horses which he shipped from Lewiston, Maine, to Lexington, Kentucky, on February 13, 1917. He delivered the animals to the defendant for transportation over its road, and connecting roads, to their destination. Upon their arrival, which the plaintiff alleges was unduly delayed, they manifested such lack of food and water during their journey that the owner claimed them to be nearly worthless. On August 15, 1917, he brought an action against this defendant at common law, sounding in tort, and claiming damages for the negligent manner in which the defendant performed its duties as a common carrier. That action, which we shall refer to as the first case, was entered and tried in 1917, at the September term of the Supreme Court held in Androscoggin County. Verdict was rendered in behalf of the plaintiff and defendant took that case to the Law Court on motion and exceptions. In a per curiam decision, 117 Maine, 560, this court said, "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." Thus it will be seen that only one out of three exceptions was passed upon by the court in the finding upon the first case. This finding was certified to the court below and on June 22, 1918, the clerk of that court entered on his docket "certificate of opinion received from the law court, to wit, exceptions sustained." On the fifth day of the September term, 1918, in the court below the entry was made "Plaintiff nonsuit," and on a later date the further entry was made "Judgment for defendant, Oct. 4, 1918, costs $82.95; execution issued April 8, 1919." The clerk testified that the entry of "judgment for defend-

ant" was made by rubber stamp and was a judgment for costs only.

On February 4, 1919, the suit at bar, which we shall refer to as the second case, was brought under the provisions of the so-called Carmack amendment to the Hepburn Act, waiving the tort and sounding in contract. This second case was tried at the April term 1919, when again the plaintiff recovered a verdict. In its brief statement of special matter of defense in the second case, the defendant set forth the fact of the institution and trial of the first case and declared "that by this election by the plaintiff, by his said writ dated August 15, 1917, of the form of action he would pursue, and by his trial before the Supreme Judicial Court at nisi prius and before the Law Court, the plaintiff made an election of which form of action he would pursue in this cause, and having elected and proceeded upon the form of action sounding in tort, he is forever barred from bringing a new action against the same parties for the same cause of action, setting up a declaration sounding in contract, as in the suit now pending; and that the subject matter of the pending suit is res judicata, said plaintiff having had full trial of said cause of action—the suit of *Frank R. Hayden* v. *Maine Central Railroad Comapny,* the date of the writ being August 15, 1917, trial being had in said suit at the September 1917 term of the Supreme Judicial Court in and for the County of Androscoggin."

Before going to trial on this second case the defendant also presented a motion asking that either the docket entry, "Plaintiff nonsuit" in the case of *Frank R. Hayden* v. *Maine Central Railroad Company,* in which the writ was dated August 15, 1917, be considered and read as "Plaintiff nonsuit; no further action," or that this entry of "Plaintiff nonsuit" be striken from the docket and judgment entered for the defendant, which appears as No. 799 on the docket of the Androscoggin County Supreme Judicial Court, September term, 1918. This motion was denied and exceptions by defendant allowed.

The defendant then objected to the admission of any evidence under the new declaration in the writ in the second case on the ground that the plaintiff had elected to bring this action on the tort in the first suit, and by this election and by the very bringing of the action he was forever barred from waiving the tort and proceeding under the contract. The presiding Justice overruled these objections, and

exceptions were allowed. The case then proceeded to trial and at the close of the evidence the defendant offered a motion that a verdict be directed for the defendant on two grounds:

First; that the entry of nonsuit in the case of *Frank R. Hayden* v. *Maine Central Railroad Company,* as it appears upon the docket, September term, 1918, Androscoggin County, Supreme Judicial Court, is in fact a final entry, and gives judgment to the defendant; and, therefore, the defendant in this present suit, having pleaded the subject matter of the present suit, was res adjudicata; that the court find that the subject matter of the present suit is res adjudicata, and direct a verdict upon this ground.

Second; that the declaration in the writ in the suit of *Frank R. Hayden* v. *Maine Central Railroad Company,* which writ was dated August 17th 1917, was a declaration at common law which sounded in tort, and by this declaration which sounded in tort the plaintiff elected the form of action which he would pursue, and is forever barred from now bringing a writ similar to the pending suit, whose declaration sounds in contract, the election having been specially pleaded by the defendant in the present suit.

The motion was denied and exceptions were allowed.

At the close of the charge to the jury defendant's counsel requested the presiding Justice to instruct the jury that the evidence shows that the three horses shipped by the plaintiff "were not ordinary live-stock within the meaning of the United States statute, commonly known as the Carmack amendment. Therefore the limitation of liability to the sum of one hundred and fifty dollars for each horse or mare shipped is in full force, and the plaintiff is limited and bound by said limitation if he is entitled to receive anything." This request was declined and exceptions allowed. The cause is therefore before us upon these several exceptions and will be discussed in the order following:

Nonsuit. The mandate in the first case, according to the time-honored practice in this jurisdiction remands that case to the court below for new trial unless it is otherwise expressly decided and stated in the rescript. In *Merrill* v. *Merrill,* 65 Maine, 79, a case in which there were exceptions to the rulings of a single Justice trying a cause without the aid of a jury, the court said, "When exceptions to his rulings are sustained, then his findings of fact, like a verdict, is set aside, and a trial de novo follows, unless it is otherwise expressly

decided and stated in the rescript." This court has never declared the same rule, in terms, where a verdict has been rendered by a jury, but the principle is the same, like procedure has long been followed with unvarying regularity when a jury verdict has been rendered, and it must now be regarded as the settled rule and practice in our courts that when exceptions are sustained in jury cases, as well as in those tried before a single Justice without the aid of a jury, a trial de novo follows, unless it is otherwise decided and stated in the rescript. In harmony with this expression of the rule is the case of *Mosher* v. *Jewett*, 63 Maine, 84, a case heard by a Justice of the Superior Court without the intervention of a jury, where the court said, "When exceptions in matters of law are sustained in such cases, the effect is to give a new trial both as to the facts and the law, the same as if the facts had been submitted to and found by a jury." In *Robinson* v. *Trofitter*, 106 Mass., 51, we find a case heard by a single Justice without the intervention of a jury and exceptions taken. The Law Court sustained the exceptions, the case went to trial a second time, and for a second time was before the Law Court. The rescript in the former mandate was "Exceptions sustained." At the second hearing before the Law Court the effect of the rescript "Exceptions sustained" was discussed and the court held that it had the same effect as it would have had upon a verdict, "that, as the finding stands in place of a verdict, the sustaining of exceptions generally is to have the same effect upon it as it would have upon a verdict, and that it is set aside as a verdict would be." The opinion also states that when the cause came up again for trial it stood as if no trial had ever been had.

Thus it follows, after the mandate of the Law Court in the first case had been received in the court below, that the first case was in order for trial "as if no trial had ever been had," to quote the words of Chief Justice Chapman in *Robinson* v. *Trofitter*, supra. But the plaintiff asked for, and obtained, an entry of nonsuit. His counsel claimed in open court, according to the record of the second case now before us, that such entry was with the full knowledge and consent of counsel for defendant, which the latter denies. Defendant's counsel further claims that the time in which such an entry could properly have been made had expired, and that any seeming acquiescence to such entry, so far as he did acquiesce, was with an understanding that the entry should carry with it a provision that the entry closed the

case and closed further litigation of that cause of action. Evidently counsel do not now agree as to the form or purport of the entry, and there is nothing of record to determine their misunderstanding. We must therefore take the entry as it appears, with such legal consequences as arise whether in favor of plaintiff or of defendant.

It may be well to observe that we are not now discussing retraxit, which at common law was an open, voluntary renunciation of a claim in court, and by which the plaintiff forever loses his action, 3 Blackstone Com., 296, but nonsuit, when, by the same authority, he may begin his suit again. "The only consequence of a nonsuit, in the general, is to subject the plaintiff to the payment of costs," *Dana* v. *Gill*, 20 Am. Dec., 255; and as to payment of such costs before bringing second suit see R. S., Chap. 87, Sec. 146. Here also we should observe that we are discussing voluntary nonsuit, with rules of law applicable thereto, and not involuntary nonsuit. Hence it is that the defendant strenuously urges that a case may reach a stage when all right to voluntary nonsuit ceases, either because of some rights which have accrued to the defendant, by virtue of the progress of the case, or for some other legal reason. And the defendant says that such conditions obtain in the first case, so that in any event the plaintiff was not entitled to voluntary nonsuit, the defendant ever denying consent to nonsuit except as before explained.

In *Washburn* v. *Allen*, 77 Maine, 344, decided in 1885, may be found such an exhaustive and learned discussion of the subject of nonsuit that it only becomes necessary to refer to that case in order to ascertain the common law of early days, the effect of the statute, 2 Henry *IV*, Chapter 7, (A. D. 1400) and the growth of modern practice in common law states. From that case we quote the rule "That the plaintiff, before opening his case to jury, or to the court, when tried before the court without the intervention of a jury, may become nonsuit as a matter of right; after the case is opened, and before verdict, leave to become nonsuit is within the discretion of the court; after verdict there can be no nonsuit." In 9 Ruling Case Law, 194, after discussing various authorities, the writer says that it is now generally held that a plaintiff has no right to take a voluntary nonsuit after a verdict has been rendered. The defendant confidently relies upon this rule and his reliance might be safe and secure had he not by his own act destroyed it, because the rule contemplates a subsisting verdict, as we shall see, and the very thing on which he depends

as marking the limit of the plaintiff's right to voluntary nonsuit, namely the verdict, is blotted out of existence by the defendant's success in the Law Court when he obtained a mandate sustaining his exceptions. For we have already noted in *Robinson* v. *Trofitter*, supra, that when exceptions were sustained, that it set aside the verdict and "when the cause came up again for trial it stood as if no trial ever had been had." In *Derrick* v. *Taylor*, 171 Mass., 444, we have a case brought in a Municipal Court where judgment was rendered for defendant and the plaintiff appealed to the Superior Court. In the Appellate Court the plaintiff discontinued the action upon his own motion. The case holds that the appeal vacated the judgment and opened the whole case to be dealt with in the Appellate Court as if it had been originally brought there, and the plaintiff could try it or discontinue it as he saw fit. In this latter case, by appeal, the plaintiff vacated the verdict won by the defendant; in *Robinson* v. *Trofitter*, supra, the defendant, on exceptions, vacated a verdict won by the plaintiff. In both cases it was held that the case, after verdict vacated, must proceed as if no trial had been had or verdict rendered. Applying these rules to the case at bar it seems plain that in the first case, when the defendant prevailed in his bill of exceptions, the verdict was set aside and the "after verdict no nonsuit" rule ceased to be operative. We must hold that in the first case the plaintiff was entitled to voluntary nonsuit and in the second case the defendant's exceptions upon this branch of the case must be overruled.

Election of Remedy: The exceptions taken upon this branch do not, in our opinion, require extended discussion. In a very recent case, *Marsh Bros. & Co.* v. *Belleſleur*, 108 Maine, 354, our court said, "The mistaken selection of a remedy that never existed and its fruitless prosecution until it is adjudged inapplicable, does not prevent the exercise of another, if appropriate, even if inconsistent with that first adopted." Again, in *Barnsdall* v. *Waltemeyer*, 142 Fed. Rep., 415, decided in the Circuit Court of Appeals for the Eighth Circuit, the court said, "the fatuous choice of a fancied remedy that never existed, and its futile pursuit until the court adjudges that it never had existence is no defense to an action to enforce an actual remedy inconsistent with that first invoked through mistake." In the case at bar the plaintiff first invoked an action which, as the facts proved, was inefficient to enforce liability on connecting railways, and

hence was a mistaken selection of action; and he was not, by this selection, prevented from invoking the second and appropriate action. Upon this branch of the case the exceptions must also be overruled.

Ordinary Live-Stock: The charge of the presiding Justice was full and comprehensive as to the law upon this subject and left the questions of fact to the jury. The requested instruction would take the decision of a question of fact from the jury and was properly refused.

Exceptions overruled.

HARRY A. FURBISH *vs.* WILLIAM R. CHAPMAN.

Franklin. Opinion January 27, 1920.

Contracts. Meeting of minds.

Action to recover damages for alleged breach of contract. The plaintiff claims that the defendant agreed to pay him a commission of five per cent for selling certain stumpage at a minimum price of twelve dollars and a half per thousand, that on his part he fully performed the contract but that the defendant has failed to pay the commission as agreed.

For the purpose of proving the contract the plaintiff produced certain correspondence between the parties. Testimony was also introduced showing that the plaintiff procured and produced to the principal, customers willing and prepared to purchase and pay for the stumpage at thirteen dollars per thousand. This would have entitled the plaintiff to the commission if the contract were proved as alleged. But the evidence does not show that the contract between the parties was as the plaintiff claims. The letters prior to that of July 23rd do not show a meeting of minds on any proposition. The letter of July 23rd which is relied upon by the plaintiff gives authority to sell the land for one hundred and twenty-five thousand dollars or upwards, and contains a promise to pay a commission of five per cent on the sale. No claim is made that the plaintiff sold the land. But the letter even when read in the light of the entire correspondence does not in the judgment of the court prove a contract to pay a commission for the sale of stumpage. The presiding Justice directed a nonsuit. To this ruling the plaintiff excepted.

Action of assumpsit to recover commissions for the sale of real estate. Defendant filed plea of general issue. At the close of the evidence on the part of the plaintiff, upon motion of defendant a nonsuit was granted; to which ruling plaintiff filed exceptions. Judgment in accordance with opinion.

Case stated in opinion.

Butler & Butler, and Frank W. Butler, for plaintiff.

Pattangall & Locke, and H. H. Hastings, for defendant.

SITTING: SPEAR, HANSON, PHILBROOK, MORRILL, WILSON, DEASY, JJ.

DEASY, J. This is an action to recover damages for alleged breach of contract. The plaintiff claims that the defendant agreed to pay him a commission of five per cent for selling certain stumpage at a minimum price of $12.50 per thousand, that on his own part he fully performed the contract, but that the defendant has failed to pay the commission as agreed.

For the purpose of proving the contract the plaintiff produced certain correspondence between the parties, the material parts of which are hereinafter set forth.

Testimony was also introduced showing that the plaintiff procured and produced to the principal, customers willing and prepared to purchase and pay for the stumpage at $13.00 per thousand. This would have entitled the plaintiff to the commission if the contract were proved as alleged.

Garcelon v. *Tibbetts*, 84 Maine, 148; *Smith* v. *Lawrence*, 98 Maine, 94; *Hartford* v. *McGillicuddy*, 103 Maine, 229.

But the evidence does not show that the contract between the parties was as the plaintiff claims.

The contract was evidenced by letters the essential parts of which are as follows:—

Chapman to Furbish, July 15, 1918. "I am quite willing to give you five per cent, broker commission for selling the property for anything above $125,000, also five per cent on anything above $12.50 for all stumpage on the soft wood sawed alive," . . . . .

Furbish to Chapman, July 17, 1918. "I should not care to work the proposition on such a basis. I would want you to state that, if I sold the property for $125,000 or more or the stumpage for $12.50

per cord or more, I am to receive a broker's commission on the sale of five per cent." . . . . "The way you have worded the broker's commission I should receive a five per cent commission only on the amount that I sell the property for over and above the $125,000, or over and above the $12.50 stumpage, and it would not pay me to bother with the proposition on such terms." . . . . As soon as you assure me that I am to receive five per cent commission on the sale I will have the parties go on and cruise the land and try to close a deal with some one of them."

Chapman to Furbish, July 23, 1918. "I did not realize that my letter read as it did, for I surely meant to give you five per cent on the sale of all my pine timber and the land on which it stands if sold for $125,000 or upwards. I would prefer to sell right out in lump sum, rather than bother to sell it by the thousand," . . . .

The letters prior to July 23 do not show a meeting of minds on any proposition. The letter of July 23 gives authority to sell the land for $125,000 or upwards and a promise to pay a commission of five per cent on the sale. No claim is made that the plaintiff sold the land. But the letter even when read in the light of the entire correspondence does not, in the judgment of the court prove a contract to pay a commission for sale of stumpage.

The presiding Justice directed a nonsuit. To this ruling the plaintiff excepted.

Exceptions overruled.

STATE OF MAINE, (By Complaint), *vs.* FRED HAHNEL.

Kennebec. Opinion February 7, 1920.

R. S., Chap. 19, Sec. 112, interpreted.

Plumbing may be defined as the installing, altering or repairing of pipes, tanks, faucets, valves and other fixtures through which gas, water, waste or sewage is conducted and carried.

It is only when rain-water conductors or leaders enter waste-carrying pipes or drains that the installation or repair of any part of them can be considered plumbing within the meaning of an ordinance requiring a plan of the work to be submitted to the Local Board of Health and a permit obtained.

The complaint in this case does not set out that the rain-water leaders installed by the respondent were connected with any waste, drain or soil-pipe. No offense, therefore, is charged in the complaint.

Complaint and warrant under provisions of an ordinance of the City of Hallowell, said ordinance being based on R. S., Chap. 19, Sec. 112. Respondent was sentenced to pay a fine of fifty dollars. By consent of parties, case was reported to Law Court upon an agreed statement. Judgment in accordance with opinion.

Case stated in opinion.

Walter M. Sanborn, County Attorney, for the State.

McGillicuddy & Morey, for respondent.

SITTING: SPEAR, PHILBROOK, DUNN, MORRILL, WILSON, DEASY, JJ.

WILSON, J. This case came before this court on an agreed statement of facts from the Superior Court of Kennebec County. It involves the single question of the sufficiency of a complaint before the Hallowell Municipal Court under an ordinance of that city relating to plumbing adopted under Sec. 112, Chap. 19, R. S., which directs cities and towns having water and sewage systems to enact by-laws and ordinances regulating the installation, repair and inspection of pipes, faucets and other fixtures through which water or sewage is carried.

In accordance with this statute the city of Hallowell had enacted an ordinance prohibiting any plumbing work being done in that city without a plan of the number and kind of fixtures and the size of the waste and vent-pipes being filed with and a permit being obtained of the local Board of Health.

The complaint sets forth in substance that the respondent did plumbing work at said Hallowell, to wit, placed rain-water leaders on a certain building without first filing such plan and obtaining such permit.

The respondent contends that the acts charged in the complaint are not plumbing work within the meaning of the statute and ordinance. We think his contention must be sustained.

A plumber has been defined as one who fits dwellings and public buildings with tanks, pipes, traps, fittings and fixtures for the conveyance of gas, water and sewage. *State* v. *Gardner*, 58 Ohio St., 599. Plumbing, therefore, as indicated by Sec. 112 of Chap. 19, R. S., by which this ordinance was authorized, may be defined as the installing, altering or repairing of pipes, tanks, faucets, valves, and other fixtures through which gas, water, waste or sewage is conducted and carried.

True, the ordinance requires rain-water leaders to be properly trapped, but this must be construed as applying only when they enter house-drains, soil-pipes or other waste-pipes; and it is only when they enter such waste-carrying pipes or drains that their installation and repair, or any part of, it can be regarded as plumbing within the meaning of the ordinance.

The complaint does not set out that the rain-water leaders installed by the respondent were connected with any waste, drain or soil-pipe. The installation of rain-water leaders unconnected with any waste, drain, or soil-pipe not being plumbing work within the meaning of the ordinance, no offense is charged in the complaint.

Entry must be,

Complaint dismissed.
Respondent discharged.

FRANK M. MOODY, Libellant,

vs.

MARY A. EGGERT MOODY, Libellee.

Cumberland. Opinion February 9, 1920.

Libel for divorce. Meaning and scope of phrase "utter desertion" under R. S., Chap. 65, Sec. 2. Elements necessary to establish desertion. Rule where the absence of husband or wife is assented to by the party claiming to be deserted. Rule as to filing of libel for divorce breaking continuity of desertion.

To establish desertion as a ground for divorce, three things must concur and must be proved, viz: Cessation from cohabitation continued for the statutory period, intention in the mind of the deserter not to resume cohabitation, and the absence of the other party's consent to the separation.

If the absence is assented to by the party claiming to be deserted, it does not constitute desertion within the meaning of the law.

Where a husband filed a libel for divorce alleging extreme cruelty, cruel and abusive treatment, and utter desertion continued for three consecutive years next prior to the filing of the libel, which came to hearing and was dismissed without prejudice, his act necessarily and conclusively imported an intention not to live with his wife; her absence, if previous to the filing of the libel it had been without his consent, was so no longer.

In the present case the assent of the libellant, as shown by his overt act in filing the libel and causing it to be served, is substantiated by his positive statement to the trial Judge that he would not take back his wife to live with him, and by his neglect to reply to her letter expressing a willingness to return and asking for his reply.

The libel now before the court was filed within one year after the filing of the former libel; a request for a directed verdict in favor of the libellee upon the issue of desertion should have been granted, and exceptions to the refusal to give such instruction must be sustained.

The dismissal of the former libel without prejudice does not change the situation; the former proceedings could not be pleaded in bar to the maintenance of the present libel; but the continuity of the desertion which had been broken, was not thereby restored.

The desertion for the required period must continue to the date of the filing of the libel.

Libel for divorce. Defendant filed answer denying the several allegations contained in libel. At close of testimony, defendant filed motion asking the court to direct a verdict for the libellee upon each of the allegations contained in the libel of the libellant. This motion was denied; to which ruling defendant filed exceptions. Verdict was rendered for libellant on the groundof desertion as alleged. Defendant filed motion for new trial. Judgment in accordance with opinion.

Case stated in opinion.

Henry Cleaves Sullivan, for libellant.

Frank H. Haskell, for libellee.

SITTING: CORNISH, C. J., HANSON, PHILBROOK, DUNN, MORRILL, DEASY, JJ.

DEASY, J. concurs in result.

MORRILL, J. This libel for divorce is dated October 10, 1918, and was heard before a jury in the Superior Court of Cumberland County at the April term 1919; the alleged causes of divorce are extreme cruelty, cruel and abusive treatment, and utter desertion for three consecutive years next prior to the filing of the libel. Upon the issues of extreme cruelty, and cruel and abusive treatment, the jury found for the libellee; upon the issue of desertion the jury found that the allegation was true, and that a divorce from the bonds of matrimony ought to be granted to the libellant therefor. Upon the conclusion of the evidence, counsel for the libellee requested the presiding Justice to direct a verdict for the libellee upon each of the allegations contained in the libel, and now has exceptions to the refusal so to do.

We need only consider the exception to the refusal to direct a verdict for the libellee upon the issue of desertion. The libel alleges "that on the twenty-sixth day of December, A. D. 1912, said libellee utterly deserted your libellant without reasonable cause and has continued said desertion for three consecutive years next prior to the filing of this libel." It appears that before filing the present libel the libellant had filed two earlier libels; the first, alleging cruel and abusive treatment, was dated January 21, 1913, was returnable at the April term, 1913, of this court in Cumberland County, came on for hearing at the January term, 1914, and was then dismissed by consent and without prejudice; the second, alleging extreme cruelty, cruel and abusive treatment, and utter desertion continued for three

consecutive years next prior to the filing of the libel, was dated December 6, 1917, was returnable at the January term, 1918, of the Superior Court for Cumberland County, came on for hearing at the May term, 1918, and was dismissed without prejudice; the libellee's prayer for divorce, inserted in her answer, was denied.

It further appeared, by the testimony of the libellant at the trial of the present case, that during the former trial in the Superior Court a conference was held in the Judge's chambers with a view to a reconciliation of the parties; at that time the libellant was asked, in substance, whether or not he would take back his wife to live with him; to this question he replied, "No, distinctly no;" the libellant substantially repeated this testimony on re-direct examination.

On July 3, 1918, the libellee wrote the libellant a letter in which she said, "I am hoping and praying that you will some day take me back to live with you in our own home. . . . . I will gladly come at any time and am very sure that if you and I can only start new we can forget all the unpleasant Past and be to each other all we once were, and Frank wont you please answer this letter just as soon as you get it and give me my answer. I can't help hoping you will send for me and I am waiting for your Reply." To this letter the libellant did not return an answer.

Upon these admitted facts we are of the opinion that the requested instruction should have been given, and that a divorce should not be granted for the cause of desertion.

"Utter desertion, continued for three consecutive years next prior to the filing of the libel," was made a ground for divorce by Public Laws of 1883, Chapter 212. We apprehend that the word "utter" is used in its ordinary acceptation, "entire and complete, absolute, total;" utter desertion involves "an abnegation of all the duties and obligations resulting from the marriage contract." *Southwick* v. *Southwick*, 97 Mass., 327. *Stewart* v. *Stewart*, 78 Maine, 548.

To establish desertion three things must concur and must be proved; these are cessation from cohabitation continued for the statutory period, intention in the mind of the deserter not to resume cohabitation, and the absence of the other party's consent to the separation. The authorities are collected in the notes to *Pfannebecker* v. *Pfannebecker*, (Iowa), 119 Am. St. Rep., 618, and *Hudson* v. *Hudson*, (Fla.), 138 Am. St. Rep., 146.

If the absence is assented to by the party claiming to be deserted, it does not constitute desertion within the meaning of the law; the word "desertion" imports that the absence is without the consent of the party deserted; a desertion consented to is not a desertion. *Lea* v. *Lea*, 8 Allen, 418. *Ford* v. *Ford*, 143 Mass., 577. "But", as said by Mr. Justice Holmes in the case last cited, "we apprehend that 'without the consent' means without the manifested consent, and that the undisclosed emotions of the deserted party do not affect his rights. . . . . So, when a wife leaves her husband, he may be glad to be rid of her, but may stand upon his rights and give her a home as long as she will accept it. Of course, proof that he entertained the feelings supposed might make it hard to believe that he did not show them, and thus express his consent to the separation, for the consent can be expressed by conduct as well as by words."

When the libellant filed his former libel in the Superior Court and caused service to be made on the libellee, his act necessarily and conclusively imported an intention not to live with her; the absence of the libellee, if previous to that time it had been without his consent, was so no longer. "Assent, in the sense of the law, is a matter of overt acts, not of inward unanimity of motives, design, or the interpretation of words." *O'Donnell* v. *Clinton*, 145 Mass., 461, 463. He might have felt justified in his action by the acts of cruelty, and cruel and abusive treatment, which he alleged against his wife; but the desertion was at an end; the absence of the wife did not constitute desertion, although the assent might have been justified. He, in effect said to her, that in the past he had overlooked her acts of cruelty and abusive treatment, and wished her to come back, but that now he was unwilling for her to return, and claimed his right to a decree of divorce.

In this case the assent of the libellant, as shown by his overt act in filing the former libel and causing it to be served, is substantiated by his positive statement to the trial Judge that he would not take back his wife to live with him, and by his neglect to reply to her letter of July 3.

The dismissal of the former libel without prejudice does not change the situation; the former proceedings could not be pleaded in bar to the maintenance of this libel; but the continuity of the desertion which had been broken, was not thereby restored. The desertion for the required period must continue to the date of filing the libel.

Upon the undisputed facts it must be held as a matter of law that a divorce cannot be granted for the cause of utter desertion continued for three consecutive years next prior to the filing of the libel. *Ford* v. *Ford,* supra. *Najjar* v. *Najjar,* 227 Mass., 450.

Exceptions sustained.

VAN BUREN LIGHT & POWER COMPANY

vs.

INHABITANTS OF VAN BUREN.

Aroostook. Opinion February 19, 1920.

Municipalities. Right of towns to authorize a committee or other agency to act instead of selectmen. Rule as to a municipality being held liable upon an implied contract. Rule if there was then an existing express contract in full force and effect. Rule as to a municipality ratifying a contract which is void on account of being ultra vires. Doctrine of res judicata.

Action of assumpsit for street lights supplied between April 1915 and April 1917. Recovery is claimed under an express contract, and if not under such express contract then under an implied contract.

The express contract was authorized if at all, by Special Legislative Act of 1909, Chap. 88, being the plaintiff's charter. The charter empowered the defendant town to enter into such a contract by its selectmen. The contract sued on was a contract under seal made and entered into, not by the selectmen, but by a committee appointed at a town meeting.

Held:

As to this branch of the case, that the town might have by vote agreed upon the terms of the contract and authorized a committee as a mere instrumentality to execute it. This is so held in the case of *Winterport* v. *Water Co.,* 94 Maine, 215.

But the defendant town undertook to authorize a committee to enter into the contract and agree upon all its terms. This was in violation of the limitation contained in the charter which was the town's only enabling act. The charter empowered the town to enter into a contract by its selectmen. The contract entered into by a committee was not binding on the town.

For a further reason, it is held, that the present action cannot be maintained on the express contract. The action is in assumpsit. The contract is under seal. For breach of a sealed contract, only actions of debt or covenant can be maintained. But the declaration contains a count on account annexed, and the plaintiff claims under this count to recover for electric street lights supplied for which the town has had the benefit. As to a part of the lights thus supplied the defendant sets up the defense of res adjudicata. It is alleged and proved that a part of the items sued for, viz: Those bearing date prior to March, 1916, were involved in prior suits brought by the company against the town in which judgments were rendered for the defendant. As to lights supplied after March 1916, the defendant denies liability on implied contract by reason of non-assent on the part of the town or its officers, the streets being then lighted by another system.

Held:

That the defense of res adjudicata must prevail. The prior actions were for the same cause. The same issues were or might have been tried. Held also, that as to lights furnished after March 1916, no implied contract was shown.

Action of assumpsit to recover money alleged to be due for furnishing electricity and appliances to defendant town. Defendant filed plea of general issue; also brief statement. By direction of court, verdict was rendered for defendant. To the order and ruling of presiding Justice, plaintiff filed exceptions. Judgment in accordance with opinion.

Case stated in opinion.

Shaw & Thornton, for plaintiff.

George J. Keegan, Archibalds, and Powers & Guild, for defendant.

SITTING: CORNISH, C. J., HANSON, DUNN, WILSON, DEASY, JJ.

DEASY, J. Action of assumpsit brought to this court on exceptions to the ruling of the presiding Justice directing a verdict for the defendant.

STATEMENT OF CASE.

The plaintiff corporation was chartered by special Act of 1909, Chapter 88. The portion of said act material to this case is a part of Section 5, as follows:

"Said corporation is hereby authorized to make contracts with the towns of Van Buren and Hamlin, relative to lighting the streets of said towns and for other public purposes, corporation or corporations, and individuals . . . . and said towns and said corporations

and individuals are hereby authorized to enter into such contracts with the Van Buren Light & Power Company, *the towns by their selectmen,* and other corporations by their President and Directors or other officers."

At a town meeting held on June 9, 1911, it was voted to authorize the selectmen to contract with the company. A part of the selectmen were stockholders. For this reason the vote of June 9th was afterward rescinded. No rights are claimed under the vote passed at this meeting.

Another town meeting was held on July 19, 1911. It is not questioned that this meeting was duly called by a warrant containing appropriate articles, or that a quorum of voters was present. At this meeting it was voted "to contract with the Van Buren Light & Power Company for lighting the streets of said town of Van Buren village," and voted "to choose a committee of three on behalf and as agents of said town of Van Buren to contract with theVan Buren Light and Power Company for lighting the streets of said Van Buren village." At the same meeting Fred J. Parent, Auguste Violette, and O'Neil Levasseur were chosen as a committee to make the contract.

The committee thus chosen entered into a fifteen year contract with the company, which is the contract in suit. The case shows that in pursuance of the contract the company installed its plant, furnished light as required by the contract, and down to April 1, 1915, was paid the stipulated compensation, but that since that date, while the company has supplied light as set forth in the account annexed, nothing has been paid.

The declaration contains a count on the contract entered into by the committee and an account annexed for lights and small items supplied between April and June, 1915 and between Nov. 1915 and April 1917. It also contains common counts.

LIABILITY ON EXPRESS CONTRACT:

The defendant contends that the contract is not binding on it because in making the contract the town acted by a committee and not by the selectmen, as provided by Section 5 above quoted.

In effect the charter reads: "The town is authorized to contract by its selectmen." This language imposes upon the town no duty to contract. It confers a power to be exercised at the option not of the selectmen, but of the municipality. The power lies dormant until vivified by a vote of the town.

Having determined to exercise its power a town thus authorized may go further and by vote settle all the terms and conditions of the contract. In such case it may employ any hand to execute it. A committee other than the selectmen may be appointed for this purpose. *Winterport* v. *Water Co.*, 94 Maine, 215.

But it is not essential that the town by vote agree upon the details of the contract. It may do this through agents. Governmental powers cannot be delegated. But negotiating and agreeing upon a contract is not a governmental but an administrative function which may be delegated. It is a "mere business act and in its power to perform it the city differs in no respect from an ordinary business corporation, or an individual and it may delegate the power to perform such acts to agents or committees." *Kramath* v. *Albany*, 127 N. Y., 580; *Biddeford* v. *Yates*, 104 Maine, 506; *Reuting* v. *Titusville*, (Penn.), 34 At., 918; *Burge* v. *Rockwell*, (Iowa), 94 N. W., 1103; *Burlington* v. *Dennison*, 42 N. J. L., 167.

But the right of delegating its powers to agents is by the charter now in question limited and restricted. Only the selectmen may be so employed. If the town had made its contract and by vote settled its terms, a committee could have been appointed as a mere instrumentality to execute it. Instead it elected to enter into the contract by agency. It disregarded the limitation contained in the charter. The contract made by the committee was not binding on the town.

It is urged that by force of the general statute (R. S. of 1903, Chap. 4, Sec. 76) the contract is valid. This general statute authorizes municipalities to make contracts for municipal lighting for terms of years and contains no limitation or direction as to the agency through which they may act.

But the charter of 1909, being the later and more specific expression of the legislative will, controls if the general law is inconsistent with it. *Isham* v. *Bennington Iron Co.*, 19 Vt., 248; *Camp* v. *Wabash R. Co.*, (Mo.), 68 S. W., 98; *Hartig* v. *Seattle*, (Wash.), 102 Pac., 410; *State* v. *Valentine*, (Tex.), 198 S. W., 1009; *Rankin* v. *Gaston County*, (N. C.), 92 S. E., 719; *Sutherland on State Construction*, 2nd Ed., 465, 36 Cyc., 1094; *Rodgers* v. *United States*, 185 U. S. S. C., 83, 46, 2nd L., 819; *Dahnke* v. *People*, (Ill.), 48 N. E., 140.

ALLEGED RATIFICATION:

It appears that at an annual town meeting held subsequently to the execution of the contract a vote was passed to approve and accept it. But there was no article in the warrant for the meeting upon

which such vote could be legally based. The only article shown in evidence was "Art. 19 To transact all other business." This was clearly insufficient to support the vote of ratification. *Lovejoy* v. *Foxcroft*, 91 Maine, 370.

FORM OF ACTION:

But for another reason the present action cannot be maintained upon the special count. The declaration is in assumpsit. The contract relied upon to support it is executed under the seals of both parties thereto. For breach of such a contract only an action of debt or covenant will lie. *Dunn* v. *Motor Co.*, 92 Maine, 168; *Drew* v. *Western Union Telegraph Company*, 111 Maine, 346.

IMPLIED CONTRACT:

The plaintiff however contends that the town having enjoyed the benefits of the companys service is liable on an implied contract, and that damages for breach thereof may be recovered in this action of assumpsit.

Undoubtedly a municipal corporation may be held liable on an implied contract without a vote, deed or writing expressly binding it. *Farwell* v. *Rockland*, 62 Maine, 301; 28 Cyc., 667; 27 L. R. A., (N. S.), 1124.

To this proposition there are however qualifications:

"Where an express contract remains in full force, one is never implied by law."

Charles v. *Dana*, 14 Maine, 387; *Holden* v. *Westervelt*, 67 Maine, 449; *Nat'l Bank* v. *St. Clair*, 93 Maine, 38.

"When the act done is ultra vires it is void and there can be no ratification and when the mode of contracting is limited and provided for by statute an implied contract cannot be raised" i. e. without conforming to the statutory limitation: "But a corporation like an individual is liable upon a quantum meruit when it has enjoyed the benefit of the work performed or goods purchased, when no statute forbids or limits its power to make a contract therefor."

Kramath v. *Albany*, 127 N. Y., 581; *Howell Elec. Co.* v. *Howell*, (Mich.), 92 N. W., 941; *Nelson* v. *New York*, 63 N. Y., 544; *Lesieur* v. *Rumford*, 113 Maine, 323.

The plaintiff contends that the express contract is clearly not ultra vires; that the limitation contained in the charter, unheeded in the making of the special contract, does not prevent recovery upon implied contract for lights furnished to and enjoyed by the town, and that the express contract, being unenforceable for reasons herein set

forth, a contract is implied to pay the reasonable value of all benefits received by the municipality with the assent of its officials authorized to contract. 19 R. C. L., 1060, 1075.

To this argument the defendant replies that as to light furnished between April 1, 1915 and March 1, 1916 the action is barred by prior adjudications, and as to that furnished after March 1, 1916 the elements of benefit and assent are both absent.

RES JUDICATA:

As to light supplied between April 1, 1915 and March 1, 1916 the defendant sets up the defense of res judicata. The evidence shows that two actions of assumpsit on account annexed were brought respectively in January and March, 1916 by the Van Buren Light & Power Co. against the inhabitants of the Town of Van Buren; that the items sued for were the same as those bearing date prior to March 1916 set forth in the writ in the pending case, that the cases were reported to the Law Court and judgments rendered for the defendant in both. 116 Maine, 119.

In any suit at law or in equity a judgment by a court of competent jurisdiction in a prior action between the same parties or their privies for the same cause of action is, conceding regularity and absence of fraud, conclusive as to all issues actually tried, or that might have been tried therein.

If for a different cause of action it is conclusive as to matters actually litigated

Corey v. *Independent Ice Co.*, 106 Maine, 494; *Blaisdell* v. *York*, 115 Maine, 351; *Emerson* v. *Street Railway*, 116 Maine, 63; *Harrison* v. *Remington Paper Co.*, 140 Fed., 400.

It is obvious that in this case the defense of res judicata is sustained. The prior actions were for the same cause. The same issues were or might have been tried.

As to items furnished after March, 1916 there is no evidence of implied promise. Before that time the town had for nearly a year refused payment; for about five months, to wit, June to November the current had been shut off. The streets were after Dec., 1915 lighted by another electric plant.

There was no implied promise to pay for the duplicate lighting system maintained by the plaintiff evidently without the request or consent of the town officers.

Exceptions overruled.

SADELIAH E. M. NICHOLS,
Appellant from Decree of Judge of Probate,

vs.

ESTATE OF MADISON M. J. L. LEAVITT.

York. Opinion February 20, 1920.

Wills. Probate of same. Appeal and reasons of appeal. Service of appeal papers in matter of appeal from allowance of will. Rule as to necessity of service of appeal papers upon executor or administrator named in said will.

Additionally to the moral obligation either by express or implied direction of the maker, a statute imposes upon every supposed executor having custody of an unprobated will, the imperative legal duty of filing it for probate.

Merely filing a will for probate would not make a proposed executor party to forensic issue so as to give him the statutory status of one entitled to be served with copy of reasons of appeal. The putative executor may himself assume the burden of waging contest to establish the writing as an efficacious will, or he may leave that weight to be borne by those whom probate of the will would benefit. As petitioner that the court take proof and allow the will, he becomes a real party, albeit a representative one, "before the judge of probate."

The right of appeal, exercise of which was attempted in this case, is statutory. Compliance with indicated requirements was not had. It follows that jurisdiction was not conferred upon the appellate tribunal and that the reserved exceptions are without merit.

Appeal from the findings of the Judge of Probate in the matter of the allowance of a will. The appeal and reasons of appeal were duly filed and entered at Supreme Court of Probate. The executor appointed under said will filed motion asking that the probate appeal be dismissed, the appeal papers not having been served upon the executor named in the will. This motion was allowed by presiding Justice and appeal was dismissed; from which ruling, exceptions were filed.

Case stated in opinion.

Louis B. Lausier, and John P. Deering, for appellant.

Edward H. Gove, for proponents.

SITTING: HANSON, PHILBROOK, DUNN, MORRILL, DEASY, JJ.

DUNN, J. The executor named in an instrument purporting to be the will of Madison M. J. F. Leavitt, filed it in the York County Probate Court, with petition praying proof and allowance. Deceased's heir at law and next of kin, in the person of a sister him surviving, assailed validity of the document, assigning want of testamentary capacity on her brother's part, undue influence exerted to have him make the paper, and that it was not executed in conformity to the statute relating to wills. Her attack was successfully resisted. Upon that, she entered notice of appeal. In the supreme court of probate, the nominated executor moved dismissal of proceedings, on the ground that appellant had not served him, as a "party who appeared before the judge of probate," with attested copy of reasons of appeal. R. S., Chap. 67, Sec. 32. The case is here on exceptions to a ruling sustaining the motion.

Additionally to the moral obligation imposed either by express or implied direction of the maker, a statute charges upon every supposed executor having custody of an unprobated will, the imperative legal duty of filing it for probate. R. S., Chap. 68, Sec. 4. While, in merely filing the will for probate, the executor proposed by Mr. Leavitt was not party to forensic issue, yet as petitioner that the court take proof and allow it, he clearly was a real party, albeit a representative one, before the judge of probate. His rights were co-equal with those of any other party there. Proceedings for probate of a will are unlike almost all other judicial investigations. When that which bespeaks itself a will has been propounded, it is in control of the probate court. That court, after public notice, and personal notice also, if deemed by it expedient, in open session, at an appointed time and place, proceeds to determine whether the presented instrument be adequate in the law to dispose of property on or after the death of him who formerly owned it. R. S., Chap. 68, Sec. 5. This it does uninfluenced even by agreement, lending validity or otherwise, between proponent and contestant. The putative executor may himself assume the burden of waging contest to establish the writing as an efficacious will, or he may leave that weight to be borne by those whom probate of the document would benefit. *Keniston* v. *Adams*, 80 Maine, 290. If he elect to make upholding effort, he may adduce and cross-examine witnesses, and from adverse decision may appeal. No higher privilege is enjoyed by a contestant.

The right of appeal, exercise of which was attempted in this case, is statutory. Compliance with indicated requirements was not had. It follows that jurisdiction was not conferred upon the appellate tribunal, and that the reserved exceptions are without merit. *Pettingill* v. *Pettingill*, 60 Maine, 411; *Bartlett, Appellant*, 82 Maine, 210; *Moore* v. *Phillips*, 94 Maine, 421.

Exceptions overruled.

MARGARET E. WEED *vs.* G. PERCY CLARK.

Penobscot. Opinion February 21, 1920.

Actions against executors and administrators. General rule regarding right of plaintiff to testify in such actions. Rule as to common law governing in absence of statutory provisions. Rule as to limitation of testimony by adverse party when an executor or administrator offers himself as witness upon certain matters.

Plaintiff sued her former employer's estate to enforce payment of a claim for wages for her work for nearly five years, and also for money averred to have been loaned to him by her. So far as it related to work, the claim was not otherwise substantiated than by testimony of witnesses to the effect that plaintiff had been employed about decedent's home. For money lent, there was only evidence of the transaction of a check paid to decedent at plaintiff's request.

The presiding Justice ruled plaintiff herself incompetent to give testimony with relation to certain entries stated to be in the handwriting of defendant's decedent. Nor was she permitted to give evidence in contradiction of witnesses imputing to her the making of statements, while decedent was living, inconsistent with her attitude as plaintiff. To these rulings, and as well to the charge of the justice, at the conclusion of the testimony, that the jury return a verdict for defendant, exceptions have been argued.

Save where there are statutory provisions differently, in all cases in which an executor, administrator, or other legal representative of a deceased person is a party, the rules of the common law control the competency of witnesses and evidence. No existing modification of such rules made the offered evidence competent.

This case totally lacked proof of an express promise on decedent's part to pay plaintiff for her work. The theory that her services were performed under an implied contract for compensation encountered and was outweighed by convincing evidence that she was already paid. He who withholds his demand while an alleged debtor is alive, and in after-time seeks to compel payment by the latter's estate, has no right to expect that such claim will escape close scrutiny or be enforced in the absence of evidence amounting to clear and cogent proof.

There is nothing to show that the check was paid to decedent on any promise, actual or implied, that he would pay it back. Presumptively it was given to pay a debt and not as a loan.

Action of assumpsit against the administrator of the estate of Herbert M. Clark, plaintiff alleging certain sums to be due for service rendered and money loaned decedent during his lifetime. Defendant filed plea of general issue. At close of the entire evidence, the court directed a verdict for defendant; to which ruling plaintiff filed exceptions. Judgment in accordance with opinion.

Case stated in opinion.

J. B. Merrill, for plaintiff.

D. F. Snow, for defendant.

SITTING: CORNISH, C. J., SPEAR, HANSON, DUNN, WILSON, DEASY, JJ.

DUNN, J. Defendant's decedent, one Herbert M. Clark, lived in Holden. For not far from twenty-five years plaintiff was his housekeeper. The day before he died she left his home to go to Patten for a visit. On her way there, she directed a Bangor savings bank to draw out of her account and pay to him the sum of $150.00, which it did by check to his order. He deposited the check to his own credit in another bank. In usual course, this check was paid by the bank on which it was drawn. Some six months after her former employer's death, plaintiff filed against his estate a claim for wages for her work, for nearly five years, aggregating $729.00, and also for money averred to have been loaned to him by her, the date and the amount of the charge for the loan corresponding respectively to those of the check. Payment of the claim never was made by the administrator. Suit followed, and the case was brought to trial. So far as it related to the items for work, the claim was not otherwise substantiated than by testimony of witnesses to the effect that plaintiff had been employed about decedent's home. For money lent, there was only evidence to

prove the transaction of the check. The administrator defendant did not testify. Plaintiff asked that she herself might be allowed to give testimony that entries in an "account book" of hers were in the handwriting of decedent, "and were in the nature of an admission" by the latter during his lifetime of an amount that he owed her, which request the trial court, after inspecting the book, declined to grant. Nor was plaintiff permitted to give evidence in contradiction of witnesses imputing to her the making of statements, while deceased was living, highly inconsistent with her attitude as plaintiff. To these rulings of the Justice presiding, and as well to his charge to the jury, at the conclusion of the testimony, to return a verdict for defendant, exceptions have been argued.

Save where there are statutory provisions differently, in all cases in which an executor, administrator, or other legal representative of a deceased person is a party, the rules of the common law control the competency of witnesses and evidence. R. S., Chap. 87, Sec. 117. Among other modifications is this: If a personal representative prosecuting or defending, on his own initiative offer himself as a witness, and he testify for the estate as to that which occurred in his decedent's lifetime, then, with regard solely to what he testified to, the adverse party, if he have knowledge otherwise admissible, may testify. Id., Clause II. As a litigant, the personal representative has all the rights his decedent would have had if living. And besides, he alone holds the key which will open the door and allow his adversary to enter and testify regarding facts that happened before the dead man died. Unless the door be opened by the personal representative, the other party may not testify as to what happened before decedent's death, not even to interpret that which is hidden from or doubtful to ordinary and easy perception and intelligence, or is only implied, in a statement which he himself made while the other lived. *Sherman* v. *Hall*, 89 Maine, 411. For greater reason he may not testify in explanation, unless and until the personal representative opposing bid him do so, when the asserted admission was by his adversary's decedent. Evidence other than testimony by the living party must be relied upon to establish identity of the admission, and to explain or control its legal and natural import. *Berry* v. *Stevens*, 69 Maine, 290. It will be noted, that plaintiff did not offer an original book of entries of business transactions, regularly kept, showing of itself a charge against decedent's estate, with her suppletory oath to

the entries therein made, which the inhibitory rule does not forbid. *Silver* v. *Worcester*, 72 Maine, 322, 329. Her grievance is, not that the "account book" was admissible, by suppletory oath, as an authentic register of the affairs of her vocation, in evidence of performance of personal services for payment of which she sued, but rather that she was ruled incompetent to bear witness that a particular entry in the book was "a statement of the amount due the plaintiff upon a certain date." Indeed, the record evinces that plaintiff's attorney virtually said to the court, the book would be valueless in evidence unaccompanied by the proffered explanatory testimony.

It is a well established rule of procedure in this State, resting for foundation on the axiomatic principle that prevention is better than cure, that a verdict may and should be directed for either party when, giving the evidence introduced full probative value, it is plain that a contrary verdict could not be sustained. *Heath* v. *Jaquith*, 68 Maine, 433; *Jewell* v. *Gagne*, 82 Maine, 430; *Royal* v. *Power Company*, 114 Maine, 220. When only one inference can be drawn from the evidence by reasoning and reasonable men, the question is one of law and not of fact. *Maine Water Company* v. *Crane*, 99 Maine, 473, 485.

This case totally lacked proof of an express promise on decedent's part to pay plaintiff for her work. The theory that her services were performed under an implied contract for compensation encountered and was outweighed by convincing evidence that she was already paid. One who withholds his demand while an alleged debtor is alive, and in after-time seeks to compel payment by the latter's estate, has no right to expect that such claim will escape close scrutiny or be enforced in the absence of evidence preponderantly amounting to clear and cogent proof. That plaintiff's witnesses testified honestly concerning the performance of services by her, was unquestioned. But, extending complete credence, their testimony tending to show the existence of an implied promise to reward her, was overborne by that of the defense, which made known that she was not left by decedent without payment of her hire. A verdict for plaintiff in this behalf could not be sustained.

No evidence that plaintiff loaned money to decedent appears to have been preserved. A promise to repay money borrowed is among the ordinary indications of a loan. *Nichols* v. *Fearson*, 7 Pet., 103, 109; 8 Law Ed., 623, 625. The charge for money lent was without medium of proof beyond that of the check. This was tantamount to

a deposit by decedent of plaintiff's personal check to his order. Unexplained, that would give rise to a legal presumption that such check was in payment or discharge of an existing liability, rather than as a loan. *Gerding* v. *Walter*, 29 Mo., 426; *Morrow* v. *Frankish*, (Del. Sup.), 89 Atl., 740; *Nay* v. *Curley*, 113 N. Y., 575; *Masser* v. *Brown*, 29 Pa. St., 128; *Huntzinger* v. *Jones*, 60 Pa., St. 170. Prof. Greenleaf thus defines the rule: "In proof of the account of money lent, it is not sufficient merely to show that the plaintiff paid money or a bank check to the defendant, for this, prima facie, is only evidence of the payment by the plaintiff of his own debt, antecedently due to the defendant. He must prove that the transaction was essentially a loan of money." Greenleaf on Evidence, Vol. 2, Section 112. *Hearne* v. *Hearne*, 55 Maine, 445, was a case of the analogous action of money had and received. Said the court: "The mere proof of delivery of money by one to another has often been held to be insufficient to support this action, the presumption being that it was delivered as a payment of a preexisting liability." See, too, *Titcomb* v. *Powers*, 108 Maine, 347. The New York case of *Russell* v. *Almot*. 116 N. Y. S., 1080, is direct authority. There, as here, plaintiff sued to recover money asserted to have been loaned to her opponent's decedent while she was employed as his housekeeper. Justice Cochrane spoke for the court: "——but it was incumbent on plaintiff to show that her check to Almot was not in payment of an antecedent indebtedness by her to him. The presumption was that the check was given to pay a debt, and not as a loan." *Leask* v. *Hoagland*, 205 N. Y., 171, likewise holds the giving of a check to be presumptively that it was delivered in payment of a debt and not as a loan; adding, "but it may represent a loan or a gift, or money of the drawer, to be applied by the drawee to the use of the former as his agent or otherwise."

The presumption, that the money belonged to the one who received it, may be overcome, and the real fact shown. *Park* v. *Miller*, 27 N. J. L., 338. There is nothing in this case to show that the check was paid to the decedent on any promise, actual or implied, that he would pay it back. He did not, from its mere receipt, thereby become a debtor.

Plaintiff's exceptions are unavailing.

Exceptions overruled.

PATRICK J. FLAHERTY *vs.* MAINE MOTOR CARRIAGE COMPANY.

Cumberland. Opinion February 21, 1920.

Auditor's report. Set-off.

This was an action on a contract. On March 2, 1912, the plaintiff purchased from the defendant a motor truck paying therefor one thousand dollars in cash, and giving a Holmes note to secure the balance due of twenty-four hundred dollars, which was to be paid in monthly payments of two hundred dollars each.

In October 1912, the truck was taken back by the defendant for default in the payments, and two years later this action was brought, the plaintiff alleging that the truck was defective in its construction and claiming a breach of an implied warranty and a recovery of the money paid.

The jury returned a verdict for the plaintiff and the case is before the court on the defendant's exceptions, and a general motion for a new trial.

The defendant's counsel at the close of the charge of the presiding Justice requested an instruction that the balance due upon the plaintiff's notes held by the defendant should be set-off in this action. The presiding Justice declined to so instruct the jury.

Held:

1. We think the refusal to instruct was correct. The note was not included in the set-off, and was in no legal sense a matter of set-off in this action. The presiding Justice in his charge to the jury very carefully explained the legal effect of the note, and the foreclosure proceedings. The refusal to instruct did not, therefore, injure the defendant or deprive him of any legal right.
2. A careful study of the evidence fails to satify us that the verdict is manifestly wrong.

Action for breach of contract in the sale of an auto truck. Defendant filed plea of general issue. Verdict for plaintiff in the sum of $762.09. Exceptions filed by defendant to certain rulings of court. Judgment in accordance with opinion.

Case stated in opinion.

D. A. Meaher, for plaintiff.

Chapman & Brewster, for defendant.

SITTING: CORNISH, C. J., HANSON, PHILBROOK, DUNN, MORRILL, JJ.

HANSON, J. This was an action on a contract. On March 2, 1912, the plaintiff purchased from the defendant a motor truck, paying therefor one thousand dollars in cash, and giving a Holmes note to secure the balance due of twenty-four hundred dollars, which was to be paid in monthly payments of two hundred dollars each.

In October, 1912, the truck was taken back by the defendant for default in the payments, and two years later this action was brought, the plaintiff alleging that the truck was defective in its construction and claiming a breach of an implied warranty and a recovery of the money paid.

The jury returned a verdict for the plaintiff, and the case is before the court on the defendant's exceptions, and a general motion for a new trial.

The case required the appointment of an auditor, who was commissioned by agreement of the parties, with the stipulation that he should hear the parties, examine the vouchers and proof, and state the accounts in the case, and in addition to the account annexed to the writ, to examine all items of account between the parties as if all such had been included in the writ.

Under this stipulation the auditor considered and determined the amount due on the plaintiff's note for $2400 held by the defendant, which was not directly included in defendant's set-off, but was comprehended in the charge in the set-off for "One Pope Hartford 3 ton truck as per contract $3400."

The auditor's report was accepted by the court and was not attacked by either party at the trial.

Exceptions. The defendant's counsel at the close of the charge of the presiding Justice requested an instruction that the balance due upon the plaintiff's notes held by the defendant should be set-off in this action. The presiding Justice declined to so instruct the jury.

We think the refusal to instruct was correct. The note was not included in the set-off, and was in no legal sense a matter of set-off in this action. The presiding Justice in his charge to the jury very carefully explained the legal effect of the note, and the foreclosure proceedings. The refusal to instruct did not, therefore, injure the defendant or deprive him of any legal right.

MOTION: A careful study of the evidence fails to satisfy us that the verdict is manifestly wrong.

Exceptions overruled.
Motion overruled.

INA M. SMITH, et als. *vs.* LEON V. WALKER, et als.

Lincoln. Opinion February 26, 1920.

Wills. Life estate with qualified power of disposal. General rule to be applied in the construction of will. R. S., Chap. 79, Sec. 16, interpreted.

A testator made the following provisions in his will; "Third: To my beloved wife, E. M. A., I give, bequeath and devise all the rest, residue and remainder of my estate both the real, personal and mixed, wherever situated and whenever and however acquired that I may own at the time of my death. Giving my wife the full power to sell, convey and dispose of any or all of said estate during her lifetime that she may choose to, and to use in any manner she chooses the whole of said estate and the proceeds realized from the sale of same for her support and maintenance or the support and maintenance of any person or number of persons that she may select. Meaning and intending to give my wife the full power to dispose and consume of all my property, if she so chooses, same as I could do if living and without any interference or suggesting from any heirs or legatees.

Fourth: If, after the decease of my wife, there is any part of my estate left, after my wife has exercised the power heretofore stated, then I give bequeath and devise to my nieces all the rest, residue and remainder of my estate to my nieces in the following manner, viz."

Upon bill in equity praying construction of these two paragraphs.

Held:

1. That the wife took a life estate in the real and personal property, with qualified power of disposal by deed or gift in her lifetime, with remainder over, of such property as she did not thus dispose of, to the nieces mentioned in the residuary clause.
2. That such was the actual intention of the testator and that such intention was judicially expressed.

Bill in equity asking for the construction of the will of Charles F. Achorn. Cause was heard upon bill and answer, and by agreement of parties reported to Law Court. Judgment in accordance with opinion.

Case stated in opinion.

A. S. Littlefield, and H. R. Smith, for complainants.

Charles D. Booth, and Leon V. Walker, for defendants.

SITTING: CORNISH, C. J., HANSON, PHILBROOK, DUNN, MORRILL, DEASY, JJ.

PHILBROOK, J. Bill in equity on report praying for the interpretation and construction of certain portions of the will of Charles F. Achorn.

After making provisions for the purchase of a burial lot, perpetual care of the same, erection of a suitable monument thereon, and small specific bequests to seven nieces, the testator thus declares:

"Third: To my beloved wife, Etta M. Achorn, I give, bequeath and devise all the rest, residue and remainder of my estate both the real, personal and mixed, wherever situated and whenever and however acquired that I may own at the time of my death. Giving my wife the full power to sell, convey and dispose of any or all of said estate during her lifetime that she may choose to, and to use in any manner she chooses the whole of said estate and the proceeds realized from the sale of same for her support and maintenance or the support and maintenance of any person or number of persons that she may select. Meaning and intending to give my wife the full power to dispose and consume of all my property, if she so chooses, same as I could do if living and without any interference or suggestions from any heirs or legatees.

Fourth: If, after the decease of my wife, there is any part of my estate left, after my wife has exercised the power heretofore stated, then I give bequeath and devise to my nieces all the rest, residue and remainder of said estate to my nieces in the following manner, viz."

The proportionate shares to the nieces here follow but they do not affect the controversy. The testator died in June, 1918, and on the following January his widow died leaving a will which was executed only a few days after the probate of her husband's will. The twenty-fifth paragraph of her will reads thus:

"It is my purpose by this will to dispose of both my separate estate and all the estate that came to me by the will of my late husband. Charles F. Achorn, or of which I have the power of disposal by his said will, and to that end I do by this will exercise all rights of disposal over the estate which belonged to my said husband, which rights of disposal were given to me by his said will."

The plaintiffs claim that the widow, by the will of her husband, took a life estate with qualified power of disposal by deed or gift in

her lifetime, with remainder over, of such property as she did not thus dispose of, to the nieces mentioned in the residuary clause of the fourth paragraph of the husband's will. The defendants claim that under the third paragraph of the husband's will she took title in fee to the residue of his real estate and an absolute title in the residue of his personal property, and that the gift over, of what should remain undisposed of by her, to the nieces mentioned in the residuary clause of the fourth paragraph of his will, is repugnant and void; also that even if it be held that the widow did not acquire title in fee to his real estate and an absolute interest in the personal property, yet under his will she did have a power to dispose of his estate by will, and that in fact, under this power, she has fully done so and no residuum remains for the nieces mentioned in the husband's will.

The case therefore presents the oft-recurring task of first ascertaining the actual intention of the testator, a question of fact, to be gathered from the entire instrument, viewed in the light of existing circumstances; and, second, determining as a question of law whether the actual intention is so stated that it may be carried into effect, or whether fixed canons of interpretation require that his intention must fail of execution.

What was the actual intention of this testator viewed in the light of existing circumstances and as found within the four corners of the will? The bill, answer, and the two wills constitute the record. From this record, and the existing circumstances thereby disclosed, we feel justified in finding that Achorn and his wife were well advanced in years, were childless, had jointly accumulated a goodly portion of this world's goods, and that his affection for and confidence in his wife were very great. Aside from small pecuniary legacies to seven nieces his chief thought was that his beloved spouse should spend a serene, comfortable and independent widowhood, and enjoy his estate according to her wishes and station in life. The first sentence of the third paragraph, when read alone, would undoubtedly create in her an estate of inheritance under R. S., Chap. 79, Sec. 16. Stopping here we should unhesitatingly say that the actual intention was to devise and bequeath title in fee to real estate and absolute interest in personal property. But although the second and third sentences are separated from the first by a period, as occurred in the very recent case of *Reed* v. *Creamer*, 118, Maine, 317, yet, as in that case, the second and third sentences are linked with the first and all must be

read together. Thus read we find running through the entire third paragraph a power of disposal more or less qualified. She could dispose "during her life time," and she could use the proceeds of sale "for her support and maintenance or the support and maintenance of any person or number of persons that she may select." These qualifications cannot be ignored even though more sweeping and unlimited language immediately follows. She could not dispose of the estate for every purpose. *Homans* v. *Foster*, 232 Mass., 4.

That the power of disposal which Mr. Achorn gave to his wife was limited rather than unlimited is further shown by the language employed by him in the beginning of the fourth paragraph, viz: "If, after the decease of my wife, there is any part of my estate left, after my wife has exercised the power heretofore stated" &c. For if her power was absolute, then after its exercise there could be nothing left; if her power was limited, then after its exercise there would or might be something left. Therefore, the fact that he provides for a remainder, after the exercise of the power by her, clearly shows that he regarded the power as limited rather than unlimited, qualified rather than unqualified.

Had he said "In case my wife fails to exercise the power, then I give" &c. that would be consistent with an absolute or unqualified power which remained unexercised, as was the case in *Burbank* v. *Sweeny*, 161 Mass., 490, but here he provides for a remainder after a full and complete exercise of power, and that necessarily implies that the power itself must be limited or qualified.

We are of the opinion that the actual intention was to create a life estate in the widow, with remainder over; that the intention was judicially expressed, that no rule of law has been forced, and the fourth rule in *Barry* v. *Austin*, 118 Maine, 51, must be applied, viz: If the devise is expressed in such general terms as would otherwise create an estate of inheritance under R. S., Chap. 79, Sec. 16, and those general terms are followed by a qualified and restricted power of disposal in the first taker, a life estate by implication is created and the limitation over is valid.

The residuary legatees under the will of Charles F. Achorn are to share in the residuum of his estate, according to the terms of his will, and decree will be prepared and presented by the plaintiff to any Justice of this court, sitting as a court in equity, for his signature, in accordance with this opinion. Parties to pay their own costs and counsel fees.

MEMORANDUM DECISIONS

CASES WITHOUT OPINIONS

STATE OF MAINE *vs.* MARTIN O'HARE AND MARTIN MURPHY.

Cumberland County. Decided January 2, 1919. This is a complaint for the unlawful possession of intoxicating liquors. The case is before this court on respondents' exceptions to the refusal of the presiding Justice to direct a verdict in their favor at the close of the evidence. The exceptions are without merit. The verdict of guilty found by the jury was fully sustained by the testimony and by the circumstances of the case, and the presiding Justice would not have been warranted in ordering an acquittal. Exceptions overruled. Judgment for the State against both respondents. *Carroll L. Beedy, and Clement F. Robinson,* for the State. *Henry C. Sullivan,* for respondents.

STATE OF MAINE *vs.* THOMAS MULKERN.

Cumberland County. Decided January 2, 1919. At the May term, 1918, of the Superior Court for Cumberland County, Thomas Mulkern was tried before a jury and convicted of the crime of rape. The case comes to this court on exceptions to rulings of the Judge of

the Superior Court in refusing to order a verdict for the respondent and in declining to grant a motion in arrest of judgment. The respondent also appealed to this court as permitted by R. S., Chap. 136, Sec. 28

It is conceded that there is no ground for sustaining the motion in arrest. The only question in issue before us is as to whether the evidence justifies the verdict. Marion I. McDonald told the story of the criminal assault upon her, as set forth in the indictment. Her testimony was corroborated, naturally not by direct testimony but by significant circumstances. There were also some circumstances shown that were relied upon as corroborating the defendant's denial.

The jury saw the witnesses, heard their testimony, and found the respondent guilty. The Judge of the Superior Court, who also had the opportunity of seeing and hearing the witnesses, refused to grant a new trial.

A careful reading of the evidence in the case does not show to our satisfaction that the verdict was unjustified. Exceptions overruled. Appeal dismissed. Judgment for the State. *Carroll L. Beedy, and Clement F. Robinson,* for the State. *Henry C. Sullivan,* for defendant.

EDWARD K. GOULD, Ex'r., In Equity *vs.* FRED H. CALL.

Knox County. Decided January 26, 1919. This bill in equity was brought to cancel a trust agreement dated July 21, 1905, entered into between Helen S. Vining, the plaintiff's testatrix, and the defendant, whereby certain bank deposits amounting to $6,000 were placed in his hands under the conditions specified in the agreement. The grounds upon which the plaintiff seeks to annul the instrument are alleged fraud and undue influence upon the part of the defendant. Miss Vining died January 26, 1916, more than ten years after the agreement was made and no effort was ever made upon her part to set it aside.

The sitting Justice dismissed the bill with costs, and the case is before the Law Court on plaintiff's appeal.

Held:

1. That the plaintiff utterly failed to substantiate his charges of fraud and undue influence on the part of the defendant.

2. The circumstances attending the preparation and execution of the instrument, the relations of the parties both before and after that time, their conduct, and the more than ordinary intelligence on the part of Miss Vining, all combine to justify the decision of the sitting Justice. The evidence would warrant no other conclusion.

Appeal dismissed. Bill dismissed with costs. *Edward K. Gou'd*, for plaintiff. *Benedict F. Maher*, for defendant.

HARRY F. OLIVER *vs.* ELIZABETH MORSE, et als.

Sagadahoc County. Decided January 27, 1919. This is a bill in equity heard before a single Justice, upon bill, answer, replication and proofs, no issues of fact having been submitted to a jury. The plaintiff claims a right of way across defendant's land. He says that he is entitled to a safe and convenient way, but that the defendants have rendered it unsafe and inconvenient by using it as a part of a pasture and allowing their cattle to wander at will upon it. The plaintiffs pray that defendants be enjoined from using their land as a pasture until this way is properly protected by a fence, to be erected by and at the expense of the defendants. The learned Justice below decreed that the prayer of the plaintiff should be granted. The defendants appeal.

That the plaintiffs have a right of way is admitted. Beyond this the defendants refuse to go. The controversy is whether the way must be kept safe and convenient by the defendants. An examination of the admitted testimony does not show the origin of the right of way, whether by grant, user, or otherwise, nor does it show any obligation resting upon the defendants to keep the way safe and convenient for plaintiff's use. But in an appendix to the printed record appear two deeds which refer to this right of way. These deeds were not identified, offered and admitted as part of the record evidence.

The plaintiffs in their argument refer to, and in large measure depend upon them. The defendants in argument say that if the deeds had been actually introduced in evidence they could and would have offered admissible testimony which would have completely nullified the force and effect which plaintiffs claim from those instruments. An examination of the language of the decree clearly shows that when it was drawn the learned Justice in some way had the deeds before him and must have relied largely upon them in determining and drafting his decree. Aside from these deeds the testimony does not show that any obligation to keep the way safe and convenient rested upon the defendants. From the evidence actually admitted we are of opinion that the decree is not sustainable and that the appeal must be sustained. In order that the parties may not be precluded from making use of these deeds, or other evidence pertaining to the issue, in any subsequent proceeding we think that the mandate should be: Appeal sustained. Bill dismissed with single bill of costs for defendants but without prejudice. Injunction denied. *Charles D. Newell, and E. W. Bridgham,* for plaintiff. *E. C. Plummer,* for defendant.

KATIE C. OLSON *vs.* A. C. MCLOON & CO.

Knox County. Decided January 27, 1919. This case comes before us upon exceptions and motion for new trial upon the ground of newly discovered evidence. The verdict was for the plaintiff. The defendant waives exceptions and relies upon the motion. After a careful examination of the new evidence, which is that of one person, who was a boy only fourteen years old when the occurrence arose upon which this action was founded, and comparing that evidence with the entire record of evidence at the original trial, we are not persuaded that this new evidence ought to, or would, change the result. Neither are we persuaded that this evidence could not have been discovered by due diligence before the original trial. Motion overruled. *O. H. Emery,* for plaintiff. *A. S. Littlefield,* for defendant.

EDWARD K. CHAPMAN

vs.

NEW YORK CENTRAL RAILROAD COMPANY.

Cumberland County. Decided January 28, 1919. The plaintiff alleges that he lost the sale of part of a car load of Christmas trees through the wrongful interference of the servants of defendant. The defendant pleaded by brief statement "That the acts complained of were caused by the enforcement of quarantine regulations of the State of New York and were not caused by any fault of the New York Central Railroad Company." The plaintiff has a verdict which defendant moves to set aside on the usual grounds. The motion must be sustained.

Prior to the month of December, 1915, a quarantine against the gypsy moth had been established by the New York Department of Agriculture, and was then in force, upon certain towns in Maine and other New England states, prohibiting the shipment into or reception at any point within the State of New York from the quarantined area, of certain coniferous trees including the class commonly known as Christmas trees; and the officials of the New York Central Railroad Company had been instructed by an officer of the department having charge of the enforcement of the quarantine in New York City, to notify his office of all cars received from New England and northern New York, and hold them until notified by his office to release them to the consignees. These instructions seem to have been given regardless of the limits of the quarantined area in New England, to guard against trees cut within the infested area and shipped from a point outside that area.

On December 11, 1915, the plaintiff shipped to his own order from Oquossoc, Maine, to New York City a car load of Christmas trees. The interline way-bill issued by Maine Central Railroad Company, which accompanied the car, stated the shipment as from Brunswick, Maine, to 60th Street, New York, N. Y.; on that way-bill in the column headed "Consignor, Connecting line Reference, Original Car & Way-bill Number and Point of Shipment," these words, "Oquossoc, Me.," appear. The bill of lading issued by the Maine Central Railroad Company and delivered to the shipper stated that the car was

received at Oquossoc, Me. The car arrived at the Thirty-third street station of the defendant in New York on December 22 or 23; about 9 or 10 o'clock in the forenoon of December 23 the plaintiff presented the bill of lading, paid the freight and received a paid freight bill; upon presenting the paid freight bill to the delivery clerk he received from the latter a delivery slip; the delivery clerk warned him not to touch the car until one of the inspectors had passed on it. The plaintiff however took possession of the car and began to unload it.

Between three and four o'clock in the afternoon of the same day information of the car, that it came from Brunswick, Maine, within the infested area, was telephoned from a freight office of the defendant to Mr. Sands, of the New York Department of Agriculture, having charge of the enforcement of the quarantine in New York City; Mr. Sands at once instructed one Kennedy, an inspector of the department "to locate Mr. Chapman and provide inspection for that car; and if on the data furnished by the railroad it could not be determined whether the car originated in the moth infested area, or outside of the moth infested area, to accept an affidavit in lieu of such inspection and release the car on that."

Q. What kind of an affidavit? A. An affidavit by Mr. Chapman to the effect that the trees loaded on that car were cut outside of the moth infested area.

Mr. Kennedy at once found Mr. Chapman and told him that the car was held subject to release by the Department of Agriculture, that it showed billing from Brunswick, within the quarantined area, and said to him that if he would make an affidavit that the trees were cut outside the infested area, the department would release the car. The plaintiff refused at first to make the affidavit, claiming that he could not personally say that the trees came from Oquossoc, but that the bill of lading would show that fact; later he said that the would make the affidavit, if Mr. Kennedy would bring a notary to him. He persisted in unloading and selling the trees. Mr. Kennedy then told one McBreen, who was in charge of the yard, that the car was held subject to instructions from the department and to stop the plaintiff from unloading it, which he did. Thereupon the plaintiff said to McBreen and his men, "I surrender these trees to you as a sale, and it is a good sale, too" and soon after left the yard; and his testimony is, that thereafter he did not "go near the railroad in any way, the railroad officials, or try to look up" Mr. Kennedy.

Mr. Sands testifies: "Mr. Kennedy returned to me at 10.30 December 24th, with a copy of the way-bill, and evidence that the explanation by the railroad agent to him was that it originated outside of the moth infested area." He further says: "I didn't put any burden of proof on the railroad to show whether the car originated in the moth area or not. It was for me to determine, and I ordered the car released. I didn't leave that question to the railroads." The railroad company was at once notified that the car could be delivered, and effort was made to find Mr. Chapman during that day, both at the railroad yards and at his hotel; the inspector also endeavored to get in touch with him by telephone at his hotel on the evening of the 23d.

This rather extended analysis of the evidence has been made, to show clearly that upon these facts, which are undisputed, but one inference can legally be drawn,—that the plaintiff lost his trees through his own wilful and persistent disregard of the reasonable regulations of the New York Department of Agriculture; his attitude is clearly reflected by his testimony printed in the record. The jury must have misapprehended the issue, and thus erred. The mandate must be: Motion sustained. Verdict set aside. New trial granted. *Clifford E. McGlauflin, and William Lyons,* for plaintiff. *Symonds, Snow, Cook & Hutchinson,* for defendant.

GEORGE J. STOBIE *vs.* JEREMIAH F. SULLIVAN.

JEREMIAH F. SULLIVAN *vs.* GEORGE J. STOBIE.

Kennebec County. Penobscot County. Decided March 7, 1919. These cross actions arose out of an automobile collision which occurred in Etna on September 23, 1917, at about 7 P. M. The suit of *Stobie* v. *Sullivan* was brought on September 29, 1917, was tried at the November term of the Superior Court in Kennebec County, resulted in a verdict for the plaintiff in the sum of $1960 and is before this court on Sullivan's motion to set aside the verdict. The suit of *Sullivan* v. *Stobie* was brought on December 6, 1917, in the Supreme Judicial Court for Penobscot County, was tried at the April term, 1918, and is before this court on report.

The attorneys for Sullivan in their brief base their claim for a new trial on the first suit and a judgment in his favor in the second chiefly upon the excessive speed at which they allege Stobie was driving at the moment of collision. It is doubtless true that Stobie was traveling at a rapid rate, but from the testimony and the location of his car after the accident, it is apparent that Sullivan was traveling at an equal if not greater speed.

The vital point of inquiry however is whether the collision took place on the north side of the road which was Stobie's proper side as he was traveling westward from Hampden toward Waterville, or on the south side, which was Sullivan's proper side as he was going northerly toward Bangor. If each had been on his own side, no trouble would have occurred, as the highway at that point was a State road, straight, wide, smooth, and well wrought.

It was not the speed of either party that was the proximate cause of the accident but the position of one car or the other on that side of the road where it did not belong. *Bragdon* v. *Kellogg*, 118 Maine, 42.

In the first case the jury determined this issue in favor of Stobie and their verdict is abundantly justified by the evidence and the circumstances. It should not be disturbed.

In the second case, in which this court has jury powers, we are of opinion that the action cannot be maintained. We have studied the evidence carefully and can reach no other conclusion than that Mr. Sullivan ran his car into Mr. Stobie's, the latter being on its proper side of the road, and therefore is not entitled to recover. A detailed discussion of the evidence is unnecessary.

The entries will therefore be: In *Stobie* v. *Sullivan*, motion overruled. In *Sullivan* v. *Stobie*, judgment for defendant. *Carroll N. Perkins, and Clement F. Robinson*, for George J. Stobie. *Harvey D. Eaton, and Terence B. Towle*, for Jeremiah H. Sullivan.

THOMAS H. LAWLER *vs.* JAMES F. SPELLMAN, et als.

Penobscot County. Decided March 8, 1919. Action of assumpsit for labor performed by the plaintiff on the defendant's farm. The jury returned a verdict for the plaintiff for $3730.73, and the case is before the court on the defendant's general motion for new trial.

The parties are in substantial agreement that the plaintiff formerly owned and occupied a farm in Township 2, Range 6, Penobscot County, which he sold to Mr. Spellman, Sr., first conveying an undivided half in 1909, and after running the place two years in partnership with the defendants, conveying the remaining half in December, 1910. At the time of the last conveyance J. F. Spellman & Sons hired the plaintiff, who was father-in-law of one of the sons, to manage the farm for $50 per month, and certain perquisites, to begin January 1, 1911, he to continue to reside there as he had for many years. This trade was for no specified time. At the time this arrangement was entered into the place was being operated as a large dairy farm, with 50 or 60 cows, about 50 hogs and 18 or 20 head of young stock. Soon afterwards the Spellmans concluded to ship the cows to Bangor, which was done in January, 1911.

As claimed by the defendant, after the hay and grain had been cut, the stock remaining on the farm being out to pasture and there being no further use for his services, "the plaintiff was informed that the defendants would not need his services after the first of September, but as it was his old home, that he could continue to reside there as long as he wished. They gave him a horse and two cows for his own use, allowed him all the land he wanted for a garden or other crops, also his fire-wood, and pasture and hay for his horse and cows. After that the Spellmans operated the farm from Bangor, simply cutting and pressing the hay, with the exception of one year when they had a crop of grain. They sent their own crew and teams from Bangor to harvest the crops, with a man to take charge."

The defendant contended "that the plaintiff did no work during the six years for the defendants in connection with general farming operations."

The plaintiff denied having notice that his contract would terminate September first 1911.

The issue presented was substantially this; "was the agreement between the parties terminated by notice as claimed by the defendant on August 1st 1911?"

The issue was sharply contested, the testimony very conflicting. We have examined the record with care, and have had the benefit of carefully prepared briefs of counsel, and we are persuaded that the evidence for the plaintiff is sufficient to sustain the verdict.

The credibility of witnesses was for the jury and they believed the plaintiff's witnesses. Motion overruled. *Pierce & Madigan,* for plaintiff. *Morse & Cook,* for defendants.

ALMA H. COLE *vs.* HENRY L. PENDLETON.

Waldo County. Decided March 8, 1919. Action of trespass in which the plaintiff alleged "that the defendant, being then and there an agent commissioned by the governor and council pursuant to the R. S., Chap. 126, Sec. 65, broke and entered the plaintiff's close, to wit, her dwelling house, without warrant, license or legal authority therefor, then and there, in her presence, wilfully, wantonly and maliciously used and directed toward the plaintiff, violent, threatening, profane and abusive language accompanying said language with threats to arrest the plaintiff and take her to Belfast unless she gave him permission in writing to shoot forthwith, certain cattle, the property of her husband who was then absent from home, he the said defendant having no warrant or legal authority to arrest the plaintiff or shoot the cattle; whereby and by reason of the defendant's violent language, threats of arrest and other unlawful acts, as aforesaid, the plaintiff became frightened, terrified and sick, and suffered and still suffers great pain and mental anguish and has been put to great expense for medical attendance and treatment, to her great damage."

The jury found for the plaintiff and returned a verdict for $65.67, and the defendant moves for a new trial on the usual grounds.

The evidence was conflicting throughout and from the record we are clear that the questions were exclusively and peculiarly jury questions, both as to facts and circumstances, as well as to credibility of the witness. While the result may not be free from doubt, and the question is close, we cannot say from all the evidence that the verdict is clearly wrong. *Dunning* v. *Staples,* 82 Maine, 432. Motion overruled. Judgment on the verdict. *Walter A. Cowan,* for plaintiff. *George E. Thompson, and H. C. Buzzell,* for defendant.

STATE *vs.* F. E. BRIDGES.

Knox County. Decided March 20, 1919. This case involves precisely the question decided in *State* v. *Fred Demarest.* Under R. S., Chap. 45, Sec. 35, a court is held to have no jurisdiction in criminal matters, without special statute, beyond the limits of the county. Demurrer sustained. *Henry L. Withee,* County Attorney, for State. *A. S. Littlefield,* for respondent.

NATHAN GINSBERG *vs.* JULIUS EPSTEIN.

Penobscot County. Decided March 20, 1919. Exceptions to the acceptance of a referee's report. The case was referred, heard, and a report made to the court at nisi. Upon motion for the acceptance of the report, objection was raised, and a written motion made for a hearing to correct the report. A hearing was had before the presiding Justice, who ordered the report accepted. To this order exceptions were filed and allowed. The ground for the exceptions is:

That at the hearing before the court, "on account of the press of time, the court refused to give to the defendant the time that was necessary to go as fully into the matter as it was the desire of the defendant to go in order to establish the mistakes made by the referee in his report, and without a full hearing, and without an opportunity on the part of the defendant to show to the court the mistakes upon which he relied, and on account of which he objected to the acceptance of the report, the court accepted the report, at the same time reserving the defendant the right to except to the ruling."

The acceptance or rejection of a report of a referee is not a question of law, but a matter of discretion. This rule is fully established in *Furbish* v. *Ponsardin,* 66 Maine, 430. But the discretion is of a judicial character, and must be exercised, judicially. *Charlesworth* v. *American Express Co.,* 117 Maine, 219; 103 Atl., 358; *Chasse* v. *Soucier,* 105 Atl., 853, not yet officially reported. All judicial proceedings are predicated upon a full hearing or an opportunity to be fully heard. Judicial discretion is a judicial judgment, and must be based upon the requirements of judicial procedure. A fundamental requirement is a hearing or opportunity to be heard.

The exceptions in the case before us show that the defendant did not have a full hearing nor an opportunity to be fully heard. At least the exceptions so unequivocally state and as fully established we are required to consider them upon the legal import of the language. Accordingly we are of the opinion that the defendant should have the opportunity of a full hearing upon the acceptance of the report. Exceptions sustained. *George E. Thompson,* for plaintiff. *Arthur L. Thayer,* for defendant.

CHARLES L. PERKINS *vs.* INHABITANTS OF YORK.

York County. Decided April 2, 1919. Action brought to recover damages sustained by reason of an alleged defect in a highway which the defendant town was bound by law to keep in repair. At the close of plaintiff's evidence, upon motion of defendant, the presiding Justice directed a non suit. The case comes to us upon exceptions to this ruling.

We have examined the record with great care, and while there may be sufficient evidence therein to require submission to the jury of the question whether a defect actually existed, yet there is no testimony showing that the municipal officers of the town, its road commissioners, or any person authorized to act for either of them, had twenty-four hours actual notice of the alleged defect or want of repair.

It follows therefore that the non suit was properly directed and the mandate must accordingly be: Exceptions overruled. *Ray P. Hanscom, and Leroy Haley,* for plaintiff. *E. P. Spinney, and Bradbury & Bradbury,* for defendants.

EMMA A. BURR *vs.* ALANSON J. MERRILL, et al.

EMMA A. BURR *vs.* LAURA A. MERRILL.

Penobscot County. Decided June 18, 1919. These are real actions involving the same question and are before the court on

report. The decision in each case depends upon the construction of the last will and testament of William P. Burr.

After mature deliberation and consideration, as a majority of the court do not concur in ordering judgment either for the plaintiff or defendant, the entry in each case must be: Report discharged. *Ryder & Simpson,* for plaintiff. *Fellows & Fellows, and John B. Merrill,* for defendants.

LLEWELLYN W. FISH'S CASE.

Penobscot County. Decided June 25, 1919. This case arose under the Workmen's Compensation Act. The appellant raises two questions, first the constitutionality of the act, and second the validity of the finding by the chairman of the Industrial Accident Commission that the accident did not arise out of and in the course of the applicant's employment. The decision recently announced, In re Mailman, 118 Maine, 172, settles both questions adversely to the claim of the appellant. In consonance with other courts of last resort, without exception, so far as we know, we hold the Workmen's Compensation Act to be constitutional, and the evidence in the case was ample to sustain the finding of facts by the commission under the rule adopted in the Mailman case. The entry must therefore be: Appeal dismissed. *L. B. Waldron,* for plaintiff. *George W. Gower,* for defendants.

BENJAMIN SHAW & COMPANY

vs.

FRANK C. MOODY, et als., AND TRUSTEES.

Cumberland County. Decided July 1, 1919. This is an action to recover commissions for negotiating a sale of certain real estate owned by the defendants. The active parties are one Guy W. Davis who does business under the style of Benjamin Shaw & Company, and Frank C. Moody, acting for himself and other owners. The

employment of the plaintiff as a real estate broker is denied by defendants, and by the terms of the agreed statement, the question of employment of the plaintiff by the defendant Frank C. Moody is to be determined by the correspondence and telegrams in the record.

The case is submitted to the Law Court upon an agreed statement of facts in which is included copies of certain correspondence; as to certain letters and telegrams between the defendant, Frank C. Moody, M. C. Rich & Company and G. V. Morris, so included in the case, the following stipulation is made, "The question of admissibility of this correspondence is reserved for the Court." The case does not show by which party the correspondence referred to was offered, nor the objection raised. The case being submitted on an agreed statement of facts, this stipulation must be held to mean that the facts stated in said correspondence are true and are to be considered as far as deemed by the court to be material.

A careful consideration of the correspondence printed in the record in the light of the admitted facts fails to show any contract of employment of plaintiff by the defendant Frank C. Moody. The case shows clearly that Moody employed F. S. & E. G. Vaill, who seem to be also known in the transaction as Maurice C. Rich & Co., to sell the property, and gave them the exclusive sale; he in terms so stated to the plaintiff, expressing his intention to live up to his agreements and not render himself liable to pay two commissions. The plaintiff knew that the Vailles had the property for sale and obtained their consent to negotiate directly with Moody, and had an agreement with them to receive half the commission if his customer took the property. The plaintiff endeavored to negotiate a binding contract for sale with defendants; but the defendant, Frank C. Moody, did not execute the sale contracts forwarded to him by plaintiff. Judgment for defendants. *William H. Gulliver*, for plaintiff. *Strout & Strout*, for defendant.

CHARLES SABIN *vs.* EDMUND W. BEAUMONT.

Androscoggin County. Decided July 12, 1919. Trial, in the Androscoggin Superior Court, of this action for malicious prosecution, under a plea of the general issue, resulted in a verdict for plaintiff,

with damages assessed at $500.00. By motion in usual form, the defendant has moved to set that verdict aside.

Defendant sent a cash register to the plaintiff to be repaired. For repairing it, plaintiff charged $10.00. Later, he declined to deliver up possession of the register, in advance of payment for his services. Whereupon defendant made complaint to the Lewiston Municipal Court, accusing plaintiff of having obtained the machine by pretences both false and criminal. Warrant issued. The plaintiff, as the respondent named in the warrant, was arrested; he immediately, without actual imprisonment intervening, was brought before the Judge of the Municipal Court, and, upon hearing, was acquitted.

The criminal prosecution was begun by the defendant in legal malice, and without probable cause to believe that it could succeed. It ended in failure. The only practical error of the record of the instant case is in respect to the matter of the award of damages. It is the opinion of the court, that the verdict is grossly excessive in amount. If at any time within 20 days after the receipt of this rescript by the clerk in Androscoggin County the plaintiff formally shall remit all the verdict above the sum of $250.00, judgment accordingly shall be entered, otherwise the entry must be: Motion for new trial granted. *McGillicuddy & Morey*, for plaintiff. *Robert J. Curran*, for defendant.

SUSANNE GREELEY *vs.* FRED L. GREELEY, Executor.

Androscoggin County. Decided July 12, 1919. Action by the payee of a non-negotiable promissory note, against the executor of the will of its maker, to recover the balance due thereon. The case is before the court on report.

Plaintiff's case is deficient in a single respect, and that likely readily within her power to correct. Proof of the claim on which the suit is based is not otherwise verified than by affidavit of the creditor before a notary public commissioned and residing in the State of Rhode Island. But the record is silent as to whether that magistrate had authority to take acknowledgment of the proof. At common

law it is not within the office of a notary to administer oaths. By statute in Maine he now has such power. It may be that Rhode Island likewise has empowered her notaries. If so, proof thereof must here be made as a fact. And this for the reason that, though the common law of a sister State is presumed to be similar to our own, it is otherwise as to a statute. *Holbrook* v. *Libby*, 113 Maine, 389.

For the reason assigned, the report is discharged. *McGillicuddy & Morey*, for plaintiff. *White, Carter & Skelton, George C. Wing, and George C. Wing, Jr.*, for defendant.

MARGUERITE MICHAUD, Pro Ami. *vs.* W. H. HAWKINS.

Androscoggin County. Decided July 12, 1919. This is an action brought to recover damages sustained by the negligent driving of the defendant's automobile in a public street in the City of Lewiston. The plaintiff is a little girl whose age at the time of the accident was four years. In addition to the injuries complained of there resulted disfiguring scars on the plaintiff's face, some of which at least are liable to remain with her during life. The jury returned a verdict for the plaintiff for $987.50.

The case comes up on a general motion by the defendant upon the usual grounds. After a careful examination of the testimony we fail to discover any reason for setting the verdict aside. It does not appear that the jury was influenced by prejudice, passion or bias. The damages are not deemed to be excessive, and the entry must be: Motion overruled. *McGillicuddy & Morey*, for plaintiff. *Newell & Woodside*, for defendant.

CHARLES W. RICKER *vs.* WILLIAM P. GRAY.

Androscoggin County. Decided July 12, 1919. This is an action on the case for damages resulting from a collision of the automobiles of plaintiff and defendant. The jury returned a verdict for the defend-

ant and the case is before the court on the plaintiff's general motion, and an additional motion for a new trial on the ground of newly discovered evidence.

The accident occurred November 28, 1917, on the road from Poland Spring to Danville Junction, southerly of the dwelling of one Wallace S. Pray, and just westerly of a curve in the roadway. The plaintiff was on his way easterly toward Danville Junction, and the defendant was on his way westerly toward Poland Spring.

The case shows that both automobiles were moving at a rate of speed as great as common prudence would dictate, considering the condition of the road, if either driver had been the only traveller on the highway. They were approaching to meet at a sharp curve in the road. The plaintiff's automobile was in the middle of the travelled way. The road was narrow at best, and the rear wheels of plaintiff's car did not leave the frozen ruts which marked the then travelled part of way. The plaintiff should have been on the right-hand side. *Bragdon* v. *Kellogg*, 118 Maine, 42, is decisive of this case.

The testimony is very clear that the plaintiff was not using ordinary care, and consequently must fail unless the testimony on the motion on the ground of newly discovered testimony warrants a different finding; but as to that a careful examination discloses serious doubt that the same is newly discovered under the law, and relates only to the position of the two cars at the time of the accident. Such testimony has no tendency to establish a stronger case than that already before us, and would not in our opinion affect the result if the case were again submitted to a jury. The entry will be: Motions overruled. *Newell & Woodside*, for plaintiff. *Harry Manser*, for defendant.

JULIUS C. LOWE *vs.* CUMBERLAND COUNTY POWER & LIGHT CO.

Cumberland County. Decided August 14, 1919. The accident which is the subject of this action occurred on April 18, 1918, at the point where the railroad track of the defendant in Portland, following the southern side of Brighton Avenue, passes the premises of Robert

J. Craig. The plaintiff, driving a pair of horses drawing a heavily laden cart, was travelling westerly along Brighton Avenue to the premises of Mr. Craig, his employer. Turning his team to enter his employer's driveway he drove upon the defendant's track for the purpose of crossing it. When the cart was astride the track it was struck by an east bound trolley car. By the force of the impact "the cart turned bottom up and went out into the road and spilled the contents and the horses went over in the ditch . . . . one over onto the other." The plaintiff was hurled through the glass front of the car and sustained the injuries sued for. The jury returned a verdict for the plaintiff in the sum of $4,375. The defendant moves for a new trial on the usual grounds.

The legal rights and obligations of a plaintiff and defendant circumstanced as these parties were have been so often stated by this and other courts that reiteration is unnecessary.

The jury must have determined that the defendant's motorman was negligent in that he failed to seasonably apply his reverse. We think that the finding was justified. A careful reading of the testimony convinces us that the jury were amply warranted in finding that after the plaintiff's team turned to make the crossing the motorman saw, or by the exercise of reasonable vigilance should have seen it in time to bring the car to a stand still and avoid the accident.

The plaintiff testifies that when he turned to cross the track the car was not in sight. In this he is corroborated by two witnesses who were near the scene of the accident in an automobile. In respect to this, however, there is a conflict of testimony. The motorman, whose story was in some degree corroborated by other witnesses, testified that when the plaintiff swerved to cross the track the trolley car was only about eighty feet away and in plain sight. If the testimony of the defendant's witnesses is to be relied upon contributory negligence is made out. The jury, however, believed the plaintiff's version to be true. In this the court cannot say that there was manifest error.

The verdict is liberal and is probably and very properly larger than, under similar circumstances, would have been returned a few years ago when the value of a dollar, measured in commodities, was much larger. The plaintiff was sixty-eight years old. There is some evidence tending to show that by reason of the disability caused by the accident his earning power was diminished about $10 per week.

Taking into consideration his age and chance of productive wage earning life his loss of earnings alone would clearly not justify the verdict. But the jury properly added to his loss of earnings, compensation for his expenses and for his suffering.

If the jury understood the evidence and the verdict represents their judgment and not their sympathy or prejudice the verdict should not be disturbed. The amount is not so large as to justify the court in holding that the jury misunderstood the evidence or failed to exercise their judgment. Motion overruled. *Hinckley & Hinckley,* for plaintiff. *Verrill, Hale, Booth & Ives,* for defendant.

STATE OF MAINE *vs.* WILLIAM HENRY.

Cumberland County. Decided October 28, 1919. The respondent was found guilty of the crime of perjury. After verdict, a motion addressed to the justice at nisi prius, praying that the verdict be set aside, was overruled. The case comes to this court on appeal. In support of the motion and appeal several grounds were urged, but we think only one need be considered.

To constitute perjury, both at common and statute law, the false testimony must have been given wilfully and corruptly. The burden is upon the State to prove this element of the charge beyond a reasonable doubt.

After a most careful and painstaking examination of the evidence, the court is of opinion that the State has failed to sustain this burden. Appeal sustained. Motion sustained. New trial ordered. *Carroll L. Beedy,* for State. *Arthur Chapman,* for defendant.

ALBERT ROY *vs.* HARRY BELLEVIEU.

Kennebec County. Decided October 29, 1919. Through his Waterville agency, in May, 1915, one William J. Skehan conditionally sold and delivered an automobile to Walter Bellevieu. In part pay-

ment of the purchase price, the vendor received a Holmes note, signed by the vendee and his parents, which note included the automobile, and later was duly recorded.

Less than 5 weeks afterward, following somewhat disastrous use by himself of the motor vehicle, Bellevieu decided to get rid of it. Accompanied by a brother of his named Harry, he went to see Fred J. Laundry, a garage keeper, whom he had known in the original dealings as the agent of Skehan. Together, in the garage, the three men talked over the situation: Walter had demonstrated unskillfulness in driving the car; moreover, his health was poor, and he was about to go away from home temporarily; Laundry, either already had, or with diligence would, put the machine in running order. And Harry Bellevieu, the brother of the contingent owner, should put it up to sale. The Bellevieus then left the garage.

Next, Albert Roy, the plaintiff, was introduced to Harry Bellevieu by Laundry, as a prospective purchaser. Negotiations, which ultimately led to a pretended outright sale and a supposed purchase of the car, were promptly under way. Harry Bellevieu, so the plaintiff testified, did not mention the subsisting Holmes note, and said nothing to indicate that any person other than himself owned the automobile. Testifying as a witness, Mr. Bellevieu said, that he not only told Roy, at the time, that he was acting for his brother, but that he gave him a receipt, covering a partial payment in money, which he (Harry) had executed as agent for Walter. Besides, that the negotiable promissory note, accepted from Roy in payment of the balance of the price for the car, was payable to the order of Walter Bellevieu. Respecting the receipt and the note, Mr. Roy, bore witness that though he could write, yet he could not read, the English language; that, until subsequently explained, the receipt was unintelligible to him; that his knowledge concerning the note was restricted to signing it, after its form had been written out by Harry Bellevieu, and to its destruction upon payment.

Roy had had the automobile in his possession but a short time when Skehan, holding the Holmes note, came to see him. Then, at first, Skehan, and him following, Roy, called upon and interviewed Harry Bellevieu; each, in turn, insisting upon recognition by the latter of claimed rights. Finally, Harry Bellevieu paid to Skehan what remained, unused by Walter, of the money that Roy had paid. Also, he delivered to him Roy's purchase price note. Furthermore,

he tendered him, and Skehan accepted, two other notes, signed by Walter and his father and mother, payable to Skehan's order. So, Skehan had the original Holmes note, and, too, cash and negotiable promissory notes aggregately equalling the amount of the face of the Holmes note. Skehan presented Roy's note, and from him received a substantial cash payment, with a new note for the balance, which was paid at maturity.

From the time of Skehan's arrival, reckoning from the sale to Roy, a year had gone. The new notes from Walter Bellevieu and his parents, both long overdue, were unpaid, and efforts to enforce collection unavailing. Relying, under the Holmes note, on legal title to the automobile in himself, Skehan sued Roy. On confession of liability, damages were assessed at $278.42, and judgment therefor entered in the Kennebec Superior Court. Roy paid the judgment, and against Harry Bellevieu brought the pending suit for deceit in the sale, counting in his writ on the concurrence of both fraud and damage. At the trial, under a plea of the general issue with brief statement, defendant contended that, during the trading between himself and Roy, Skehan was consulted with regard to outstanding claims against the automobile; that, suppressing information of his own demand, he, by his speech, and by the words of Laundry, asserted to have been authoritatively spoken, led both plaintiff and defendant to believe the automobile to be without encumbrance; that he encouraged and sanctioned the sale and purchase of the car; and that the proceeds of the transaction, with the other Bellevieu notes, eventually moving to him, superseded the Holmes note, and left it without potent existence. Plaintiff recovered a verdict for $259.50. That verdict defendant has moved, in usual form motion, to have set aside.

It is the general rule, that receiving a negotiable promissory note creates presumptive evidence of the payment of the indebtment for which it was taken. For foundation that presumption rests upon the intent of the parties. Rebuttable always by competent evidence, the presumption does not attend in cases where the creditor thereby would lose the benefit of existing security. Skehan retained the Holmes note. Nevertheless, it was open to show that he had waived his rights thereunder; that against him there operated an equitable estoppel to assert title to the property.

Waiver is a question of fact. Estoppel in pais is a question of law and fact mixed. In the case in hand, there is absence of assignment of erroneous instruction. The tribunal to which determination of the facts in controversy was referred, found that all the essential ingredients required to sustain the action existed. It is the office of a jury to judge of fact. The members of the panel that tried this case saw the witnesses; heard them testify, and observed them while on the stand. Having those distinct advantages, they considered all the testimony; adjusted its conflicts; weighed its value; and based their report upon that part which they found to be of greater weight. A verdict, if it be a conclusion to which, acting fairly, justly, and intelligently, a jury might come, is final. The function of a court is to correct manifest error—to set aside verdicts palpably wrong. Were it to interpose otherwise, for the purpose of granting a new trial, the court would go outside its own province, and trench upon the constitutional sphere of the jury.

No sufficient reason is appreciated for disturbing the present verdict. Motion for new trial overruled. *Robert A. Cony*, for plaintiff. *A. A. Matthieu, and Mark J. Bartlett*, for defendant.

FRED REPETTI *vs.* PETER DEBE.

Somerset County. Decided October 31, 1919. This is an action on the case to recover damages for seduction of plaintiff's minor daughter. The jury returned a verdict for the plaintiff in the sum of four thousand dollars. The case comes to this court on general motion for a new trial, and the only question raised under the motion involves consideration of the allegation that the damages are excessive.

Counsel on each side have filed very helpful briefs, and have carefully argued the facts as the gravity of the case required. We have reviewed the case and examined the evidence in the light of the claims of each contestant, and we are unable to conclude that the jury erred in assessing the damages.

The case was carefully tried. The jury heard and saw the witnesses, heard the story of the business relations between the

parties, and the close personal relations existing, together with all the other evidence in the case, and under proper instruction returned what appears to us a proper verdict, with which we do not feel authorized to interfere. Motion overruled. *Fred F. Lawrence,* for plaintiff. *Merrill & Merrill,* for defendant.

NOEL MARSTON *vs.* N. E. REDLON COMPANY.

Cumberland County. Decided October 31, 1919. This is an action brought by Noel Marston through his mother as next friend against N. E. Redlon Company, contractors having their usual place of business at Portland in the State of Maine.

The declaration alleges that the plaintiff received injuries at Portland on the 20th day of February, 1918, while playing in the rear of a certain building, which building was located on Congress Street. The injuries were received through the collapse of the building during a severe gale of wind. The defendant previous to the day of the accident removed certain flooring and timbers from the building and it was claimed by the plaintiff that the removal of this material weakened the building and caused its collapse. The plaintiff while playing close to the building was struck by certain bricks and other debris which fell from the third story. He was taken to the hospital at Portland where he remained under treatment for some time.

The case was tried at the February term about one year after the accident. The jury returned a verdict for the plaintiff and assessed damages in the sum of forty-five hundred and thirty-five dollars.

By agreement the case is before this court on defendant's motion to have the verdict set aside on the ground that it is excessive. The writ alleges severe injuries to the boy's hip, back, spine, etc., that his face was disfigured, that his legs were cut and lacerated and that he suffered great pain in body and mind. The plaintiff was nine years of age when the accident occurred. His injuries were serious, and the case shows that they are of permanent character, and of such nature that one at least may in time result in cancer. In addition, it appears that further operations may be necessary in order to insure

safety and ease in walking. The injury was most distressing, and his hospital and home treatment were of many weeks duration. The jury having all the facts before them, one year after the accident, and having in view the age of the plaintiff, his long life expectancy, the suffering he had endured, the pain and suffering he is likely to endure, the almost certain malignant growth to follow his most serious injury, estimated the damages with greater certainty than we could possibly attain if the case were submitted to us on report.

We have examined the evidence with great care, and we are unable to conclude that the damages assessed are excessive. Motion overruled. *Henry Cleaves Sullivan, and William A. Connellan,* for plaintiff. *William H. Gulliver, and John B. Thomes,* for defendant.

O. C. ROBERTS, Collector *vs.* C. E. SMALL.

Waldo County. Decided November 13, 1919. Action to enforce collection of taxes assessed upon real estate, and to enforce a lien upon said property, to secure payment of such tax, heard by a single Justice without jury, and is before this court upon defendant's exceptions which are four in number, viz:

1. The justice found for the plaintiff against the defendant and the property attached.
2. That the assessors were legally elected and sworn.
3. That the tax against the defendant was legally assessed.
4. That the real estate was definitely described.

The justice who heard the case having found in the affirmative upon these propositions it is only necessary to point to the record which shows that the annual meeting of the town was legally called and holden; that the assessors were chosen by ballot and sworn by a Justice of the Peace; that the real estate was properly described; that the real estate had for several years been taxed to the defendant and the taxes paid by him; that no notice of change of ownership or occupancy had been given in accordance with the provisions of R. S., Chap. 10, Sec. 25. Accordingly the mandate must be: Exceptions overruled. *F. W. Brown, Jr.,* for plaintiff. *Arthur Ritchie,* for defendant.

WEBSTER F. CHUTE *vs.* HATTIE H. CARTER.

Penobscot County. Decided December 2, 1919. Action for money had and received. Verdict for plaintiff for $557.44. Motion for new trial by defendant. As it is not the opinion of a majority of the court that the verdict is manifestly wrong, the entry must be: Motion overruled. *Fellows & Fellows,* for plaintiff. *R. E. Mason, and William E. Whiting,* for defendant.

CORA D. TYLER *vs.* Estate of HERBERT E. PATTEN.

Hancock County. Decided December 4, 1919. This case involves a clear question of fact. It was peculiarly a question for a jury. They saw the parties and heard the evidence and rendered an entirely reasonable verdict in amount. While we might not disturb a verdict if it was the other way, we yet feel that the decision of the case falls within the function of a jury, as a constitutional tribunal, solely authorized by law to pass upon questions of fact. Motion overruled. *Hale & Hamlin,* for plaintiff. *Gray & Sawyer,* for defendant.

WILLIAM THOMPSON,

Treasurer of Bangor State Hospital,

vs.

CHARLES HENRY HAMM.

Penobscot County. Decided December 4, 1919. This case is decided upon the docket entries, to wit: Ent. at Bangor, 1919; 3d. writing; both briefs to be filed before Portland term; if not, judgment for plaintiff; case and plaintiff's brief in.

The defendant's brief was not filed in accordance with the docket entry nor is it yet filed. Judgment for plaintiff. *George E. Thompson* for plaintiff. *D. F. Snow, C. P. Conners, and Gillin & Gillin,* for defendant.

FRANK JOHNSON *vs.* JOSEPH WEARE.

York County. Decided February 9, 1920. Action to recover damages for personal injuries and injuries to plaintiff's motorcycle received in a collision with defendant's automobile. The plaintiff has a verdict, which defendant moves to set aside.

As is usual in such cases, the plaintiff holds to one theory as to the manner in which the collision happened; the defendant, another. Each disclaims negligence on his own part, and imputes it to the other.

Just before the collision the defendant's automobile was stationary on the driver's left hand side of the road, there about twenty four feet wide between the car tracks on the westerly side thereof and the sidewalk on the easterly side; the automobile was westerly of the car tracks. The defendant started his automobile diagonally across the car tracks and road towards his right hand side in front of the approaching motorcycle of the plaintiff.

As between the parties, the failure of the one or the other to measure up to the standard of due care in his conduct, under the circumstances, and the credibility of the witnesses as well, were peculiarly questions for the jury; and upon a careful examination of the evidence the court cannot say that the verdict was manifestly wrong. Motion overruled. *Ray P. Hanscom,* for plaintiff. *E. P. Spinney,* for defendant.

STATE OF MAINE *vs.* MARY LAROSE.

Cumberland County. Decided February 14, 1920. This is an indictment for liquor nuisance. The defense offered no evidence. At the close of the testimony introduced by the State, counsel for respondent moved for a directed verdict in his favor on the ground of insufficient evidence. To the refusal of the court to grant this motion exceptions were taken. The exceptions are without merit. No other verdict than guilty would have been justified by the evidence. Exceptions overruled. Judgment for the State. *Carroll L. Beedy,* for the State. *Henry Cleaves Sullivan,* for respondent.

ANSWERS TO QUESTIONS PROPOUNDED TO THE JUSTICES OF THE SUPREME JUDICIAL COURT BY THE HOUSE OF REPRESENTATIVES

TO THE HONORABLE HOUSE OF REPRESENTATIVES OF THE STATE OF MAINE:

The undersigned Justices of the Supreme Judicial Court, having considered the questions upon which their advisory opinions were requested by the House Order of Feb. 27, 1919, respectfully submit the following answers:

Before expressing our opinion upon the submitted questions, it is essential to call attention to certain firmly established principles of law governing the rights of the public and of private individuals and corporations in the waters of great ponds and in the non-navigable rivers and streams flowing therefrom.

GREAT PONDS

Throughout the questions the phrase "public lakes or great ponds" is used; but we have no public lakes in this State, as distinct from great ponds, and we must therefore consider the questions as having reference to so-called "great ponds," using that term in its legal and technical sense.

Under the peculiar, but settled law of Maine and Massachusetts, originating in the Colonial Ordinance of 1641-47, ponds of more than 10 acres in extent are designated as great ponds. Whatever doubt might otherwise arise from a critical study of the subject as a matter of legal history, it must now be accepted as the common law doctrine in Maine that the State holds these ponds in trust for the use of the people of the State, together with the right to control and regulate the waters thereof. *Barrows* v. *McDermott*, 73 Maine, 441; *Brastow* v. *Rockport Ice Co.*, 77 Maine, 100; *Fernald* v. *Knox Woolen Co.*, 82 Maine 56, 19 Atl., 93, 7 L. R. A. 459; *Auburn* v. *Water Power Co.*, 90 Maine, 584, 38 Atl., 561, 38 L. R. A. 188; *Conant* v. *Jordan*, 107 Maine, 227, 77 Atl., 938, 31 L. R. A. (N. S.) 434. The right of the individual to fish and fowl in these waters, provided

he can do so without committing trespass upon the cultivated land of littoral proprietor (*Barrows* v. *McDermott*, supra), the right of boating, bathing, cutting ice (*Barrett* v. *Rockport Ice Co.*, 84 Maine, 155, 24 Atl., 802, 16 L. R. A., 774), and the supplying of water to a municipality for domestic uses, have all been recognized as among the public purposes which are within the regulation and control of the State. The State's title in great ponds is the same in its origin as in tidal waters. The State holds, and can control, the use of both for public purposes, and it is perhaps for the better protection of these rights in great ponds that the private ownership of littoral proprietors has been confined to low-water mark, and the title to the land below that line—that is, to the bed of the great ponds—has been declared to be in the State. It is in this qualified sense that the people are said to own the great ponds within our borders.

Moreover, since the people as beneficiaries possess these public rights, the Legislature, which represents the people, has the power to abridge these rights and to grant them, or any portion of them, to private individuals or corporations, if it sees fit so to do. Thus the Legislature of Massachusetts in 1869 (Public Acts, 1869. Chapter 384; Public Statutes, Mass., Chap. 91, Secs. 10, 11) gave to the littoral proprietors the exclusive right of fishery in ponds of less than 20 acres in extent, thereby surrendering the right of fishery which all the public had previously enjoyed in ponds of between 10 and 20 acres in extent, and the Massachusetts court subsequently recognized the validity of the act. *Commonwealth* v. *Vincent*, 108 Mass., 441; *Commonwealth* v. *Tiffany*, 119 Mass., 300; *Commonwealth* v. *Perley*, 130 Mass., 469. So the Legislatures of this State and of Massachusetts have granted to private and to municipal corporations the right to take water from a great pond for a public water supply. *Auburn* v. *Union Water Power Co.*, 90 Maine, 576, 38 Atl., 561, 38 L. R. A. 188; *American Woolen Co.*, v. *Kennebec Water District*, 102 Maine, 153, 66 Atl., 316; *Watuppa Reservoir Co* v. *Fall River*, 147 Mass., 548, 18 N. E., 465, 1 L. R. A., 466. In like manner our Legislature has often granted to private corporations the right to raise, store, maintain, and control the waters of great ponds for manufacturing purposes; the corporations paying damages for all flowage caused thereby upon the land of littoral proprietors. By virtue of these grants many of these corporations have made large expenditures in the construction of dams, in the erection of industrial

plants, and in the acquisition of flowage rights, which flowage rights have become part and parcel of their vested property rights. While the State may hold the waters of great ponds in trust for the people and may regulate them as it sees fit, while the littoral proprietors may use them for their private purposes as hereinafter stated, while the Legislature may grant their use to water power companies to be controlled for manufacturing and industrial purposes, or to municipalities for domestic and other uses regardless of damages to millowners on the outlet streams (*American Woolen Co.* v. *Kennebec Water District*, 102 Maine, 153, 66 Atl., 316), yet it has never been suggested that the State had the right to compel either the littoral proprietor to pay for the uses to which he may lawfully put the water of such pond by reason of his having access to its shore, as distinguished from that of the general public, nor that the millowner on the outlet stream could be compelled to pay for the use of the waters that constitute the natural flow of the stream. We think such millowner is entitled to that use without paying compensation therefor, although in some cases its full enjoyment may be secondary to that of the domestic needs of a municipality or other public uses.

There seems to be some misapprehension as to these so-called public rights in great ponds. They are often spoken of as if they were sacred and inalienable. Not so. Under the original ordinance they could not be conveyed by a town without legislative authority; nor can they now. *Attorney General* v. *Revere Copper Co.*, 152 Mass., 444, 25 N. E., 605, 9 L. R. A., 510. That is the only limitation upon their transfer. They can be granted and conveyed, as they often have been, by the Legislature, which represents the people. What is owned by the people may be transferred by the Legislature, unless prohibited by the Constitution, and no such constitutional inhibition barricades the way here. So much for public rights in great ponds.

Littoral Proprietors

Every individual or corporation owning land bordering upon a great pond owns to the natural low-water mark of the pond. *Wood* v. *Kelley*, 30 Maine, 47; *Paine* v. *Woods*, 108 Mass., 160; *Fay* v. *Salem & Danvers Aqueduct Co.*, 111 Mass., 28. Such owner has at all times a right of access to the pond for any of the purposes for which

he may use the waters, such as bathing, boating, fishing, fowling, agricultural and domestic uses, and the cultivated lands around the pond are protected against the passage of any person who would gain access thereto for the exercise of these public rights. Ordinance of 1641-47; *Barrows* v. *McDermott*, 73 Maine, 441. No person or corporation, without Legislative authority, either general through the Mill Act, or special through a private act, may draw down the waters of a great pond below natural low-water mark, nor raise and hold them above their natural level. If drawn below the natural low-water mark, a strip of land belonging to the State would separate the littoral proprietor's lot from the water of the pond and cut off his access thereto; and if raised above the natural level, a portion of the land adjacent to the low-water mark would be either continuously or at times covered with water, when in the natural state it would be available for his own use. He is entitled to the full enjoyment of his property in its natural state. *Stevens* v. *King*, 76 Maine, 197, 49 Am. Rep., 609; *Fernald* v. *Knox Woolen Co.*, 82 Maine, 48, 19 Atl., 93, 7 L. R. A., 459. He cannot be deprived of that full enjoyment, except it be taken from him for public uses under the exercise of the right of eminent domain, with the accompanying payment of just compensation.

Riparian Proprietors

The legal rights of the riparian proprietor along the rivers and streams flowing from great ponds are equally well settled. Where lands border upon a non-tidal stream, although it may be floatable for logs or boats, each of the riparian proprietors owns the fee in the land which constitutes the bed of the stream to the thread of the stream, "ad medium filum aquae," as it was anciently expressed, and if the same person owns on both sides he owns the entire bed, unless, of course, it is excluded by the express terms of the grant itself. He owns the ice which forms in winter (*Wilson* v. *Harrisburg*, 107 Maine, 207, 77 Atl., 787), "with the single qualification that it is not to be taken in such quantities as to appreciably diminish the head of water at the dam below" (*Stevens* v. *Kelley*, 78 Maine, 445, 451, 6 Atl., 868, 57 Am. Rep., 813). The Legislature cannot empower a municipality to take the ice, even for domestic purposes, without paying just compensation therefor. *Auburn Ice Co.* v. *Lewiston*, 109 Maine, 489, 84

Atl., 1004. The riparian proprietor has the right to take fish from the water over his own land, to the exclusion of the public. *Waters* v. *Lilley*, 4 Pick., (Mass.) 145, 16 Am. Dec., 333. He does not own the water itself, but he has the right to the natural flow of the stream, and the right to the use and benefit of it, as it passes through his land, for all the domestic and agricultural purposes to which it can be reasonably applied, and no proprietor above or below can unreasonably divert, obstruct or pollute it. *Watuppa Reservoir Co.* v. *Fall River*, 147 Mass., 548, 554, 18 N. E., 465, 1 L. R. A., 466; *Auburn* v. *Water Power Co.*, 90 Maine, 576-585, 38 Atl., 561, 38 L. R. A., 188.

The only limitation upon the absolute rights of riparian proprietors in non-tidal rivers and streams is the public right of passage for fish, and also for passage of boats and logs, provided the streams in their natural condition are of sufficient size to float boats or logs. Subject to this qualified right of passage, non-tidal rivers and streams are absolutely private. *Wadsworth* v. *Smith*, 11 Maine, 281, 26 Am. Dec. 525; *Pearson* v. *Rolfe*, 76 Maine, 386.

So, too, the riparian proprietor may avail himself of the momentum of the stream as power for manufacturing and industrial purposes, provided, of course, the water is not thereby unreasonably detained or essentially diminished. *Blanchard* v. *Baker*, 8 Maine, (Greenl.) 253-266, 23 Am. Dec. 504. He can build dams upon his own land to develop power for milling or manufacturing purposes, subject to the provisions of the Mill Act and to the payment of damages for all flowage caused thereby; but the flowage rights thus acquired become property rights in the nature of an easement appurtenant to the manufacturing plant. All these rights which the riparian proprietor has in the running streams are as certain, as absolute, and as inviolable as any other species of property, and constitute a part of his land as much as the trees that grow thereon, or the mill or the house that he builds thereon. He can be deprived of them only through the power of eminent domain constitutionally exercised. In short, we cannot conceive of any sense in which the public can be said to have any ownership or rights in the water powers of the State as distinct from any other class of property. A water power is not alone the water flowing in the stream, but it includes, even if undeveloped, the site of the dam and the elevation at or from which power may be generated by the falling water. It is all of these combined. It does not exist apart from the bed and banks of the

stream. If the power is developed, then the potential becomes actual, and the use of the momentum is attached to the dam and becomes an integral part thereof. The riparian proprietor does not own the water which is stored in his dam or is flowing by his premises. But he has the right to use it without unlawful or unreasonable diminution or diversion. The water is an element in the value of the land over which it flows. If the bed of a river has a sharp declivity, the flowing water, if utilized, creates power which adds to the value of the land; therefore the water power "becomes an element of value, not as water, not as power, but as an integral part of the mills themselves." *Water Power Co.* v. *Auburn*, 90 Maine, 64, 37, Atl. 331, 37 L. R. A., 651, 60 Am. St. Rep., 240.

With these basic principles in mind, we will now consider the submitted questions.

Question No. 1

"May the Legislature authorize the construction and development by the state of water storage reservoirs and basins for the purpose of controlling and conserving the waters of the public lakes and great ponds, of increasing and regulating the flow of the rivers flowing therefrom, and of increasing the value and capacity of the water powers of said rivers?"

If the last clause were omitted we might have answered this question in the affirmative, as it might be conceded that the improvement of our rivers for the purpose of improving the facilities of navigation on a river naturally navigable or floatable, and thereby floating the products of the farm and of the forests to market, would be a matter within the constitutional power of the Legislature. It would be the improvement of waterways for transportation, and therefore would be akin to the promotion of railroads, which are no more than improved highways. Taxation in aid of the construction of railroads is deemed to be a public purpose and held to be constitutional on that ground. *Dyar* v. *Farmington*, 70 Maine, 515. Taxation for the improvement of rivers and streams for the purpose of navigation would seem to be constitutional for the same reason.

But the question goes further, and adds, "and of increasing the value and capacity of the water powers of said rivers."

If this last phrase was intended to cover only what the grammactical construction might indicate, namely, that it is only one of several purposes for which the State might exercise its authority, and at that merely a subsidiary or incidental purpose, we might still, although with some hesitation and reservation, return an affirmative answer. The facts connected with each particular case must needs be known before we could reply with confidence.

If, however, this clause is intended as the paramount purpose to which the preceding clauses are but introductory, and the real question in the minds of the members of your honorable body is whether the State may develop storage reservoirs for conserving the waters of the great ponds, and increasing and regulating the flow of the outlet rivers and streams for the chief purpose of increasing the capacity and value of the privately owned water powers on said rivers and streams whether developed or undeveloped, then we must answer this question in the negative.

A patient study of the phraseology leads us irresistibly to the conclusion that the last clause states the dominant purpose. The control and conservation of the waters of great ponds, and the increase and regulation of the flow of the outlet streams would avail little, if these measures did not affect the ultimate purpose of "increasing the value and capacity of the water powers of said rivers." This interpretation is confirmed when we examine the second question, which is a corollary of the first, and inquires as to the power of the State to compel the water powers located on rivers below such storage reservoirs and basins to pay a proportional part of the cost of such construction and development, either by direct charge or by a rental or tax based upon the increased available power. Taking the two questions together, the apparent plan contemplates that the State at its own expense shall acquire, develop, and maintain these storage reservoirs in great ponds and then reimburse itself for the outlay either in whole or in part, or perhaps at an ultimate hoped-for profit from the owners of the water powers below.

With the wisdom or expediency of such a project we have nothing to do. If constitutional, that would be a matter for the Legislature to decide. We base our negative answer upon two obstacles existing under our organic law.

In the first place, as the cost of all such development must be borne in the first instance by the State, it must be met either

directly and immediately by taxation throughout the State, or indirectly through the issue of bonds which can be met later only by taxation and which simply postpones the day of reckoning. In our opinion, taxation for this purpose, either directly or indirectly, is beyond the constitutional powers of the Legislature to authorize. Article 4, part 3, section 1 of the Constitution of Maine provides as follows:

"The Legislature . . . . shall have full power to make and establish all reasonable laws and regulations for the defense and benefit of the people of this state, not repugnant to this Constitution, nor to that of the United States."

The established construction of this provision as to the scope of legislative powers governing taxation is that the purpose for which the taxes are raised must be one which is admitted in law to be just and reasonable, and proper for government to carry out. It must be in the exercise of a governmental function. The State cannot enter upon a commercial enterprise, however alluring the prospect, and tax the people for its promotion. In 1871 there was a movement to develop and increase the manufacturing industries of the State and the Justices of this court were asked by the House of Representatives their opinion upon this question:

"Has the Legislature authority under the Constitution to pass laws enabling towns by . . . . loans of bonds to assist individuals or corporations to establish or carry on manufacturing of various kinds within or without the limits of said town?"

The Justices answered in the negative, and Chief Justice Appleton expressed his views upon the question in most vigorous and convincing terms. Opinion of the Justices, 58 Maine, 596. Decisions involving the same principle, and to the same effect, were soon afterward rendered. *Allen* v. *Jay*, 60 Maine, 124, 11 Am. Rep., 185; *Brewer Brick Co.* v. *Brewer*, 62 Maine, 62, 16 Am. Rep., 395. And such is the law today. Other illustrations of futile attempts on the part of the Legislature to transcend the function of government and embark upon business enterprises, however commendable in themselves, may be cited: Thus an act authorizing townships to subscribe to the stock of any corporation organized to erect and operate sugar mills in the township and to levy taxes therfor. *Dodge* v. *Mission Township*, 107 Fed., 827, 46 C. C. A. 661, 54 L. R. A., 242. An act to encourage the development of the coal, natural gas, and

other resources of their localities by subscribing for the stock of companies organized for that purpose. *City of Geneseo* v. *Gas Co.*, 55 Kan., 358, 40 Pac., 655. An act empowering the village of Sauk Rapids to issue bonds for the "purpose of aiding in the construction of a dam across the Mississippi river at said Sauk Rapids, for the purpose of improving the water power of said river at the said village." The water power was in private ownership. The court in declaring the act beyond legislative power used this significent language:

"The public has a right to the use of a railroad, for any one of the public may of right use it, under reasonable rules and regulations, and upon reasonable terms; but there is no such right with respect to a water power. The owner may exclusively use it himself, or grant the right to use it to such persons as he may select, to the entire exclusion of everybody else. No one of the public may of right insist on having any use of it. The public has no interest in its improvement, and derives no benefit from it, beyond the incidental benefit arising from any person improving his own property. That is not an interest that will justify taxation." *Coates* v. *Campbell*, 37 Minn., 498, 35 N. W., 366.

To the same effect, see *Weismer* v. *Village of Douglas*, 64 N. Y. 91, 21 Am. Rep., 586, and *Sutherland* v. *Village of Evart* (decided by United States Circuit Court of Appeals), 86 Fed., 597, 30 C. C. A., 305.

In *Lowell* v. *Boston*, 111 Mass., 454, 15 Am. Rep., 39, an act authorizing the city of Boston to issue bonds and lend the proceeds secured by mortgage on land to the sufferers from the great conflagration of 1872, was held to be in violation of the Constitution, and the reasons are stated as follows:

"The protection of the interests of individuals, either in respect of property or business, although it may result incidentally in advancement of the public welfare, is, in its essential character, a private and not a public object. However certain and great the resulting good to the general public, it does not, by reason of its comparative importance, cease to be incidental. The incidental advantage to the public or to the State, which results from the promotion of private interests, or . . . . enterprises, does not justify their aid by the use of public money raised by taxation, or for which taxation may become necessary. It is the essential character of the direct object of the expenditure which must determine its validity, as justifying a tax,

and not the magnitude of the interests to be affected, nor the degree to which the general advantage of the community, and thus the public welfare, may be ultimately benefited by their promotion." Opinion of Justices, 211 Mass., 624, 98 N. E. 611, 42 L. R. A. (N. S.), 221.

It should be noted in this connection that the Const. Mass. pt. 2, Chap. 1, Sec. 1, Article 4, with its "good and welfare" clause is much broader and more comprehensive than the Constitution of Maine. *Brown* v. *Gerald*, 100 Maine, 351-365, 61 Atl. 785, 70 L. R. A. 472, 109 Am. St. Rep., 526.

In other words, a state is simply a political unit, and not a business corporation, except incidentally to further its political purposes. In its organization and machinery it is not adapted to acquire, own, manage, or make a profit out of lands or other property except for public uses. *Banton* v. *Griswold*, 95 Maine, 445-449, 50 Atl., 89.

The decisions in *Laughlin* v. *City of Portland*, 111 Maine, 486, 90 Atl. 318, 51 L. R. A. (N. S.) 1143, Ann. Cas. 1916C, 734, and *Jones* v. *City of Portland*, 113 Maine, 124, 93 Atl. 41, subsequently affirmed by the Supreme Court of the United States (245 U. S. 217, 38 Supreme Court 112, 62 L. Ed. 252, L. R. A. 1918C, 765, Ann. Cas. 1918E, 660). in no way conflict with this principle. In those cases the Municipal Fuel Yard Act (R. S., Chap. 4, Sec. 64) was held to be within the power of the Legislature on the ground that it enables our citizens to be supplied with fuel, which is a necessity in its absolute sense to the enjoyment of life and health, and which could otherwise be obtained with great difficulty and at times perhaps not at all, and whose want would endanger the community as a whole. The elements of commercial enterprise or pecuniary benefits to the municipality either direct or indirect were entirely lacking. In fact, they were expressly prohibited by the statute under consideration which compelled the furnishing of fuel by municipalities at cost. That decision was in line with the general rule laid down by Judge Cooley in his work on Constitutional Limitations when he declares that if the object is to furnish "facilities for its citizens in regard to those matters of public necessity, convenience, or welfare, which on account of their peculiar character, and the difficulty, and perhaps impossibility, of making provisions for them otherwise, it is alike proper, useful, and needful for the government to provide," then taxes may be levied to provide these facilities. The support of schools, the construction of highways, the building of sewers, the aiding of railroads, and the

supplying of light and water to municipalities are instances of these well-defined public purposes for which taxes may be imposed. Into this class falls the supply of fuel when necessity requires.

It might be that in order to develop power to be applied by the State to some admittedly public purpose, such as public lighting or a power plant in aid of the operation of a railroad, the power of taxation could be lawfully invoked, but that is not the purport of the question under consideration. The dominant purpose here is for private benefit and not for the "benefit of the people," and therefore the power of taxation to promote it does not exist.

The second obstacle to the furtherance of the proposed plan is the fact that it necessarily involves the exercise of the right of eminent domain on the part of the State. We are not aware of any great ponds within the State which are surrounded by land owned by the State, and from which the outlet rivers or streams flow through the public domain. If there are any great ponds so situated, they are few in number, of inconsiderable extent, and their outlet streams are of little value for industrial development. We understand that the questions have no reference to such ponds, if any there are. It is common knowledge that title to the lands surrounding substantially all the great ponds of the State and bordering on their outlet streams has passed into private ownership, and therefore the acquisition of these properties by the State, with their water powers developed or undeveloped, would necessitate their being taken by the State under the exercise of the right of eminent domain.

The Declaration of Rights, which stands today as it was designed by its framers to stand, as a shield for the protection of the private individual against encroachment and usurpation on the part of the governing powers reads as follows:

"Private property shall not be taken for public uses without just compensation nor unless the public exigencies require it." Const. Maine, Article 1, Section 21.

Whether the public exigencies require such taking in a given case is a question for the Legislature; whether the taking is "for public uses" is a matter for the determination of the court. And here it must be remembered that, while the power of the State to take private property by taxation is somewhat akin to the power of taking it by eminent domain, yet the term "for public uses" under the clause of the Constitution just quoted has a much more restricted

meaning than "for the benefit of the people" under Article 4, pt. 3, Section 1, already discussed. This distinction should not be overlooked. The problem, then, is to determine whether the taking by the State of privately owned property and property rights for the contemplated purposes is "for public uses," as that term has been judicially construed in this State.

The term "public uses," as applied to the exercise of the power of eminent domain has met with two definitions and has given rise to two lines of decisions in this country, one holding that public use means public advantage, and that—

"Anything which tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the inhabitants of a section of the state, or which leads to the growth of towns and the creation of new resources for the employment of capital and labor, contributes to the general welfare and prosperity of the whole community, and, giving the Constitution a broad and comprehensive interpretation, constitutes a public use."

The other line of decisions holds that public use means use by the public, or employment by the public, and that therefore, to make a use public, within the eminent domain clause, "duty must devolve on the person or corporation holding property appropriated by right of eminent domain to furnish the public with the use intended, and the public must be entitled as of right to use or employ the property taken." 10 R. C. L. page 25. Public service corporations, such as steam and electric railroads, telegraph and telephone companies; and water companies, are familiar examples. This State in a comparatively recent case has adopted the latter rule as embodying the spirit as well as the letter of our Constitution, and as the stabler and wiser foundation upon which to build the fortunes of a State and to protect the rights and property of its citizens. The security and safety of the State rest upon the security and safety of the individual, and the security and safety of the individual depend upon the preservation of his sacred rights of life, liberty and property under the law. When these are in jeopardy the state itself is in jeopardy. After a review of many authorities and an illuminating discussion of the fundamental principles involved, this court in 1905 affirmed this interpretation of public uses in the case of *Brown* v. *Gerald*, 100 Maine, 351, 61 Atl. 785, 70 L. R. A., 472, 109 Am. St. Rep., 526. In that case the court said:

"Public benefit or interest are not synonymous with public use. . . . . Neither mere public convenience nor mere public welfare will justify the exercise of the right of eminent domain . . . If the doctrine of public utility were adopted to its fullest extent, there would practically be no limit upon the exercise of this power. . . . . "Property is devoted to public use, when, and only when, the use is one which the public in its organized capacity, to wit, the State, has the right to create and maintain, and therefore one in which all the public has a right to demand and share in.' *Budd* v. *New York*, 143 U. S., 517 [12 Sup. Ct. 468, 36 L. Ed. 247]. In a broad sense it is the right in the public to an actual, and not to an incidental benefit. . . . . It is the right of the public as individuals to use, when occasion arises. The use must be for the general public, or some portion of it, and not a use by or for particular individuals. . . . . It is not necessary that all of the public should have occasion to use. It may suffice if very few have, or may ever have, occasion. . . . . It is necessary that every one, if he have occasion, shall have the right to use. . . . . It must be more than a mere theoretical right to use. It must be an actual, effectual right to use."

Applying this accepted definition of public uses it is obvious that the State cannot take property from one class of individuals or private corporations for the purpose of benefiting another class of individuals or private corporations. It cannot take a privately owned dam or dam site from A. for the purpose of increasing the storage and thereby improving the privately owned water powers of B. or C. or D. It seems clear that the great public benefit which is supposed to follow from the exercise of this power is not a public use. It is not a use of which the public may avail itself if it have occasion. It is a private use pure and simple.

A manufacturing corporation which might reap the benefit is called into being by no public necessity, exercises no sovereign powers, subserves no public use, and is subject to no public duties. Further, if the State may exercise the power suggested, it may commit the execution thereof to any agency, corporate or otherwise, and this far-reaching right may be committed to any corporation. *Riche* v. *Bar Harbor Water Co.*, 75 Maine, 91. The proposed plan of state development of reservoirs for storing the waters of great ponds may render the flow of our rivers more uniform, may conserve the water supply,

may tend to the development of more mill sites and the enlargement of existing mills, all of which are incidentally of public benefit. But the public benefit is only incidental. In its essential and legal aspect the plan is merely an aid to private enterprise.

We therefore answer question No. 1 in the negative; but, while so answering, we wish it to be understood that our opinion is not to be construed or extended beyond our interpretation of the question answered.

It should be further understood that this discussion is entirely apart from the power to tax or to take, in the exercise of the police power of the State. The police power is inherent in all sovereignty and is exercised for the protection of the people, the preservation of the peace and order of society, and the health and safety of its members. *Skowhegan* v. *Heselton*, 117 Maine, 17, 102 Atl. 772. It was by virtue of this police power residing in the people that the Justices upheld the constitutionality of a proposed law to regulate or restrict the destruction of trees growing on wild land and to prohibit wanton and wasteful cutting. Neither the power of taxation nor of eminent domain was involved. Opinion of Justices, 103 Maine, 506, 69 Atl., 627, 19 L. R. A. (N. S.) 422, 13 Ann., Cas., 745. As was said by the court in *Union Ice Co.*, v. *Ruston*, 135 La., 898, 66 South, 262, L. R. A. 1915B, 859, Ann. Cas., 1916C, 1274:

"The police power is the power to regulate the business of others and not the power to go into business."

Nor is it necessary to consider in this discussion the essential nature and scope of the Mill Act, so called (R. S., Chap. 97), which has existed in this State since its organization a century ago, and in the mother commonwealth of Massachusetts for more than a century prior thereto. Province Laws 1714, Chap. 111; *Corse* v. *Dexter*, 202 Mass., 31, 88 N. E., 332. This act, generally speaking, authorizes any man upon his own land to erect a water mill and dam to raise water for working it upon or across any stream not navigable by paying compensation for all flowage damages caused thereby. It arose out of the necessities of the people in the early days, when small water mills of various kinds were essential to the very existence of the settlers, but is now regarded somewhat as a legal anomaly, because at the present day, and under modern industrial conditions, its effect is the acquisition of property rights from one individual or corporation against their will for the benefit of another individual or corporation,

by the mere payment of damages. Were it a new proposition, its constitutionality might well be doubted. *Jordan* v. *Woodward*, 40 Maine, 317. But it has been so long acquiesced in as the policy of the State, and so constantly upheld by judicial decisions, that its validity is no longer debatable. *Ingram* v. *Water Co.*, 98 Maine, 566-572, 57 Atl., 893. It is to be understood that these answers do not involve the mill act nor the rights acquired thereunder.

QUESTION NO. 2

"In the case the construction and development of water storage reservoirs and basins as aforesaid is held to be legal, may the state charge to the owners of water powers located on rivers below such storage reservoirs and basins a proportional part of the cost of such construction and development, or in lieu thereof a sum in the nature of a rental or tax, based upon the increased power thereby dame available for use of said water power owners?"

As an answer to this question is only desired in case the former question were answered in the affirmative, the Justices infer that no further answer need be made. Since, however, we have indicated, although apparently that inquiry was not in the contemplation of your honorable body, that the State might create storage reservoirs for conserving the waters of great ponds and regulating the flow for the purpose of increasing the navigability of the outlet rivers and streams, the question might arise under No. 2 whether in such cases any tax or rental might be based upon the increased power thereby made available at the various mill sites. We must answer that we know of no such tax that could be assessed on the increased capacity, except an increased tax on the enhanced value of the dam site. That would be in violation of the constitutional provision requiring all taxes assessed by authority of the State to be "apportioned and assessed equally according to the just value thereof." Const. Maine, Article 9, Section 8, and Article 36. This does not, however, involve the question of franchise taxes which may arise under questions No. 3 and No. 4, to be hereafter considered. Nor can we conceive of any kind of rental that could be charged, except possibly under such conditions as prevailed in *Kaukauna Co.* v. *Green Bay, etc., Canal Co.*, 142 U. S. 254-273, 12 Sup. Ct., 173, 35 L. Ed., 1004, and *Green Bay, etc., Canal Co.* v. *Patten Paper Co.*, 172 U. S., 58-77, 19

Sup. Ct. 97, 43 L. Ed. 364; where there was a leasing of the surplus power incidentally created and that was a matter of agreement between the parties. Nor could any charge be enforced upon the lower water power owners, either in law or in equity. A person cannot be made a debtor against his will. If an upper riparian proprietor sees fit to improve the storage system, he cannot charge a lower proprietor with any portion of the cost. Artificial improvements inure to the benefit of the lower proprietors. *Phillips* v. *Sherman*, 64 Maine, 171; *Weare* v. *Chase*, 93 Maine, 269, 44 Atl., 900. True, the owner below can claim no special rights in the additional storage. He is entitled of right to only the natural flow of the stream; but, if more than the natural flow at certain seasons comes to him, he can use it without being forced to pay therefor. This portion of our answer, however, we regard as quite academic, as the purpose of this supposed improvement is evidently not the purpose contemplated by the questions as framed.

QUESTION NO. 3.

"Where the Legislature has granted a private corporation the right to erect a dam to control the waters of a public lake or great pond without raising the natural high water level thereof, in order that the waters therein may be impounded and used for purposes of such corporation, may the Legislature subsequently impose a tax upon such corporation, based upon the increased amount and use of water from said lake or pond which the corporation enjoys by reason of having erected such dam?"

QUESTION NO. 4

"Where the Legislature has granted a private corporation the right to erect a dam to control and also to raise the natural level of the waters of a public lake or great pond, in order to impound additional waters to be used for the purposes of such corporation, may the Legislature impose a tax upon such corporation, based upon the increased amount and use of water from said lake or pond, which the corporation enjoys by reason of having erected such dam and of having raised the natural level of the waters of said lake or pond?"

These questions involve the same principles and can be answered together. In No. 3, the question assumes the erection of a dam to control the waters of a great pond without raising the natural high-water level. Even under those conditions, rights of flowage must be acquired, because every littoral proprietor, owning as he does the shore to low-water mark, is entitled to his land between high and low water mark in its natural state. No person or corporation would have any more right to flow land that, in a state of nature, would at any season of the year remain uncovered, than to flow above the high-water mark. Either act requires authority from the Legislature, general or special. Question 4 assumes the maintenance of flowage between high and low water and also above the natural high water level. The same principles are therefore involved in both questions although the damage would be greater in the one case than in the other.

These two questions, it will be observed, are complete in themselves and independent of interrogatories 1 and 2. The purpose for which the waters are to be impounded and the flow regulated and increased, whether public or private, is not divulged. The exercise of the power of eminent domain does not enter into the proposition. The single question is the right of the state to impose a tax upon a private corporation chartered for the purposes indicated, based upon the increased amount and use of water from a great pond which the corporation enjoys by reason of having erected such dam.

Evidently the corporation could not be taxed separately for the use of the water as property, because water power as a separate entity is not taxable. *Union Water Power Co.* v. *Auburn*, 90 Maine, 60, 37 Atl. 331, 37 L. R. A. 651, 60 Am. St. Rep. 240; *Water Power Co.* v. *Buxton*, 98 Maine, 295, 56 Atl., 914; *Fibre Co.* v. *Bradley*, 99 Maine, 263, 59 Atl., 83. The corporation can be taxed only upon the "just value" of its property, however acquired and whatever may be its elements of value.

Nor can the dam itself with its appurtenant rights be subject to a special property tax. That would violate the constitutional provision requiring equality of apportionment and assessment before referred to.

We see no reason, however, why the Legislature may not have the constitutional power, if it is deemed expedient to exercise it, to put

into one class all corporations having express grants from the Legislature to control the waters of great ponds, and impose a tax upon the franchises of such corporations; that is, upon the right to carry on their corporate business and to exercise their granted powers. The nature and extent of corporate franchises are discussed in *Twin Village Water Co.* v. *Damariscotta Gaslight Co.*, 98 Maine, 325, 56 Atl. 1112, and *Crawford Electric Co.* v. *Power Co.*, 110 Maine, 285, 86 Atl. 119, Ann. Cas., 1914C, 933. Taxes of this kind are now imposed upon railroad, express, telephone and telegraph companies, and savings banks. The power of the State to impose franchise taxes seems to be plenary, and it may not only impose them, but it may measure their amount by any standard it sees fit to adopt. *State* v. *Western Union Telegraph Co.*, 73 Maine, 518; *State* v. *Maine Central R. R. Co.*, 74 Maine, 383; Opinion of Justices, 102 Maine, 527-529, 66 Atl. 726; *Maine* v. *Grand Trunk Ry. Co.*, 142 U. S. 217, 12 Sup. Ct. 121, 163, 35 L. Ed., 994. So long as the franchises of all corporations in the same class are taxed at the same rate and on the same basis, the constitutional requirements are met. And since the tax may be measured by any standard that the Legislature may deem it wise to adopt, we see no objection to a franchise tax based upon the increased amount in use of water which each corporation enjoys by reason of having erected its dam; not by virtue of any alleged ownership of the State in the waters of the pond but as an arbitrarily adopted standard. In like manner it might impose a franchise tax upon manufacturing corporations using coal instead of water for the generation of power, and measure the tax by the number of tons of coal consumed, not because the State owns the coal, but simply as a standard of computation. Since 1901 a tax has been imposed upon the franchises of all corporations incorporated under the laws of this State (except those exempted by R. S., Chap. 51, Sec. 28), based upon the amount of authorized capital stock (R. S., Chap. 9, Sec. 18). Nor is it any objection to a franchise tax that it is measured by the value of the property used in connection with the exercise of it (*State* v. *Maine Central R. R. Co.*, 74 Maine, 376); although, of course, a tax imposed under such circumstances as to become merely a tax upon property under the guise of a tax upon the franchise would be invalid.

With these qualifications and explanations we return a negative answer to questions Nos. 3 and 4 on the assumption of the

assessment of a property tax, and an affirmative answer on assumption of the imposition of a franchise tax, leaving the legal rights of the parties in concrete cases to be determined by the developed facts.

QUESTION NO. 5

"Has the reservation 'of a tract of land not exceeding 200 acres together with the best mill site in any such township' as provided in section 5 of chapter 280 of the Laws of 1824, been repealed, or is the said reservation still in full force and effect?"

Before answering this question, the Justices take occasion to say that in their opinion it presents neither "an important question of law," nor is it propounded upon a "solemn occasion," within the meaning of Section 3 of Article 6 of the Constitution of Maine. But, as it accompanies other questions which we have answered, we will consider this one briefly.

The section in question was a part of an act passed in 1824, entitled "An act to promote the sale and settlement of public lands." This act covered the entire subject of the sale and settlement of our public lands and prescribed a method therefor. Section 5 contained this reservation for mill sites and their grant to individuals by the state land agent under certain conditions therein specified. Section 8 reserved 1,000 acres for the benefit of the town. Four years later, in 1828, the Legislature passed another act with the same title, and covering the same subject-matter, but changing in some respects the policy of the State. Public Laws, 1828, Chap. 393. Section 8 of the act of 1824, as to reservation of 1,000 acres in each town for public uses, was retained in the new act; but Section 5, as to reservation of mill sites, was omitted. Section 10 of the act of 1828 provided:

"Be it further enacted that this act shall take effect from and after the 3d day of March next, and all acts and parts of acts providing for the sale and settlement of public lands, from and after that time are hereby repealed: Provided, that all contracts entered into under any of said acts, prior to the expiration of said time, shall be valid."

This section expressly repealed the entire act of 1824, except in case of existing contracts made under Section 5, and Section 5 of that Act was therefore no longer in force. It has never been re-enacted. This was the view of the compiler of the so-called revision of 1831, because in the preface to that revision, which contained the public

laws enacted between 1822 and 1831, he explains that those acts which in whole or in part had been repealed by subsequent acts were printed in small type. All of Chapter 280 of the Public Laws of 1824 appears in small type, and the marginal note also calls attention to the fact that this act was repealed by Chapter 393 of the Public Laws of 1828. We therefore answer that Sec. 5 of Chap. 280 of the Public Laws of 1824 has been repealed.

We have the honor to remain, very respectfully,

[Signed]

LESLIE C. CORNISH,
GEORGE M. HANSON,
WARREN C. PHILBROOK,
CHARLES J. DUNN,
JOHN A. MORRILL,
SCOTT WILSON,
LUERE B. DEASY.

Answer of Justice A. M. Spear to Questions Propounded to the Court by Order of the House of Representatives of February 20, 1919

As the text and meaning of questions 1 and 2 have been fully and correctly stated in the opinion, it is unnecessary to again repeat them.

The answer to these questions involves four inquiries:

First. What is the present ownership of the State in the great ponds? Second. What is the effect of the Ordinance of 1641-47 upon the titles purporting to have been conveyed by the State without excepting or reserving the great ponds? Third, Has the use of the waters of the great ponds, raised and stored under the operation of the Mill Act, become a vested right in the millowners? Fourth. Is development and storage by the State, in view of the private ownership of the streams and rivers that constitute the outlet of the great ponds, practicable?

The answer to the first inquiry must be predicated upon the ownership of, or control which the State has in, the waters in the great ponds. It may be assumed that the State was primarily the owner of all the public lands and the great ponds situated thereon. The assumption is equally true that the State, duly authorized by the Legislature, has, from time to time, transferred to private owners its title to all the public lands it primarily held. It may also be assumed that the deeds given by the State were based upon plans, so delineated that the boundary lines either inclosed the great ponds, or ran in straight lines through them, and not "by", or "by the shore of," a great pond, so as to exclude the ponds in the description. It is also true that, at the time the State became possessed of the great ponds, and continuing during the period of all the sales of its public lands, the Ordinance of 1641-47 applied to the waters of the great ponds, originally conferring a common right upon "any man" to "fish and fowl" upon these waters. Therefore arises the question whether the deeds of the State conveyed to the grantees thereof a legal title in the great ponds, subject to the use impressed upon them by the ordinance, or, by virtue of the ordinance, did it retain its title in the fee to the great ponds, although the deeds were absolute in form, without exception or reservation?

At common law a sale of land included all the waters on the land. Navigable rivers are not here considered. A sale of land without reservation or exception of the waters thereon would convey them to the grantee. Farnham on Waters, Vol. 1, paragraph 60, page 273; Watuppa Cases, 154 Mass., 305, 28 N. E., 257, 13 L. R. A., 255. The sale of the public lands in this State contained no reservation or exception of the great ponds. The State therefore conveyed a title in fee, unless defeated by the uses imposed by the ordinance. For it must be constantly kept in mind that there is not a legislative act, a scrap of paper, custom, or usage that confutes a title in fee, except the terms of the ordinance, adopted by usage and confirmed by judicial decision. It should also be noted that the terms of the Ordinance of 1641-47 have been applied, in totidem verbis, so that when we speak of the ordinance we refer to the language of the colonial enactment.

We therefore at the threshold approach the inquiry: What was the title of the State in great ponds? With what tenure did it hold them in trust under the ordinance? What title has it conveyed? The inquiry here is, when it conveyed its lands, with the great ponds thereon, without reservation or exception of the ponds, did it vest the legal title thereof in the grantees subject to the trust, or did the ordinance operate as an exception to the plain language of the deeds? I think the history of the origin, purpose, and scope of the ordinance will show that it did not so operate.

I assume that the sale of the public lands by the State was made by authority of the Legislature, which represents the people, and acts for the people, as their authorized agent. The answer depends upon how the State acquired its legal title, its trust title, and what title it conveyed. Prior to 1641-47 the colonies and proprietary grantees owned all the public lands, and waters situated thereon, free from any public or private easement or use. When Maine was separated from Massachusetts, it succeeded to the title of these lands and waters within its prescribed boundary. It is sufficient for this discussion to say that this was the origin of the State's title. At this time Parliament, not the king, alone, had authority to grant the public domain with the waters thereon. The State, by its Legislature, succeeded to this authority of Parliament. It follows that the State had a right to sell these lands, together with the waters thereon. In this connection it should be noted that our court, contrary to the court of

Massachusetts, has construed the ordinance to cover all the great ponds in the State upon all grants, whether made prior to the ordinance or after. Hence we make no distinction in regard to private grants made prior to the date of the ordinance.

When this ordinance was passed, Massachusetts was a colony of Great Britain. But it was enacted by the colonial government. Although adjudicated forfeited in 1685 by a decree in chancery, it was nevertheless re-enacted in the Ancient Charters and continued in effect over the part of the colony to which it was originally applied. The ordinance never applied to the territory of Maine. Nor has it been extended to Maine by any legislative act. "Rather it has been declared to be a part of the common law of the state. It has been judicially adopted as the expression of a public right, so acted upon and acquiesced in as to have become a settled universal right." *Conant* v. *Jordan*, 107 Maine, 227, 77 Atl., 938, 31 L. R. A. (N. S.), 434; *Barrows* v. *McDermott*, 73 Maine, 441. Accordingly, if the State has retained title in fee in the great ponds, against the absolute grants in its deeds, it has done so through the application of the Ordinance of 1641-47 alone. Therefore, to see just what title the State now retains, we must look to the ordinance, its scope, its intent, and its purpose; for it is very evident that the title from the ordinance did not originate in a grant, exception, or reservation, but in the right of user, not to the State as a sovereignty, not to the community in any organized capacity, but to the people in common. The Ordinance of 1647 with which we are concerned reads as follows:

"For great ponds lying in common though within the bounds of some town, it shall be free for any man to fish and fowl there, and he may pass and repass, on feet through any man's property for that end, so they trespass not on any man's corn or meadow."

There are no words of grant, exception, or reservation in this ordinance. There is no expression of an intent or purpose to affect any property right, either in land or water. Its whole purpose was to declare a privilege in the public, not as a sovereignty, but as individuals, to use the waters of the great ponds, a right necessary, in those early days, to the acquisition of a living. Neither the State, nor the public in an organized capacity, acquired the rights conferred by the ordinance. Only "on foot" could "any man" pass and repass. It was a personal privilege, not a State privilege, or society privilege, of which the courts, not the executive nor judicial department were

guardians. The only right that "any man" was given or could demand was to be protected by the court against an interference with his individual right, precisely as "any man" entitled to an easement relies upon the court to protect his individual right. The State, by its executive or legislative departments, had absolutely nothing to do with this ordinance right. It acquired nothing as a body politic. The gift of the ordinance was to the individual, not the State. The right has never been changed by any legislative act. It has never been changed by the court. "The right" under the ordinance is the only question which has ever been before the court, and, as above seen, the only question that could come. The question of ownership was never raised, as it was never material to the enjoyment of the right. To be permitted to exercise the right was all the individual ever asked. He never claimed any property rights, and the State could claim none, except for his benefit, to be enforced solely by the courts. The ordinance never contemplated a commercial purpose. Nor has it ever by usage, custom, or legal interpretation been devoted to such a purpose. The rights under the ordinance have never been permitted to be used except by passage over wild land. If a great pond was surrounded by cultivated land, not a single right created by the ordinance could be exercised. *Brastow* v. *Rockport Ice Co.*, 77 Maine, 104, and cases cited. Under the ordinance such pond would be absolutely closed to commercial purposes. Under the ordinance no person had any title for commercial purposes; under the ordinance the State had not, because, as before seen, the right to use was given to the individual, and not the State. The question of commercial use is now for the first time propounded. For nearly 100 years the State has by its acts acquiesced in and regarded the use of the great ponds, for commercial purposes, as the property of the mill owners and water power proprietors. So far as I know the State has asserted no right inconsistent with the above stated principles of ownership and uses.

There is another most significant provision in this ordinance, bearing upon the interpretation to be given to the scope and character of the right to use the waters. This ordinance gave the same right to "cross and recross" private property that it did to use the waters of the great ponds for fishing and fowling. The latter right was nugatory without the former. In the intent and purpose of the ordinance the right to pass and repass was coequal and coextensive with the right to fish and fowl. The right to pass and repass was

greater, if anything, than the right to fish, as the latter right would be completely defeated without the former. The courts have never undertaken to make this a property right.

But could it be contended for a moment that the State, or the public, acquired any title in the soil of the land owned by virtue of this right to pass and repass? By a parity of reasoning, did they acquire any greater right in the bed of waters of the great ponds? Was it ever intended they should? Was there any reason why they should? It was not in the smallest degree necessary to the enjoyment of the right. It is a significant fact, also, that the important cases that have been fully considered and elaborately discussed involved, not the ownership of the waters,nor the right to fish and fowl, but the right to pass and repass to the water. *Barrows* v. *McDermott*, 73 Maine, 441, involved the right to pass to fish; *Conant* v. *Jordan*, 107 Maine, 227, 77 Atl. 938, 31 L. R. A. (N. S.) 434, the right to pass to fowl, or shoot ducks. As a legal proposition the State holds no interest whatever. It is not necessary that it should. The ordinance did not impose any duty upon the State. It declared an individual right. That right did not come through the State. It did not depend upon the legislative or executive department of the State for its origin or enforcement. Where the right is challenged, it is always between two persons; the one claiming to exercise the right, the other denying the exercise. The right when challenged becomes solely a matter for the court. It is a legal privilege, not a property right. In such a legal controversy, nothing but the privilege of access, and the use, if access can be gained without trespass, is ever involved. The State is never made a party, nor do I see how it could be. I reiterate that as a legal proposition the State is not concerned in the ownership, or even the control, of the great ponds to secure to the public every right and privilege guaranteed by the ordinance, any further than it is in a controversy between two farmers, in that it provides the legal machinery by which the legal right in either case may be determined.

When a use arises under the ordinance, it becomes a legal right, and does not depend at all upon state ownership or control. The theory of state ownership or control is inconsistent with the express language of the ordinance. By apt words the ordinance vests the right, not in the ownership, control, or custody of the State, but directly and solely in "any man," the only beneficiary named. Does state ownership or

control regulate the right to fish, fowl, cut ice, skate, boat, swim, etc.? Has the State by any form of legislation created these rights or privileges? Not in the least. The court determines whether it is a right by virtue of the ordinance and the law of the land then guarantees its use.

While I have referred only to the terms of the Ordinance of 1647, the Ordinances of 1641 and 1647 were re-enacted as one act in the Ancient Charters, and are considered together in *Commonwealth* v. *Alger*, 7 Cush., (Mass.) 53. The former is significantly important in construing the scope and intent of the latter. It reads as follows:

"Every inhabitant that is a householder shall have free fishing and fowling in any great ponds and bayes, coves and rivers, so farre as the sea ebbes and flowes within the presincts of the towns where they dwell. Unlesse the free men of the same towne or the Generall Court have otherwise appropriated them provided that this shall not be extended to give leave to any man to come upon others proprietie without there leave."

THE COURT SAY:

"But, as originally adopted, it is to be noticed that the privilege of free fishing and fowling was confined to householders within the limits of the town where they reside, and that the right to go upon any man's property without his permission is expressly excluded. Thus it will be seen that the object of the original ordinance was not to confer a right upon the public, even to fish and fowl, but only to a householder, and that upon a pond situated within the town in which he lived. This certainly conveyed no title in the great ponds to the state. The Ordinance of 1647 (1) merely extended the privilege to a great number of people, and (2) gave the additional right to pass and repass private property, if not cultivated."

I am unable to discover any evidence in this latter ordinance which was intended, or by any possible construction can be held, to convey title to the State in the waters of the great ponds. This ordinance conveyed rights to use, not rights to appropriate. Nothing in the ordinance prevents the state from selling. There is no constitutional prohibition. It was expressly held in *Barrows* v. *McDermott*, supra, that—

"The Legislature has power over the whole subject so far as public and common rights are concerned."

The principle is confirmed in *Berry et al.* v. *Raddin, et al.*, 11 Allen, (Mass.,) 579, in which it is held that even the town can convey, subject to the public right, in this language:

"There can be no doubt that the town of Lynn . . . . became the owner of all the land and the water included within its boundaries, with full power to grant any portion of either."

To the same effect is *Attorney General* v. *Revere Copper Co.*, 152 Mass., 444, 25 N. E. 605, 9 L. R. A. 510; *Inhabitants of West Roxbury* v. *Stoddard, et al.*, 7 Allen, (Mass.,) 158; the Watuppa Cases, supra.

By any legal rule of interpretation the State cannot be regarded as ever holding these ponds in trust. A trust implies a special ownership for some other party or some specfic purpose. There must be a trustee, a corpus, and a beneficiary. But under the ordinance the only interest created thereby went directly to the beneficiary. There was nothing created by this ordinance which the State could hold as trustee.

At this point it is pertinent to add that the ordinance vested no inalienable title in the people. The Legislature may, if disposed, abrogate the entire effect of the ordinance, as was actually done in Massachusetts by raising the area of a great pond from 10 to 20 acres. *Commonwealth* v. *Tiffany*, 119 Mass., 300. Our Legislature can close every great pond within the State to fishing and fowling, and has done so many times. The close time laws accomplish this result. The ordinance, therefore, established no vested property right in the people. Only to "any man" did it give anything. This distinction should be kept clearly in mind, as it is the confusion of the limited right conferred with the unlimited right assumed by our court that renders their opinions mere dicta.

I think it is now clearly shown that neither the letter nor the spirit of the ordinance conveyed any property right in the great ponds to the State in its organic capacity, or to the people in their sovereign capacity.

This analysis of title shows as valid a paper title in the lands, and the great ponds thereon, in the grantees of the State, as does the deed to a farm, subject to an easement, or to land adjacent to a highway, subject to the public use. In either case the grant is subject to the easement, but beyond that the title of the grantor vests in the grantee. In other words, the colonial ordinance had no more effect, in retaining title in the State to the great ponds it had sold, than the location of

a highway would have in retaining title in the adjacent owner, to the land he had sold. Except for public use the title in either case would vest in the grantee.

How, then, is the title of the grantees of the State sought to be defeated? It will be seen that the only evidence of such defeat is to be found in the dictum of the court. This dictum contradicts both the words and the spirit of the ordinance, reverses the purpose and intent with which it was created, confutes the effect of formal and absolute grants made by the State, and, if carried to the extent now claimed, impairs vested rights and does a gross injustice to vested capital. For the dictum, which I am about to consider, must be construed to mean that the ordinance vested in the State, in its sovereignty, a title to great ponds of which the people of the State did not divest themselves, by the act of their Legislature in giving deeds, which, at common law, conveyed the ponds with the land.

The direct issue of ownership in fee of the ponds has never been presented to the court, nor has ever any case arisen in which the issue was involved; on the contrary, every case could have been, and always has been, determined by the application of the ordinance alone, as establishing a right which the State held, not in fee, but for the benefit of the people. And the one case which directly assumes that the State has title is so clearly inconsistent with the word, spirit, intent, and scope of the ordinance as to expose the looseness and fallacy with which the dicta has been employed. See *Auburn* v. *Water Power Company*, 90 Maine, 576, 38 Atl., 561, 38 L. R. A., 188.

But a dictum is not a judicial decision. It is binding upon no one, not even the Judge who utters it. This is a familiar rule to lawyers.

Our court, however, has said many times, in different forms of phraseology, that the State owns the great ponds. *Auburn* v *Water Power Co.*, 90 Maine, 576, 38 Atl., 561, 38 L. R. A., 188, supra goes as far in its expression of ownership in the State as any case I have been able to find. It takes its major premises, however, from a paragraph in *Watuppa Reservoir Co.* v. *Fall River*, 147 Mass., 557, 18 N. E. 472, 1 L. R. A., 466, which reads as follows:

"Under the ordinance, the state owns the great ponds as public property, held in trust for public uses. It has not only the jus privatum, the ownership of the soil, but also the jus publicum, the right to control and regulate the public uses to which the pond shall be applied."

The phrase "ownership of the soil" considered by itself, would clearly indicate a fee; but, when limited by the phrase "held in trust for the public," the interpretation of the ordinance is in harmony with the construction that the great ponds, by whomever held, are impressd with the trust of the ordinance, and that the State has such ownership in trust as will enable the court to enforce its provisions.

No case has arisen where the direct issue has involved the actual title to the bed of the great ponds or the waters thereon. No decision has said that the legal title in fee was in the State. No statute has said so. Can the court, by judicial dicta alone, create a title where none before existed, or take away a title where one does exist? The mere statement of the court that the State owns the great ponds does not restore the title with which it has parted. Property rights cannot thus be given or taken away. When real estate has once become vested its title cannot be changed, except by some legal mode touching the specific property involved. As a test of whether legal title to real estate can be created or conferred by judicial decision, I will revert again to the right, coeval, coexistent, coextensive, and an integral part of the ordinance, to pass and repass to a great pond over the land of a riparian owner. Have the decisions of the court erected a title in the State in this land of passage? It will be conceded that the court could not thus violate a man's title. Accordingly, there is no rule of property derived from the ordinance; else it would vest the title of the land of passage, as well as the water, in the State.

But the ordinance has been extended to a broader field than fishing and fowling. It has specifically been applied to the rights in ice on a great pond, and held to have reserved the common right to take ice as it reserved the common right to fish. In reserving this right, however, the decisions base it upon precisely the same principles of law and ownership as they do the common right to fowl and fish. It is apparent, from a consideration of the cases, that every utterance of our court in regard to the State "owning the great ponds," "owning the beds of the great ponds," "owning the waters of the great ponds," that a riparian owner "owns only to low-water mark," is pure dictum, and not decisive upon the real issue of ownership, which is now for the first time before the court. No case has analyzed the source of, or reason for, the title being in the State. But these dicta, when construed with reference to the scope and purpose of the ordinance, can readily be reconciled with the well-settled principles of law regula-

ting the acquisition or transfer of title. There are many kinds of title; title in fee, title in trust, title for a specific purpose, title for a specific time, title upon the happening of contingencies, and title to be defeated by the happening of contingencies. All these and many more are qualified ownerships, and may not inappropriately be spoken of as "the ownership" of the trustee or beneficiary, for the time being. But when the law makes an occupation or ownership dependent upon any contingency, or qualified title, the court, when it speaks of such ownership as being in any particular person, or even in the State, is always understood to use the term with reference to its conditions or limitations. In other words, the court cannot, by saying that a trustee owns certain property, make him the owner. All the conditions of the trusteeship, or other limitations, will attach, notwithstanding the declaration of the court. Thus, when it is said in *Auburn* v. *Water Power Co.*, 90 Maine, 576, 38 Atl., 561, 38 L. R. A., 188, supra, "that, by virtue of the rule of property derived from the Ordinance of 1641-47, as interpreted in this state as well as Massachusetts, the title to all great ponds . . . . is in the state," it is pure dictum. It makes no difference whether state owned or not. It could take under the police power. Note the language of this quotation: "By virtue of the rule of property derived from the ordinance" the title is in the State. By the rule of the ordinance as above "derived" there is found neither intent, purpose, nor language to convey or retain any title to the great ponds in the State. The exact contrary of such an interpretation of its language is too plain to require discussion.

But this language, when referred to the purpose and scope of the ordinance, should be limited to the legal force of the ordinance, and construed to retain a title in the State, in trust, for the common use, whether for fishing, fowling, or cutting ice. The purpose and scope of this ordinance is defined in *West Roxbury* v. *Stoddard, et al.*, 7 Allen, (Mass.) 171, as follows:

"4. Fishing, fowling, boating, bathing, skating or riding upon the ice, taking water for domestic or agricultural purposes or for use in the arts, and the cutting and taking of ice, are lawful and free upon these ponds, to all persons who own lands adjoining them, or can obtain access to them without trespass, so far as they do not interfere with the reasonable use of the ponds by others, or with the public right, unless in cases where the Legislature have otherwise directed."

These rights lie open only to those whose lands lie adjoining or who can gain access to them without trespassing. When we revert to the purpose and scope of this ordinance, it is apparent that the legal title to the bed of a great pond adds nothing to the authority of the State as a trustee to enforce the full purpose of the ordinance. Nor would legal title to the water. So the ordinance did not confer nor retain title. It conferred common rights, and by implication imposed power upon the State to secure the enjoyment of those rights as prescribed by the ordinance. And it is a significant fact as before noted, that all the cases have involved the public right, and not state ownership. The State has said, and only said, and has been only required to say, upon the issue in any case, that if you pursue the right according to the ordinance, not by virtue of the title in this State, you will be protected from the charge of trespass. *Barrows* v. *McDermott*; *Conant* v. *Jordan*. In *Brastow* v. *Rockport Ice Co.*, 77 Maine, 100, an ice case, the court say that, for this purpose, "by the principle of the ordinance it is a public pond and free for all who can reach it without trespassing upon the lands of others." The basis of this opinion is that the pond was public by virtue of the ordinance, not by virtue of any state ownership. I am unable to find an opinion in this State, involving the public common right, which is not based, as in the above cases, solely upon the principles of the ordinance.

I wish now to discuss one other case—*Auburn* v. *Water Power Co.*, 90 Maine, 576, 38 Atl., 561, 38 L. R. A., 188. The precise question was whether Auburn, which had taken its domestic water supply from Lake Auburn, was required to pay damages to the millowners on the outlet for taking water from the lake to the detriment of the owners below. The court answered in the negative, and based its conclusion upon two theories of legal right in the city: First, that it was an exercise of the police power, an inherent right to take water from any feasible source for domestic use. It is rightly said:

"Water, air, and light are the gifts of Providence, designed for the common benefit of man, and every person is entitled to a reasonable use of each."

Again:

"This right to the use of water for domestic purposes is primary, and the right to use it as a mechanical power is secondary."

After conferring the right of the city to take the water, without compensation, upon this theory, the court then proceeds to justify on the second theory, that "by virtue of the ordinances . . . the title to all great ponds is in the state." We have already referred to this as dictum, but the fallacy of applying it to the Auburn Case goes to confirm its complete irrelevancy. No case has ever claimed that the ordinance went beyond conferring a "common right." And this common right resided in the individual only. "It shall be free for any man," says the ordinance, "to fish and fowl there and he may pass and repass." Can it be said that a municipal corporation, or any other corporation, or organization, could succeed to this right, by virtue of this ordinance? I am unable to find any authority for it in the ordinance or anywhere else, except in the pure dicta of the court. Nor was it necessary to invoke this ordinance, as the police power, the inherent power of the people, superior to the Constitution itself, gave the city a primary right to take the water for domestic purposes. That case illustrates the source, force and effect of the dicta based upon the ordinance in regard to the title to great ponds.

But it is said the State has declared that the title of the riparian owners goes only to low-water mark, on great ponds, and that the title to the bed must be in somebody. This title to the bed must also be construed with reference to the purposes of the ordinance. The bed is of no consequence to the public right except to protect it. Nothing but the use of the water has ever been claimed or desired by the public. The administration of the ordinance, therefore, required that the control of the bed of a pond should be incidental to a control of the waters on the bed. By common law the riparian owners on a stream owned to middle thread of the stream and could prevent anchorage for fishing on his land although under the water. If the same right of riparian ownership had been permitted to operate on great ponds, the common right to fish could have been materially curtailed. Hence the State, for a proper administration of the ordinance, assumed control of the bed, in trust for the public, and thereby prevented the exclusive control by the riparian owner against the common right. Call it "ownership," "ownership in the soil," or title in the State, the whole purpose of the ordinance is translated into a mere contest against the riparian owner for the benefit of the common use. This control does not affect the legal title to the bed, by virtue of the ordinance.

As another test, suppose the State had brought a writ of entry for the possession of the bed and waters of a great pond—what will be its evidence of title? The deed it has given? That would defeat it. The ordinance? That would defeat it. The dictum of the court? But title cannot be created or taken away without due process of law.

At this point I wish to call attention to what I regard as the most important consideration in this whole discussion, which shows the complete failure of any consideration whatever by our court of the issue now involved. As before said, the issue involving the ownership of the beds of great ponds and the waters thereon, has never been directly presented to the consideration of the court nor has it ever rendered a decision upon that issue. But what to my mind is of compelling force in derogation of the dicta herein considered is the fact that an opinion cannot be found in the State of Maine where the effect of a grant or deed by the State has been considered, or even alluded to, or apparently thought of. The effect of these grants, accordingly, is still an open question.

I have thus reviewed the source, intent, scope, and purposes of the ordinance, and its application to Maine, by judicial procedure for the purpose of showing that it was merely a declaration of a public policy, and that it did not convey any title in fee to the public, nor obtain any title which the State could not sell, and that the State did not obtain its title to great ponds "by virtue of the ordinance," but by concession when it was separated from Massachusetts and became a State; that, having sold the lands, with the great ponds thereon, without reservation, the ponds passed with the lands to the grantees; that the State thereby parted with its title, which vested in the grantees, subject to the common use created by the application of the ordinance; and that the dicta of the court, which would seem to hold, notwithstanding the State had thus conveyed its lands and ponds thereon, that the ordinance vested a title in the State which its deeds did not convey, are erroneous in giving to the ordinance the power of a "rule of property," which it never had, nor was intended to have.

A source of the land titles in Maine will be found in R. S., 1883, pages v to xvii, inclusive, but you will look in vain for any reference to the Ordinance of 1641-47. By the erection of Maine into a State, and the concession of all public lands within its territorial area, the State became possessed in fee of all such lands. The State had the right, and has exercised it, through all the years, by authority of the

Legislature, to sell and convey its public lands, and thereby transfer to the grantee all the legal title it had. Therefore my purpose is to raise the question whether the State has not divested itself of legal title to every township it has conveyed, together with legal title to all the great ponds situated thereon, subject only to the control of the waters of the great ponds for the purpose of common use by virtue of the ordinances, and to such other reservations as the deeds of conveyance may contain.

The Mill Act

My third inquiry, whether the use of the waters of the great ponds, raised and stored under the operation of the Mill Act, became a vested right in the millowners, interposes, in my judgment, another insuperable obstacle to the authority of the State to develop these water basins for commercial purposes. I have been considering what is called in the dicta of the opinions "the rule of property derived from the ordinance" and have shown that no such rule ever resided in the ordinance by word or implication. The Flowage Act, however, which I am now about to briefly consider, introduced a policy by positive enactment which did create and put in practice a genuine "rule of property." In Massachusetts the Flowage Act was passed subsequent to the colonial ordinance; but in Maine, as a State, it went into actual operation before the ordinance, inasmuch as it was embodied in the first body of laws ever passed by the State, while the ordinance did not go into legal effect until later declared by the court. The history of this act may be found in *Tinkham* v. *Arnold*, 3 Maine, (Greenl.) 120, announced in 1824. This was a flowage case, involving a right to flow by prescription. That case shows that as early as the year 1714 it was provided by a provincial act that millowners should have a right to flow and improve ponds for their "best advantage without molestation." In 1795 that provision was elaborated into practically its present form; and, as the Tinkham opinion says, with few alterations this act was enacted in this State by St., 1821, Chap. 45. The opinion gives this early interpretation:

"The right to flow the lands of others, paying damages, is distinctly given and continued to millowners."

Thus it will be seen that the Mill Act was enacted in 1714, while Massachusetts was still a province, re-enacted in 1795, after it became a State, incorporated, "with few alterations," into the first code of laws enacted in this State, where it remained substantially unchanged almost 100 years. This statute was enacted and continued as an economic policy, for the express purpose of inducing the erection of mills and the storing of water with which to operate them. In furtherance of this inducement it authorized millowners to erect dams, as provided in the act, and to flow back the waters, whether upon the streams or upon the ponds, for the purpose of storage, upon the payment of damages to the riparian owners whose lands were overflowed. When the damages were agreed upon, or assessed by legal process, the millowner thereby acquired a vested right to forever flow the lands upon which the damages had thus been fixed and paid. The sole and only purpose of this investment was to store water in the basins or ponds for the purpose of assuring a successful and profitable operation of the mill below. The use of the water thus stored became vested capital, as much as the funds employed in the erection of the dam or the building of the mill. The three things necessarily operate together; one is as essential as the others.

The sole object of acquiring flowage rights is to store water. The sole object of paying damages for flowage is to store water. The sole object of storage is to gain an accumulation of water, to be held and let down from time to time as the water supply and operation of the mill may require. For this purpose millions of dollars have been invested in this State in flowage and millions of dollars put into the erection of mills which could not have been profitably constructed, and undoubtedly never would have been constructed, without a guaranty of the right to flow and store water. They found this guaranty in the statute. It is therefore evident that the investment in mill structures is inseparable from the investment in the flowage; that the two investments stand together, and the impairment of one is the impairment of the other. These investments have been invited under the general policy and positive law enacted by the people of the State through the Legislature.

The Mill Act in Massachusetts of 1796 (Laws 1780-1807, page 729) was entitled "An act for the support and regulation of mills." The preamble was as follows:

"Whereas, the erection and support of mills to accommodate the inhabitants of the several parts of the state, ought not to be discouraged by many doubts and disputes, and some special provisions are found necessary relative to flowing adjacent lands and mills held by several proprietors."

On February 4, 1821, the Mill Act was passed by the Legislature of Maine under the same title and in all essential particulars in the exact language of the Massachusetts act. It is therefore evident that the State, by the voice of its Legislature, invited and encouraged the investments which have hitherto been made in the acquirement of flowage rights. These investments have been made upon the strength and protection of the flowage act. The millowners have acted, and had a right to act, upon the good faith of the State. It would therefore be a moral invasion on the part of the state to attempt to impair or diminish the value of these rights thus acquired. I concede, however, that such invasion does not operate as a legal inhibition; but I go further and express the belief that the application of the doctrine of equitable estoppel, and constitutional intervention do as a matter of law inhibit such invasion. It is not my purpose, nor is it necessary, to here discuss the doctrine of equitable estoppel, as the principles upon which it proceeds are well established. Generally speaking, when one party by his word or act invites or induces another party to act to his detriment in a manner in which he would not have acted, except for the inducement of the other party, the doctrine of equitable estoppel applied. Equitable estoppel will lie against the State. This was so held in *Commonwealth* v. *Andre*, 3 Pick., (Mass.) 224. It is also said in 10 R. C. L. 104, Section 31:

"It is, however, quite well settled that when the state makes itself a party to an action or to a contract or grant in its proprietary capacity it is subject to the law of estoppel as other parties litigant or other contracting parties."

That an act of the Legislature involving contractual rights is a contract, with those who act upon it, has been the rule of law since the famous Dartmouth College Case. Upon the assumption, even, that the State otherwise owns and controls the waters of the great ponds, the Flowage Act, in view of its purpose and invitation, was clearly an agreement on the part of the state with the millowners that, when they had acquired the riparian right to flow, they should

thereafter be entitled to the reasonable use and benefit of the waters stored upon the lands thus purchased and the dams which they had incurred the expense to erect. I am unable to apply any other reasonable interpretation of the purpose and intent of the Legislature in enacting the Mill Act; and that the intent should control is elementary. It is accordingly my view (1) that the State is equitably estopped from claiming any ownership, control, or use, for commercial purposes, in the waters thus stored in the basins thus created and to the accomplishment of which the State has contributed nothing; and (2) that such an invasion is contravened by the constitutional objection that such an attempt by the State to take or use these stored waters for commercial purposes would be in violation of the contract contained in the Flowage Act.

Impracticability

My fourth reason for answering question 1 in the negative, while not strictly legal, is nevertheless effective. It is impracticable, as a legal proposition, for the State to undertake the storage of waters in the great ponds for commercial purposes. The State could not accomplish the end, without the right to condemn private property, for the erection of numerous dams and manufacturing plants upon the streams or rivers that constitute the outlets of these bodies of water.

It is a matter of common knowledge, revealed by the records of the land office, of which the court is authorized to take judicial notice, that the State has from time to time disposed of practically all of its public lands, except reserved lots, to private ownership.

Assuming, now, that the sale by the State of public lands did not convey a title in the bed and waters of the great ponds situated thereon, it is nevertheless true, and established law, that the State, unless expressly reserving, has retained, no ownership in the non-navigable streams and rivers that form the outlets of the great ponds. Inasmuch as the assumption of ownership in the great ponds, by the State, bounds such ownership by low-water mark, it is also obvious that it would be impracticable for the State to erect a dam within the boundary of the lake, with its wings limited to low-water mark, that would be of any avail in creating a storage of water in the lake.

Accordingly, the State at the threshold of its undertaking would be met with the following conceded problems as practical difficulties.

(1) That the erection of a dam requires a site upon the river or stream flowing from the pond either at the outlet or some place below.

(2) If the State does not own the site, it cannot erect a dam without acquiring title or control of the site.

(3) It can acquire title only by purchase or the right of eminent domain.

(4) The question cannot contemplate title by purchase, as acquisition in this way would depend entirely upon the will of the owner, and hence too uncertain as a basis upon which to predicate any action by the State.

(5) The only way in which the State can acquire title to a dam site on a river or stream is by the exercise of eminent domain.

(6) But the right of eminent domain can be exercised only for a public use, as "private property shall not be taken for public uses without just compensation, nor unless the public exigencies require it." Bill of Rights.

(7) Public use is a question of law; public exigency, a question of legislation.

(8) Public use is defined in *Brown* v. *Gerald*, 100 Maine, 351, 61 Atl. 785, 70 L. R. A. 472, 109 Am. St. Rep., 526, as follows:

"Judge Cooley, in his work on Constitutional Limitation (6th Ed.) 653, says: 'Nor could it be of importance that the public would receive incidental benefits, such as usually spring from the improvement of lands or the establishment of prosperous private enterprises. The public use implies a possession, occupation and enjoyment of the land by the public at large, or by public agencies; and a due protection to the rights of private property will preclude the government from seizing it in the hands of the owner, and turning it over to another on vague grounds of public benefit to spring from the more profitable use to which the latter may devote it.' And again on page 655; 'That only can be considered a public use where the government is supplying its own needs, or is furnishing facilities for its citizens in regard to those matters of public necessity, convenience or welfare which, on account of their peculiar character, and the difficulty, perhaps impossibility, of making provisions for them otherwise, is alike proper, useful and needful for the government to

provide.' There is perhaps no general definition more satisfactory than this one. And we think there is nothing in the creation and distribution of power for manufacturing enterprises, no matter how great their general utility, which makes it 'alike, proper, useful and needful' for the government to provide for it. They are clearly private enterprises, built up by private capital, for private gain."

(9) The State, even by the ordinance rule conveyed to low-water mark. It could not, therefore, flow above low-water mark, except under the Mill Act. It could not flow under the Mill Act except by ownership of land and mills on the stream below. R. S., Chap. 97. It cannot acquire ownership of the lands and mills below, except by eminent domain. Eminent domain cannot be exercised for a commercial purpose. *Brown* v. *Gerard*, supra.

It is therefore obvious that, as a practical undertaking, the State could not make a reservoir of the great ponds for storing water "for the purpose of increasing the value and capacity of the water powers of said rivers," as such increase would be a commercial, not a public, use, ultra vires and void.

QUESTIONS 3 AND 4

Questions 3 and 4 are fully stated and correctly construed in the majority opinion and need not again be stated here. Upon the interpretation of the Flowage Act I base my answer to these questions. The general corporation tax may be eliminated, as it applies to all corporations, whatever their business.

The question here is: Can a special franchise tax be imposed upon millowners for the use of the waters they have stored under special acts, privileges, and powers purporting to have been given by the Legislature? This depends, first, upon what such a franchise means; and, second, upon what the Legislature actually bestowed. A franchise is primarily a gift. In law, first, it bestows upon certain persons the right to associate in an organization called a corporation, and to enjoy certain privileges and immunities of which they were not permitted to avail themselves as individuals; second, it may confer certain special rights and powers, which are beyond the scope and power of corporations, generally. For instance, the right to organize under the general law comes within the first class. Authority to organize under the special law, and to exercise rights and powers,

not given by the general law, confers, not franchises, but special powers. The purpose of the franchise and the exercise of powers under it must be kept distinct. *Crawford Electric Co.* v. *Power Co.*, 110 Maine, 285, 86 Atl. 119, Ann. Cas., 1914C, 933. It should be here noted, as it is the foundation of this discussion, that storing water under the Mill Act is not the exercise of a corporate power.

Under the law and the constitutional limitation of the right of eminent domain the acts of the Legislature in attempting to confer upon corporations the right to flow, and thereby store water, are ultra vires, and consequently bestowed no special right or privilege whatever. This conclusion is based upon the premises already stated and the deductions legally derived thereform:

(1) The State, in no event, owns above low-water mark.

(2) The State cannot itself, or authorize any corporation to, take the land above low-water mark except for a public use.

(3) The special acts have not authorized a public use. Hence these acts, if intended to confer the right to flow, for industrial purposes, were in defiance of the right of eminent domain, as defined by the Constitution, ultra vires, and void.

The only way known to the law, at the present time, by which a private corporation can be permitted to take or use land for private purposes for flowage, is under the Flowage Act of the State. In other words, abolish the Flowage Act and no constitutional way would survive for the use, taking, or flowage of private land for the storage of water for a municipal purpose. The Bill of Rights blocks the way. Therefore, whatever the corporations may have attempted to do, by virtue of special acts, to store the waters of the great ponds, they have acquired no legal rights, except under the Flowage Act.

It is accordingly my opinion, the State having conferred no legal right or privilege, that the water stored and controlled by these corporations was an appurtenant to the mills and dams, as before shown, and should be valued and taxed as a constituent part thereof. It is conceded law that flowage rights are an appurtenant to the mill and dam. In other words, for the purposes of taxation, the tank in which the water is kept is regarded as realty, while the water in the tank, static, impounded under the general law, is designed to be given, by special laws which have no force, a character entirely inconsistent with its natural and ordinary form.

But it may be urged that the Flowage Act should be considered as having conferred a special privilege, as much as if it were a special act, as it is special in its character. But the fallacy is in this: That the Flowage Act confers no privileges or powers whatever upon a corporation. Its primary purpose was, not to confer a privilege, but to relieve the individual who ran a little gristmill to grind the wheat and corn, or a little carding mill, to fit the wool for homespun use, from the perpetual annoyance and interference of the land-owner above. Its original purpose was to secure rights to the community, not to confer privileges upon anybody. The corporation and the individual have had, and have today, absolutely equal privileges under the Flowage Act; hence it confers no special privilege.

For the reasons herein given, I am inclined to answer questions 3 and 4 in the negative.

In the discussion of the foregoing answers I have made no attempt to elaborate the principles of law upon which my conclusions are based, but have deemed it essential to state in a general way only the well-established rules of law underlying the conclusions at which I have been able to arrive.

I concur in answer to question 5. It will also be observed that I concur in the answers to 1 and 2, with additional reasons.

Respectfully submitted,

A. M. SPEAR.

QUESTIONS SUBMITTED BY THE GOVERNOR OF MAINE TO THE JUSTICES OF THE SUPREME JUDICIAL COURT OF MAINE, JULY 9, 1919, WITH THE ANSWERS OF THE JUSTICES THEREON.

TO THE HONORABLE CARL E. MILLIKEN, GOVERNOR OF MAINE:

The undersigned, Justices of the Supreme Judicial Court, having considered the questions propounded by you under date of July 9, 1919, relating to the ratification of the Eighteenth Amendment to the Constitution of the United States and the necessity of submitting by referendum the ratifying resolve of the Legislature to the qualified voters of the State, respectfully submit the following answer.

The request for our opinion is accompanied by a statement of facts, from which it appears that the Sixty-fifth Congress of the United States on December 3rd, 1917, adopted a joint resolution proposing an amendment to the Constitution of the United States which amendment provides that after one year from the ratification thereof the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof, for beverage purposes is thereby prohibited.

This amendment, thus adopted by joint resolution of Congress, was proposed to the Legislature of Maine of 1919 for ratification and was ratified by a joint resolve of the Senate and House of Representatives, the concluding paragraph, after reciting all the preliminary steps, being of the following tenor:

"Therefore Resolved that the Legislature of the State of Maine hereby ratifies and adopts this proposed amendment to the Constitution of the United States. And that the Secretary of State of the State of Maine notify the Secretary of State of the United States of this action of the Legislature by forwarding to him an authenticated copy of this resolve."

Petitions apparently bearing the requisite number of signatures having been seasonably filed with the Secretary of State, requesting that this resolve be referred to the people under Amendment XXXI of Article 4 of the Constitution of Maine, known as the initiative and

referendum amendment, the question is now asked of the Justices whether this joint resolve of the Legislature of Maine, ratifying an amendment to the Federal Constitution proposed by and duly submitted for ratification by the Congress of the United States is subject to the provisions of amendment XXXI, and therefore must be referred to the people under the facts existing in this case.

Answer.

This question we answer in the negative. In our opinion this resolve does not come within the provisions of the initiative and referendum amendment, and cannot be referred to the people for adoption or rejection by them. The ratification of the proposed amendment to the Constitution of the United States was complete, final and conclusive so far as the State of Maine was concerned, when the Legislature passed this resolve.

Our reasons are as follows: The subject matter of the action of the Legislature under consideration is a proposed amendment to the Constitution of the United States, the proposal and ratification of which are wholly governed by the provisions of that Constitution. Those provisions are clear and explicit. They are as follows:

"Art. V. The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Convention in three-fourths thereof, as the one or the other mode may be proposed by the Congress. . . . ."

This article was a part of the original Constitution of 1789, and has remained unchanged to the present day.

It will be observed that there are two distinct stages in the process, the proposal and the ratification. The proposal may originate in either of two ways;

First, from Congress by joint resolution whenever two-thirds of both Houses deem it necessary;

Second, from the States whenever two-thirds of the Legislatures of the several States may request that a national constitutional con-

vention be called for that purpose, in which case Congress must call such a convention.

All the Federal amendments which have thus far been adopted have been proposed in compliance with the first method, that is by a joint resolution of the two Houses of Congress. No National Constitutional Convention has ever been called or held. Such proposed amendment is a matter within the sole control of the two Houses, and is independent of all executive action. The signature of the President is not necessary and it need not be presented to him for approval or veto. *Hollingsworth* v. *Virginia*, 3 Dall., 378; *State* v. *Dahl*, (N. D.) 34 L. R. A. 97. Nor is Congress, in proposing constitutional amendments, strictly speaking, acting in the exercise of ordinary legislative power. It is acting in behalf of and as the representative of the people of the United States under the power expressly conferred by Article V, before quoted. The people through their Constitution, might have designated some other body than the two Houses or a National Constitutional Convention, as the source of proposals. They might have given such power to the President or to the Cabinet or reserved it in themselves, but they expressly delegated it to Congress or to a Constitutional Convention.

As there are two methods of proposal, so there are two methods of ratification. Whether an amendment is proposed by joint resolution or by a National Constitutional Convention it must be ratified in one of two ways:

First, by the Legislature of three-fourths of the several States, or

Second, by Constitutional Conventions held in three-fourths thereof, and Congress is given the power to prescribe which mode of ratification shall be followed.

Hitherto, Congress has prescribed only the former method, and all amendments heretofore adopted have been ratified solely by the approving action of the Legislature in three-fourths of the States. That is the mode of ratification prescribed by Congress in case of the amendment now under consideration, and it was in pursuance of that prescribed mode that this ratifying resolve was passed by the Legislature of Maine.

Here again, the State Legislature in ratifying the amendment, as Congress in proposing it, is not, strictly speaking, acting in the discharge of legislative duties and functions as a law making body, but is acting in behalf of and as representative of the people as a ratifying

body under the power expressly conferred upon it by Article V. The people through their Constitution might have clothed the Senate alone, or the House alone, or the Governor's Council, or the Governor, with the power of ratification, or might have reserved that power to themselves to be exercised by popular vote. But they did not. They retained no power of ratification in themselves but conferred it completely upon the two Houses of the Legislature, that is the Legislative Assembly.

It is a familiar but none the less fundamental principle of Constitutional Law that the Constitution of the United States is a compact made by the people of the United States to govern themselves as to general objects in a certain manner and this organic law was ordained and established not by the States in their sovereign capacity but by the people of the United States. The preamble, "We the people" so states and such is the fact. *Chisholm* v. *State,* 2 Dall., 419. It is equally well settled that it was competent for the people to invest the Federal Government, through the Constitution, with all the powers which they might deem necessary or proper and to make those powers, so far as conferred, supreme; to prohibit the States from exercising any powers incompatible with the objects of the general compact, and to reserve in themselves those sovereign authorities which they did not choose to delegate either to Federal or State government. Martin V. Hunter's Lessee, 1 Wheat., 304. Whether a certain power has been conferred either expressly or by reasonable implication upon the National Government, or has been reserved to the States or to the people themselves must depend upon the construction of the language of the Constitution governing that particular subject matter.

It admits of no doubt that in the matter of amendment which is governed by Article V, the people divested themselves of all authority and conferred the power of proposal upon Congress or upon a National Constitutional Convention, and the power of ratification upon the State Legislatures or upon State Constitutional Conventions.

This view has the sanction not only of reason but of authority. Mr. Iredell, in the North Carolina Convention which ratified the Federal Constitution, in discussing this ratifying clause, said: "By referring this business to the Legislatures, expense would be saved and in general it may be presumed, they would speak the general sense of the people. It may however on some occasions be better to

consult an immediate delegation for that purpose. This is therefore left discretionary." 4 Elliot Deb., 176, 177. This discretion under the terms of Article V is to be exercised by Congress.

In *Dodge* v. *Woolsey*, 18 How., 331, 348, the Supreme Court of the United States, in emphasizing the supremacy of the constitution said: "It is supreme over the people of the United States, aggregately and in their separate sovereignities, because they have excluded themselves from any direct or immediate agency in making amendments to it, and have directed that amendments should be made representatively for them by the Congress of the United States when two-thirds of both Houses shall propose them, or when the Legislatures of two-thirds of the several States shall call a convention for proposing amendments; which in either case become valid to all intents and purposes, as a part of the Constitution when ratified by the Legislatures of three-fourths of the several States, or by Convention in three-fourths of them, as one or the other mode of ratification may be proposed by Congress. . . . . Now whether such a supremacy of the Constitution with its limitations in the particulars just mentioned and with the further restriction laid by the people upon themselves and for themselves as to the modes of amendment, be right or wrong politically, no one can deny that the Constitution is supreme as has been stated and that the statement is in exact conformity with it."

A well known writer on Constitutional Law after tracing the history and the scope of Article V concludes as follows:

"Whether an amendment is proposed by Congress or by a Convention, it is ratified or rejected by the representatives of the people either in Legislature or in convention, and not by the people voting on it directly. The people have no direct power either to propose an amendment or to ratify it after it is proposed and submitted." Watson Const., Vol. 2, page 1310.

It is interesting to note in this connection, as an historical fact demonstrating the attitude of the Federal Government, that according to their admitted and accepted practice if a State Legislature has once ratified a Federal amendment a subsequent Legislature has no power to rescind such ratification. Such rescission was attempted by Ohio and New Jersey with reference to the fourteenth amendment and by New York with reference to the fifteenth, but the proclamation of the Secretary of State for the United States was issued announcing

the final adoption of the amendments as a part of the Federal Constitution, notwithstanding the attempted rescission by subsequent Legislatures. The attempted rescission was ignored. Watson Const., Vol. 2, page 1315.

If a subsequent Legislature cannot rescind the ratification by a former Legislature, it would seem that much less could such ratification be rescinded by the subsequent vote of the people, especially in view of the fact that the people have unreservedly surrendered all authority over that subject matter.

It follows from what has been said, that even if the people of Maine by adopting in 1908 the initiative and referendum amendment to our State Constitution had attempted to assume or regain the power of ratification of proposed amendments to the Federal Constitution, by exercising a supervisory authority over the State Legislature in that respect, such attempt would have been futile. Their power over amendments had been completely and unreservedly lodged with the bodies designated by Article V, and so long as that article remains unmodified they have no power left in themselves either to propose or to ratify Federal amendments. The authority is elsewhere.

But the people by the adoption of the initiative and referendum amendment did not intend to assume or regain such power.

The purpose and scope of that amendment were fully considered and discussed in the case of *Moulton* v. *Scully*, 111 Maine, 428, 446, and it was there held that the design of the initiative and referendum was to make the lawmaking power of the Legislature not final but subject to the will of the people and to confer that power in the last analysis upon the people themselves. And the court adds:

"This, too, marks the limitation of the amendment. It applies only to legislation, to the making of laws, whether it be a public act, a private act or a resolve having the force of law. This is shown clearly and conclusively by the language of section 2 of part third of Article IV under the general head of 'legislative power.' 'Every bill or resolution *having the force of law* to which the concurrence of both houses may be necessary . . . . which shall have passed both houses, shall be presented to the Governor, and if he approve he shall sign it' etc. The referendum applies and was intended to apply only to acts or resolves of this class, to every bill or resolution having the force of law, that is to what are commonly known as legislative

acts and resolves, which are passed by both branches, are usually signed by the Governor and are embodied in the Legislative Acts and Resolves as printed and published. And the words 'No act or joint resolution of the Legislature' etc. before quoted, in the referendum amendment must be construed in the light of the context, considering all the sections, and parts and articles together as meaning 'no act or joint resolution of the Legislature having the force of law.' This is the simple and plain interpretation of simple and plain language." In the application of that rule of construction this court held in that case that a joint address to the Governor on the part of both branches of the Legislature calling for the removal of a public officer was beyond the scope of and unaffected by the referendum. The same rule applies here with equal force. This resolution, ratifying the proposed Constitutional amendment was neither a public act, a private act nor a resolve having the force of law. It was in no sense legislation. It was not signed by the Governor, nor could it have been vetoed by him. It was simply the ratifying act of the particular body designated by Article V of the Federal Constitution to perform that particular act. The principles laid down in *Moulton* v. *Scully* are decisive of this point.

The Supereme Court of Oregon in a case decided on April 29, 1919, passed upon this branch of the question where this same Federal amendment was involved, and held that the term "any act of the legislative assembly," made the subject of referendum by the amended Constitution of Oregon, did not include a joint resolution, but only proposed laws. *Herbring* v. *Brown*, 180 Pac. Rep., 328.

In conclusion it may be said that not only have all previous amendments to the Federal Constitution been ratified by two-thirds of the Legislatures of the several States, but this particular Eighteenth Amendment, commonly spoken of as the prohibitory amendment, has already been promulgated by Federal authorities as having become a part of the Constitution through this same avenue.

The State Department of the United States, under date of January 29, 1919, issued its proclamation announcing that this Eighteenth amendment had been duly ratified by the Legislatures of three-fourths of the States including by name the State of Maine, and therefore certifying, in pursuance of U. S. Rev. St. Section 205, "that the amendment aforesaid has become valid to all intents and

purposes as a part of the Constitution of the United States." See appendix to Part 2 of U. S. Stat. 3d Session, Sixty-fifth Congress, 1918, 1919.

The construction which we adopt is evidently the same which the Federal authorities have placed upon the Federal Constitution. With them the chapter is regarded as closed.

For the reasons hereinbefore set forth we answer the propounded question in the negative.

We have the honor to remain,

Very respectfully,

(Signed)

LESLIE C. CORNISH,
ALBERT M. SPEAR,
GEORGE M. HANSON,
WARREN C. PHILBROOK,
CHARLES J. DUNN,
JOHN A. MORRILL,
SCOTT WILSON,
LUERE B. DEASY.

To the Honorable Carl E. Milliken, Governor of Maine:

The undersigned Justices of the Supreme Judicial Court having considered the question propounded by you under date of July 9, 1919, concerning the necessity of submitting by referendum to the qualified voters of the State a certain Act of the Legislature of Maine entitled, "An Act Granting to Women the Right to Vote for Presidential Electors," respectfully submit the following answer.

The request contains certain recitals of fact, the substance of which is that the above statute was passed by the concurrent action of both branches of the Legislature and was duly approved by the Governor; that the Legislature adjourned without day on April 4, 1919, and within ninety days thereafter, petitions apparently bearing the requisite number of signatures, were filed with the Secretary of State, requesting that this act be referred to the people under amendment XXXI of Article IV of the Constitution of Maine, known as the initiative and referendum amendment.

Question

"Is the effect of the Act of the Legislature of Maine of 1919, entitled "An Act Granting to Women the Right to Vote for Presidential Electors," approved by the Governor on March twenty eighth, 1919, suspended by valid written petitions of not less than ten thousand electors, addressed to the Governor and filed in the office of the Secretary of State within ninety days after the recess of the Legislature, requesting that it be referred to the people, and should the Act be referred to the people as provided in Article IV of the Constitution of Maine, as amended by Amendment XXXI adopted September 14, 1908?"

Answer.

This question we answer in the affirmative. In our opinion this legislative act comes within the provisions of the initiative and referendum amendment and should be referred to the people for adoption or rejection by them.

To solve this problem it is necessary to pursue the same general course as in deciding the question concerning the prohibitory amend-

ment to the Federal Constitution, by an examination first of the provisions and requirements of the Constitution of the United States relating to this subject matter, and second, of the provisions and requirements of the Constitution of Maine.

The first question that naturally arises is this, where under the Federal Constitution is lodged the power of determining in what manner Presidential Electors shall be chosen and of prescribing the qualifications of the voters therefor?

It is competent for the people of the United States in creating the compact known as the Federal Constitution to lodge this power wherever they saw fit. It was a matter wholly within their discretion. It is a well known historical fact that there was a long and spirited debate in the Constitutional Convention over this very question, that is, the method to be adopted in electing the Chief Magistrate of the Nation. Many plans were submitted, such as election by Congress, by the people at large, by the Chief Executive of the several States, and by electors appointed by the Legislatures. 1 Elliott Deb., 208, 211, 217, 262.

Finally the following provisions, which were presented by Gouverneur Morris for the Special Committee, were adopted by the Convention after much discussion and were incorporated in Article 11 of the perfected instrument, where they stand unchanged today, viz:

"Each State shall appoint, in such manner as the Legislature thereof may direct, a number of electors equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress" &c., Article II, Section 2.

"The Congress may determine the time of choosing the electors and the day on which they shall give their votes; which day shall be the same throughout the United States." Article II, Section 4.

These two sections comprise all the provisions of the Federal Constitution applicable to the point in issue here. Under Section 4, Congress is given the power to determine the date of holding presidential elections and of the meeting of the electors, but that marks the limit of its constitutional power. In re Green, 134, U. S., 377. All other powers in connection with this subject are expressly reserved to the States. *McPherson* v. *Blaker*, 146 U. S., 1; *Pope* v. *Williams*, 193 U. S., 621.

In the case last cited, the Supreme Court of the United States say: "The privilege to vote in a State is within the jurisdiction of the State itself, to be exercised as the State may direct and upon such

terms as to it may seem proper, provided of course no discrimination is made between individuals in violation of the Federal Constitution."

The word "appoint" as employed in Section 2 has been interpreted to be sufficiently comprehensive to include the result of a popular election and to convey the broadest powers of determination. *McPherson* v. *Blacker*, 146 U. S., 1, 27.

The language of Section 2 is clear and unambiguous. It admits of no doubt as to where the constitutional power of appointment is vested, namely in the several States. "Each State shall appoint in such manner as the Legislature thereof may direct," are the significant words of the section, and their plain meaning is that each State is thereby clothed with the absolute power to appoint electors in such manner as it may see fit, without any interference or control on the part of the Federal Government except of course in case of attempted discrimination as to race, color or previous condition of servitude under the fifteenth amendment. The clause, "in such manner as the Legislature thereof may direct," means simply that that State shall give expression to its will, as it must of necessity, through its lawmaking body, the Legislature. The will of the State in this respect must be voiced in legislative acts or resolves which shall prescribe in detail the manner of choosing electors, the qualifications of voters therefor and the proceedings on the part of the electors when chosen.

But these acts and resolves must be passed and become effective in accordance with and in subjection to the Constitution of the State, like all other acts and resolves having the force of law. The Legislature was not given in this respect any superiority over or independence from the organic law of the State in force at the time when a given law is passed. Nor was it designated by the Federal Constitution as a mere agency or representative of the people to perform a certain act, as it was under Article V in ratifying a Federal Amendment, a point more fully discussed in the answer to the question concerning the Federal prohibitory amendment. It is simply the ordinary instrumentality of the State, the legislative branch of the government, the lawmaking power, to put into words the will of the State in connection with the choice of Presidential Electors. The distinction between the function and power of the Legislature in the case under consideration and its function and power as a particular body designated by the Federal Constitution to ratify or reject a Federal Amendment is sharp and clear and must be borne in mind.

It follows therefore that under the provisions of the Federal Constitution the State by its legislative direction may establish such a method of choosing its Presidential Electors as it may see fit, and may change that method from time to time as it may deem advisable, but the legislative acts both of establishment and of change must always be subject to the provisions of the Constitution of the State in force at the time such acts are passed and can be valid and effective only when enacted in compliance therewith.

In the exercise of the power thus conferred by the Federal Constitution various methods of electing Presidential Electors were adopted in the early days by the several States as set forth in detail in *McPherson* v. *Blacker*, 146 U. S., at page 29 to 35.

In our own State the same holds true to a certain extent. Prior to 1847 the legislative direction expressed itself in the form of a joint resolution passed every fourth year at the session immediately preceding a presidential election. These resolves had the force of law and with the exception of those of 1820 and 1824 they were uniformly presented to and were approved by the Governor.

Prior to 1840 the district prevailed in whole or in part. Res. 1820, Chap. 19; 1824, Chap. 76; 1828, Chap. 23; 1832, Chap. 65; 1836, Chap. 9. In 1840 (Res., Chap. 55) ten electors at large were provided for, and since that time the electors have been chosen at large upon a single ballot. This method was followed in 1844. Res. 1844, Chap. 295.

Under the resolves of 1820, 1824 and 1828, the qualifications of voters for representatives and senators to the Legislature were made the qualifications of voters for Presidential Electors. By the resolves of 1832 and 1836, the qualifications of voters for representatives alone were made the test, and by the resolve of 1840 this was changed to qualifications of voters for senators alone.

The Legislature of 1847 directed for the first time by a general act instead of by a quadrennial resolve the manner in which the voters should proceed in the election of Presidential Electors, Public Laws, 1847, Chap. 26, and, following the resolves of 1840 and 1844, prescribed the qualified voters therefor to be, "The people of this State qualified to vote for senators in its legislature." This qualification established by the Act of 1847 has been preserved in all the subsequent revisions. R. S., 1857, Chap. 4, Sec. 79; R. S., 1871, Chap. 4, Sec. 78; R. S. 1883, Chap. 4, Sec. 26; R. S. 1903, Chap. 6, Sec. 123; R. S., 1916, Chap. 7, Sec. 57; and such was the law of this State when the Act in question, Chap. 120 of the Public Laws of 1919,

was passed. The qualification of voters for senators, as well as for representatives is fixed by the Constitution of Maine as "Every male citizen of the United States of the age of twenty-one years and upwards" &c. Article II, Section 1. Therefore prior to the Act of 1919 only male citizens could vote for Presidential Electors. It is clear that this Act, extending this privilege to women, constitutes a change in the method of electing Presidential Electors and is a virtual amendment of R. S., 1916, Chap. 7, Sec. 57, not in express terms, but by necessary implication.

In other words, this State during the century of its existence prior to 1919, had by appropriate legislative act or resolve directed that only male citizens were qualified to vote for Presidential Electors. By the Act of 1919 it has attempted to change that direction by extending the privilege of suffrage, so far as Presidential Electors are concerned, to women. Had this act been passed prior to the adoption of the initiative and referendum amendment in 1908, it would have become effective, so far as legal enactment is concerned, without being referred to the people, but now under Amendment XXXI such reference must be had if the necessary steps therefor are taken.

The language of that amendment is as follows:

"No act or joint resolution of the legislature, except such orders or resolutions as pertain solely to facilitating the performance of the business of the legislature, of either branch thereof, or of any committee or officer thereof, or appropriate money therefor, or for the payment of salaries fixed by law, shall take effect until ninety days after the recess of the legislature passing it unless in case of emergency" &c.

None of the exceptions applies here. Section 17 provides that upon written petition of not less than ten thousand electors filed in the office of the Secretary of State within ninety days after the recess of the Legislature requesting that "one or more acts, bills, resolves or resolutions, or part or parts thereof passed by the legislature, not then in effect by reason of the provisions of the preceding section be referred to the people, such acts, bills, resolves or resolutions shall not take effect until thirty days after the Governor shall have announced by public proclamation that the same have been ratified by a majority of the electors voting thereon at a general or special election."

It is evident that the Act in question falls within the terms and scope of this amendment. This is an ordinary legislative act, a bill in the form prescribed by amendment XXXI. It is entitled, "An

Act Granting" &c. The enacting clause is, "Be it enacted by the People of the State of Maine." It was presented to the Governor for his approval and was signed by him, as required by Section 2 of Part Third of Article IV of the Constitution of Maine, viz: "Every bill or resolution having the force of law, to which the concurrence of both houses may be necessary . . . which shall have passed both houses, shall be presented to the Governor, and if he approves he shall sign it" &c. It has been published as Chapter 120 of Public Laws of 1919.

This is not a mere joint resolution addressed to the Governor asking for the removal of a public official, as in *Moulton* v. *Scully*, 111 Maine, 428, nor is it a joint resolution ratifying an amendment to the Federal Constitution, as in the other question propounded to us herewith, in neither of which cases did the referendum attach because neither resolution had the force of law. This is the public statute of a law-making body, and is as fully within the control of the referendum amendment as is any other of the 239 public acts passed at the last session of the Legislature, excepting of course emergency acts. It is shielded from the jurisdiction of that referendum neither by the State nor by the Federal Constitution. In short, the State, through its Legislature, has taken merely the first step toward effecting a change in the appointment of Presidential Electors, but because of the petitions filed, it must await the second step which is the vote of the people. The legislative attempt in this case cannot be fully effective until "thirty days after the governor shall have announced by public proclamation that the same has been ratified by a majority of the electors voting thereon at a general or special election."

It follows that for the reasons already stated this question is answered in the affirmative.

Very respectfully,

LESLIE C. CORNISH,
ALBERT M. SPEAR,
GEORGE M. HANSON,
WARREN C. PHILBROOK,
CHARLES J. DUNN,
JOHN A. MORRILL,
SCOTT WILSON,
LUERE B. DEASY.

ARNO W. KING

IN MEMORIAM

SERVICES AND EXERCISES BEFORE THE LAW COURT, AT BANGOR, JULY 3, 1919, IN MEMORY OF

HONORABLE ARNO W. KING,

LATE JUSTICE OF THE SUPREME JUDICIAL COURT

Born August 2, 1855. Died July 21, 1918.

SITTING: CORNISH, C. J., SPEAR, HANSON, PHILBROOK, DUNN, MORRILL, WILSON, DEASY, JJ.

Resolutions of the Hancock County Bar, prepared by Hon. GEORGE E. GOOGINS and Hon. FULTON J. REDMAN, Committee on Resolutions appointed by Hon. HANNIBAL E. HAMLIN, President of the Hancock County Bar Association and presented by MR. GOOGINS as follows:

MAY IT PLEASE THE COURT:

It is with feelings of profound personal sorrow that I rise to make formal announcement at the Bar of this court of the death of ARNO WARREN KING, late Associate Justice of the Supreme Judicial Court of Maine, at his home in Ellsworth on July 21st 1918.

In behalf of the Hancock Bar Association I here present the resolutions prepared by the Committee, commemorative of the life and public services of Justice KING, who was an honored member of our Bar Association.

RESOLUTIONS

Resolved: That the members of the Hancock Bar Association desire to express their appreciation of the character and public services of ARNO WARREN KING, for many years a member of their association and of this court, and to place upon its records their loving tribute to his memory, that the same may be made permanent.

Resolved: That we admired and trusted him as a friend and brother attorney; honored him as a judge, and respected him as a man. He was kind. He was patient. His courteous and gracious manner naturally drew about him a host of admiring friends to whom he was ever loyal and true. He was of upright character, a lover of truth and justice always, and an uncompromising opponent of sham and falsehood. His nature was genial and sympathetic, and he was beloved for his great charity of heart. His fine sense of honor, strict integrity and impartial judgments made him an ideal magistrate. He was learned in the law, able in decision, and keen in analysis as his written opinions left in the reports of this court abundantly show. As a lawyer at the Bar he was a skillful pleader and advocate and one of the leaders of his profession. His diligence, courage, learning and fairness were justly and deservedly rewarded by the excellent reputation he bore as a practitioner at the Bar and as a magistrate of this court. He will be deeply and sincerely mourned by his associates on the Bench and his brethren of the Bar; and his memory will be cherished by all his friends, neighbors and fellow-citizens.

Resolved: That these resolutions be presented to the court with the request that they be entered upon its records and that a copy thereof be transmitted to his widow, who survives him.

GEORGE E. GOOGINS
FULTON J. REDMAN
Committee on Resolutions.

Justice KING was born in Lamoine, Hancock County, August 2, 1855, the son of the late Warren and Mary King. He attended the public schools of that town; fitted for college at Coburn Classical Institute, in Waterville, and entered Colby College with the class of '83. He did not complete his college course as he soon left Colby

to begin the study of law. He was graduated from the Boston University Law School, and admitted to the Bar in Hancock County, at the October term, 1883. He began practice at Ellsworth, and in 1884 was taken into partnership with Honorable Andrew P. Wiswell, late chief justice of this court, the firm becoming Wiswell and King. For a time Congressman John A. Peters was a member of the firm; but as Mr. Peters soon withdrew, and Mr. Wiswell in 1893 being appointed to the Bench of the Supreme Court, Brother KING was left to continue practice by himself until his own appointment to the Bench, June 28th 1907.

It was soon after his appointment as an associate justice of this court that Colby testified to her high regard for Judge KING by conferring upon him the degree of Doctor of Laws. By his death the college loses a loyal friend and one of her most distinguished and valued sons.

Judge KING will be greatly missed, not only by the State and court both of which he faithfully and loyally served, but by the Hancock County Bar, where for more than twenty years he was actively engaged in the practice of law; his honorable bearing, great learning, ability and industry placing him in the front rank of the legal profession in this State.

In his home city, Ellsworth, he continued to the end to occupy a high place in the esteem of his fellow-citizens who regarded him as one of their most enterprising and public-spirited citizens, and they will mourn his loss deeply. They appreciated his value to the city both as a lawyer and a business man. Judge KING was loyally devoted to the industrial welfare of Ellsworth and interested in the social and intellectual improvement of her people. He held many positions of trust and honor, having been president of one of the city's banks and a director in another; president of the Local Board of Trade and of the Ellsworth Loan and Building Association. In the Masonic order he was active and enjoyed high honors, holding at one time the office of grand commander of the Grand Commandery of Maine, the highest Masonic office in the State.

I mention these things not for the purpose of magnifying but of showing his value as a citizen of the community and State he honored. In his life we find the evidence of a great personality.

In offering my tribute to his memory, I feel that words are inadequate to express the sorrow of the heart. I am proud to say that Judge KING was my friend. The news of his death came to each one of us as a personal bereavement.

"'Twas but just now he went away;
I have not since had time to shed a tear;
And yet the distance does the same appear
As if he had been a thousand years from me.
Time takes no measure in Eternity."

"The sorrow for the dead," says Washington Irving, "is the only sorrow from which we refuse to be divorced." Our bereavement for our deceased friend and brother is measured by our love for him. It is expressive of our admiration for his many kindly acts and his manly virtues.

"His life was gentle; and the elements
So mixed in him, that nature might stand up
And say to all the world,—This was a man."

Now that he is gone we refuse to be divorced from our sorrow. Our long and friendly associations with him are deep in our hearts, and we shall ever cherish his memory. Although his seat on the Bench is now filled by another, the place he so long has occupied in our hearts will always be reserved for him. The remembrance of him will brighten and sweeten our lives, as the perfume of the flower that has faded and fallen still pervades and scents the air around it.

The pleasures of his companionship which we, his associates and brothers, so long shared while he lived and labored here among us, have left their lasting impress upon each of our hearts, and their memory will lighten our burdens and brighten our pathway as we toil up the rugged steeps of life. We shall ever be inspired to greater effort by the happy recollections which the mention of his name recalls. If it be true that the tomb is but the gateway to a larger and nobler life beyond, we may well believe that our Brother KING is still engaged in shedding light and happiness upon those around him. That was his mission here, and—

"The light he leaves behind him lies
Upon the paths of men."

Judge KING belonged to what we older members of the Bar are pleased to call the "younger set" of justices. But, in the swiftness of time's changes the young are sometimes made old in a day; and had he lived he would now stand second in the order of continuous service. In my thirty years at the Bar I have seen the personnel of this Bench completely changed. Only one of the justices who graced it in 1889, when I was admitted,—Judge EMERY—is now living. WALTON, DANFORTH, VIRGIN, PETERS, LIBBEY, FOSTER, and HASKELL,—all are gone. We miss the old, familiar faces, just as we miss those who have but recently departed—SAVAGE, HALEY, MADIGAN and KING. It is sad to contemplate that in the last two years this court has lost four Associate Justices.

The judicial services of Justice KING, covering a period of eleven years, will leave a lasting impress upon the jurisprudence of our State. As a lawyer he was ever a safe counsellor and a good advocate—one in whom both clients and members of the Bar could place the fullest confidence. He was a wise and upright judge as his record in this court will show. Ellsworth has produced a galaxy of distinguished men who have helped to make the State of Maine illustrious,—brilliant lawyers, judges, and statesmen—but not one who was the superior of ARNO WARREN KING in his love of justice or in his high ideals. His instincts were all true to the nobler things of life. He was a man among men. When that is said eulogy is exhausted.

The life of Judge KING should prove an inspiration to every young lawyer who is ambitious to make the most of life and become an honor to the legal profession. I think it can be truly said of him that the keynote of his success was his desire to do right. His strict adherence to principle was the foundation upon which he built the pedestal of his professional career and which grew in strength and grandeur as the years advanced. He possessed a well-trained legal mind, well-stored with legal knowledge; and guided by a true conscience he was ever sure of his mark. He rose rapidly in his profession, gaining in stride as his mind matured and his ability became appreciated by those around him, until success promoted him from a pleader in the courts to an expounder of the law in the highest judicial tribunal of our State. That he came to this Bench well-equipped to discharge its grave and important duties is amply

shown by his first written opinions, reported in the 103rd Maine Report. He gave to the court and State eleven years of industrious, efficient service, thus earning for himself the benediction: "Well done thou good and faithful servant."

At nisi prius Justice KING was always welcome in every county where he went to hold court, but in none was he ever more welcome than in his own County of Hancock. There the old proverb about a prophet not being honored in his own country met with a firm denial from all who knew him. We, the members of the Hancock Bar, who were ever near him and felt the influence of his noble character, can testify to the very high esteem in which he was held by the people of his home county. We saw him often in court and in his office at the Court House, in vacation; and we each grew to know and love him as the years rolled swiftly by and as the full value of his companionship dawned upon us. He usually presided at the October term in his home city, and his unconscious dignity, patience, and cordial bearing inspired confidence and trust in all who had business in his court. Here all the best qualities of his kindly nature were brought into action in furtherance of that justice which leaves no trace of judicial wrong in its trail.

His last days on earth, severe and painful though they must have been to him, valiantly striving to overcome the anguish of an incurable disease, were borne with the same patience and fortitude as had ever characterized him in active life. And when, at last, he received the summons to go hence, surrounded by those who were near and dear to him, we may well believe that, as he crossed the outer threshold of this earthly castle to enter the larger life beyond, there came no mournful note of adieu from him,—only a gentle wave of the hand and a smile whose light still illumines the home he loved.

We cannot think of him as dead; so recent was his departure that we can hardly realize that he is gone. We can almost imagine that he is about to return from yonder chamber and resume his accustomed place on the Bench. But, alas, the step from the chamber of death into the presence of God cannot be thus retraced. The places that once knew our brother will know him no more forever.

"Blessed are they that mourn, for they shall be comforted."

I love to think of our friend as I occasionally saw him on the Bench of this court, clad in the robes of his office; his genial smile betimes shedding its light upon those around him. The soft, resonant tones of his voice still echo within these walls; and the warm handclasp he gave us, his cordial greeting and kind words cheerfully spoken, will remain a happy memory in our hearts. The pleasure of living in the presence of a genial soul, even for one fleeting moment, is one of the supreme joys of mortal existence. I shall ever recall my last social chat with Brother KING as one of the happiest moments of my life. But little did I dream that the end of my friend was so near. So strong and vigorous he appeared to be, so full of life and boyish zest he was, and so sure of long tenure of office he had a right to feel, that I never associated him with thoughts of death. Yet it but illustrates the truth which is as old as humanity, that—

"The boast of heraldry, the pomp of power,
All that beauty, all that wealth e'er gave,
Await alike the inevitable hour,
The paths of glory lead but to the grave."

And now as I look back in memory to that last meeting with my friend, I am reminded of the lines of the poem—Man's Mortality:

"E'en such is man;—whose thread is spun,
Drawn out and cut, and so is done.—
The rose withers, the blossom blasteth,
The flower fades, the morning hasteth,
The sun sets, the shadow flies,
The gourd consumes,—and man he dies!"

The mortal remains of Justice KING are interred in the Woodbine Cemetery at Ellsworth, but we believe that his spirit lives and will grow and radiate love and happiness beyond, as it did here, only in wider circles.

"Dust as we are, the immortal spirit grows
Like the harmony in music;"

To live in grateful remembrance in some human heart long after our bodies are dust and our spirits have passed to the great beyond, is the rich reward that comes to man for his good deeds done here in the flesh. Living, Judge KING exemplified many of the nobler traits of

human character. Dead, he must still be performing the work of love and justice which he so diligently and faithfully performed here; but with larger opportunities and a wider vision. He has set the standard high; let us try to live up to it. Let us emulate his noble example and cherish the thought that the world is the better and more enchanting because men of the type of ARNO WARREN KING have lived to honor and glorify it.

Remarks of Hon. FULTON J. REDMAN of Hancock County Bar:

Science tells us that every sound wave leaves its impress on the physical world. Every wave, every ripple of the sea helps to shape the contour of the shore which it touches. Likewise, our own lives are shaped and moulded by the lives of those with whom we come in contact.

I had the good fortune to be born and to spend a part of my boyhood down in the county where Judge KING was born and spent the years of his life. In later years it has also been my good fortune to spend not a little of the time in that same community where he was so long a leader. I will mention just one thing among the many that brought him close to me.

Aware as he was in very recent years that the one by whose side it is my rare privilege to stand in sickness and in health, was at the time regaining her strength in the rugged State of Maine, not once did I even casually meet Judge KING, no matter how much might be on his mind or how burdened with the cares of his own duties at the moment, without an inquiry from him so tender, so sincere, so full of hope that I know my cares were his cares, that my hopes were his hopes, that what was in my heart was in his heart.

Delicacy should perhaps forbid me to bring my own fireside into these remarks. But I say this so that if ARNO WARREN KING, my friend and preceptor, is at this moment within the hearing of my voice, he will know that his fine feeling and kindliness, like the gentle ripples on the shore, have left their impress upon my nature; that the fullness of his soul has helped to shape the desire of a younger man to be thoughtful of the cares of others.

There is another element in Judge KING'S nature that has left its impress on my own.

I refer to his rugged conservatism.

No man was stronger in his desire that the world should ever be a better world; but he had little of the dreamer or the visionaire in his nature. He was an idealist; but he was a constructive and a very practical idealist. He realized that the greatest progress in the world comes from the slow, orderly, dignified processes of evolution and not from the destructive, tearing-down forces so alluring to radical natures, as a cure-all for the woes of mankind. He realized that the evils which exist about us are not due, as some men think, to our form of government or to imperfections in our system of jurisprudence, but are due to the frailities of man and to the perversity of human nature. He worked unceasingly as a jurist to make our system of jurisprudence function in the manner intended by its founders.

He not only gave his oath to adhere to the Constitution of the United States, he *believed in* that Constitution and in the principles that it sets forth. This is a subtle distinction sometimes.

I often have the feeling that the courts of America, in the future even more than in the past, will be called upon to save that Constitution from destruction, and with it the principles of government and the system of jurisprudence, which constitute the greatest heritage that the American people today possess.

There is too often a temptation on the part of legislative and executive branches of government to weigh action in terms of expediency, to weigh action over against the ballot rather than on the even scales of justice. This is one of the pitfalls of democracy. It is one of the pitfalls of majority rule.

The courts of America may some day have to occupy the front line trenches as defenders of truth, justice and equity and the great underlying tenets of free government that have been handed down to us by our forebears, against the onslaught of foreign institution, repulsive to free men and destructive to the principles of individual liberty that we cherish.

If the State of Maine is ever put to the test, I hope that it will remember the life on the Bench of the distinguished trial judge whose memory we today honor.

Judge KING was a man who owned property. Before going on the Bench he had engaged in business enterprise and had practiced his profession successfully. He was a man of means. He was an officer

of a successful bank. He had been and still was a director in financial institutions. He was the type of man that Karl Marx and preachers of class-hatred, past and present, would have said belonged to the capitalistic class and consequently would be utterly incapable of understanding, appreciating the needs of or meting out justice to the masses, the down-trodden or the weak.

Yet did ever a man sit on the Bench in any court of justice who was more painstaking, more careful, harder working as a judge, that the humble and the weak and the oppressed might receive their full measure of justice? He worked his life away in painstaking effort that rich and poor, proud and humble, the weak and the strong might receive justice at his hands. And why did he hasten the end of his too short career on the Bench by this painstaking effort? Because he had the spirit of America in his veins; the institutions of America were graven on his soul.

The creators of the Soviet do not understand our institutions. There are aliens in our midst today who have never caught the spirit of America. The task of the living today is to make this element realize that here in America in our halls of justice is to be found a type of jurist that Judge KING so nobly personified, who loves truth and justice and honor better than riches, better than power, better than life itself.

Judge KING has left his influence upon the State of Maine; he has left his impress upon this distinguished court, upon the Bar and upon the lives of men in every walk of life with whom he came in contact.

He gave to the cause of justice life itself. In his passing the world is poorer and Heaven has gained a friend. "Large was his bounty and his soul sincere."

Remarks of Hon. LUCILIUS A. EMERY, former Chief Justice of the Supreme Judicial Court of Maine:

MAY IT PLEASE YOUR HONORS:

I gratefully accept the invitation of the Bar to express here my appreciation of the character of the late Justice KING. My acquaintance with him began when he was a student of law in my home town of Ellsworth and in the office of Hon. Andrew P. Wiswell afterward a chief justice of this court. I remember him then as a diligent

student and an observing attendant at the sessions of the court. It was a pleasant coincidence that he and Mr. Justice DEASY, who had been a student in my own office, were admitted to the Bar of Hancock County at the same time in October, 1883. *Par nobile fratrum.* That coincidence interested me the more in that at the same term at which they were admitted I relinquished the arduous labors of the practicing lawyer to take up the important but less exhausting duties of a justice of this court.

It was, therefore, only from the view-point of the judge that I observed the characteristics of Justice KING as a practicing lawyer. I soon came to welcome his appearance in a case, whether it was to be tried to the jury or to the court. While faithful to the uttermost to the cause of his client, he sought to establish it honorably upon its merits. His opening statements were lucid in language and temperate in tone, in the belief that "An honest tale speeds best being plainly told." He rarely, if ever, made the too common mistake of stating his case more strongly than the evidence would warrant. Where there was a difference, his evidence was usually stronger than his statement and hence the more impressive. His closing arguments were what such arguments should be, a full, fair and lucid summing up of the evidence in support of his case. He realized that facts are more convincing than words, and that fair citation of evidence is more effective than eloquence.

He did not seek to mislead court, jury or witness, or to set traps for the other side; nor did he "play to the galleries." Though firm, he was fair and courteous. He showed no vexation at an adverse ruling, but respectfully saved an exception and quietly went on. While cordial in manner he was not effusive, but bore himself modestly and with quiet dignity. In the twenty or more years of his practice before me I do not recall an instance of an altercation, or even bickering, between him and the opposing counsel, nor of any unfairness or discourtesy toward any person, witness or other. To the court, while not obsequious, he was always respectful and, on proper occasions, deferential.

Such was his conduct and demeanor that he inspired respect and trust. Confidence in his ability, wisdom, integrity and honor was felt by all, by judges, jurors, his fellow lawyers and his fellow citizens. These qualities in time received due recognition. After nearly twenty-five years of honorable and useful service at the Bar, he was called to duty and service on the Bench. His appointment was

especially gratifying to me who knew him so well. His commission was read at the session of the Law Court in Portland in 1907, and as the then chief justice it was my good fortune to induct him with a hearty welcome from us all to his place upon the Bench; an incident it is a pleasure to remember.

His eminent judicial qualities and faithful service as a justice of the court will be so faithfully and fittingly described by the distinguished chief justice now presiding, I will leave that grateful task to him.

But our deceased friend whom we honor today was more than a lawyer or a judge, and I am impelled to speak some words of him as a man apart from the lawyer and the judge. I think as a man he was as near as any one I ever knew, if not nearer, to the Greek ideal, a man of balanced mind and harmonious spirit. Where there are no deep valleys, there are no mountain peaks; where there is a general uniformity of excellence, the only conspicuous excellence is that uniformity. Hence I will not essay to single out any particular traits in his character. He was a good husband and father, a good neighbor and friend, and a good citizen mindful of the duties of citizenship. He was cheerfully helpful in all good works, in the church, in charitable organizations, and in all plans for social betterment. The memory of his good works and of his kindness of heart will long be cherished by his fellow townsmen and by all who knew him as well as they.

In conclusion I venture to sound a personal note. I think that for the last dozen years of his life I knew him as intimately as did anyone outside of his family circle, and outside of that circle no one has more personal cause to mourn his death. After he was called to the Bench, he occupied chambers next my own in the Ellsworth Court House and many hours did we spend together in pleasant converse upon questions of law and procedure and on many other subjects of mutual interest. His intelligence, clear-sightedness and catholicity made those hours, hours of pleasure and profit. Our many such conversations brought us very near together in mind and heart. He further showed such warm sympathy and loyal friendship, I came to love him as "my soul's brother."

Justice KING was a good lawyer, a good judge, a good citizen, a good man. It is fitting that memory of him as such should be perpetuated by the record of these exercises. I wish him also to be remembered as the lovable, loyal friend, the chivalric friend, "without fear and without reproach."

Response for the Court by Chief Justice LESLIE C. CORNISH.

GENTLEMEN OF THE BAR:

Four times within the space of a little more than a twelvemonth, the uninvited and unwelcome guest invaded the precincts of this court and served his peremptory summons upon four members of our Bench. In June, 1917, Chief Justice SAVAGE was suddenly taken from us, and then followed in steady succession, Justice MADIGAN in January, 1918, Justice HALEY in February, 1918, and Justice KING on July 21, 1918. Such mortality had never been known in the judicial history of this State. May it never be repeated. The Bench was not merely decimated; it was halved. Therefore it is that we the friends, companions and associates of Justice KING, the last to fall, are met on this beautiful June day, in this court room so often filled by his presence, at this Law term which he loved to attend, to pay to his memory the tribute which a noble, useful and blameless life had won and to place on the enduring records of this court a portrayal of his life and character as a source of inspiration to coming generations.

"Let us now praise famous men;
* * * * * * * *
All these were honored in their generations,
And were the glory of their times;
For the memorial of virtue is immortal;
Because it is known with God and with men.
When it is present, men take example of it;
And when it is gone they desire it."

Thus sang the Apochraphal writer long ago and although two thousand years and more have intervened, still is it true that the "memorial of virtue is immortal." Still is it true that men take example of it while here and remember it with tender longing when it has passed beyond. In this spirit are we gathered here today, Bench and Bar, uniting in a sweet memorial service for one who had maintained the best traditions of both and whose life had enriched and ennobled not only our profession, but human life and human interests wherever his fine personality had touched them.

You who were his associates at the Bar, his neighbors, in all that that homely word implies, his companions, friends of a lifetime have portrayed him as you knew him and as he was, and have drawn a splendid picture of a splendid man. Your distinguished ex-chief justice has added to that sketch his discriminating estimate of him as a magistrate, an estimate derived from long association on the Bench and from a view in perspective after retirement. There would seem to be little left for the court save to express to you our grateful thanks for your appreciative words and our complete concurrence in all that has been offered.

But the heart will not permit this, and will not rest content, unless the court shall add its word of esteem, of affection and of farewell.

ARNO W. KING was a son of Hancock County and lived his life within her borders. He was born in that part of Trenton now known as Lamoine on August 2, 1855, and the environment of our rugged Maine coast may have had its part in developing the sturdy boy into the virile and self-reliant man. Wholly through the fruits of his industry on the farm and in the shipyard, he fitted for college at Coburn Classical Institute and entered Colby College with the class of 1883, a class that recently lost another distinguished member in the great parliamentarian Asher C. Hinds. He did not, however, complete his college course, a fact that he always regretted, because the pressure of financial burdens and his arrival at an age when many others were already established in life, led him to give up his college work in its midst, and enter upon his professional studies, first with Andrew P. Wiswell at Ellsworth and then at the Boston University Law School. He was admitted to the Hancock Bar at the age of 28, in 1883, the same year that would have seen his graduation from college. In January, 1884 he formed a partnership with his former instructor and continued in active practice with him until Judge Wiswell's appointment to the Supreme Bench in April, 1893. The removal of the senior partner, as always, threw added responsibility upon the junior and served to test his metal. He responded fully to the challenge and increased in strength and in mental stature as the years wore on. The real fibre of the man then emerged more completely than before into professional and public view and he took his place among the leaders of the Hancock Bar, a Bar that has always occupied a high position throughout the State for the ability and character of its members.

In June, 1907, utterly unsought and unexpected by him, he was tendered by Governor Cobb a position upon the Bench, to fill the vacancy caused by the death of Justice Woodard who had himself been appointed at the decease of Chief Justice Wiswell only six months before. He accepted and thus with an interregnum of only a few short months, he followed in the footsteps of his distinguished instructor and partner, and a member of the firm of Wiswell and KING occupied a position upon this Bench for almost a quarter of a century.

Here began my intimate personal acquaintance with him and the formation of a friendship that death is powerless to sever. I had been appointed only three months before, so that we were naturally thrown closely together, occupying the same chambers at the Law Courts and discussing together the various cases and problems as they were presented. It was a sweet companionship, such as the sincere love of man for man always creates, and my life upon the Bench for the eleven years we served together were rendered richer and happier because they were served with him.

It is not difficult to portray the character of Judge KING either personally or professionally because there are no frailties to be avoided, no thin ice to be hastily crossed. His life was an open book. No chapter need be changed or omitted. We often hear it said "There was another side to him." The delightful thing about Judge KING was that there was no other side to him, that is no different side. He was the same the first time that I met him as he was at the end of our more than a decade of judicial work together. He had no moods to be watched for and guarded against, no idiosyncracies to be pampered. He was simply ARNO W. KING at all times and in all places, strong, dependable, steadfast, well-poised, even-tempered, honest-minded, justice-loving, courageous, and withal sympathetic, tender, kindly and lovable. These qualities were inherently his, whether we view him as judge, citizen or man.

Judge KING found the duties of the Bench most congenial, and he has often told me of the happiness that the judicial life brought to him. He was admirably fitted for it by temperament, learning and experience. He gave to it eleven of the richest and fullest years of his life and has left an indelible impression upon the jurisprudence of his native State. He respected the position and maintained its honor with scrupulous care and a fine dignity.

At nisi prius he was the ideal magistrate, learned in the law, calm in temperament, patient in hearing, deliberate in acting, just in decision, firm in conviction, and with a reserve power that made itself deeply felt. He conducted the business of the trial court where the Judge comes more intimately in contact with the Bar, the litigants and the general public, with great ease, effecting that happy medium of deliberation and promptness which constitutes the perfection of that system of litigation. He was dignified without being austere; patient without being wasteful of time; prompt without being hasty. His charges to the jury were clear, comprehensive and helpful. They gave the jury just what they were waiting to hear. His relations with the attorneys were cordial, friendly and sympathetic. Throughout all his trial work I have never heard a single word of criticism or unfavorable comment, even from disappointed and unsuccessful attorneys. And so it was that as the years passed and he went on the circuit from county to county, he attached to himself one Bar after another, as his sworn retainers, and his sad death at the very height of his intellectual powers brought a sense of personal grief to every attorney within our borders.

To the Law Court Judge KING brought a marked element of strength. He was loyal to precedents and familiar with them, but his was the learning of the market-place rather than of the cloister. He was wise in the every day affairs of men and abounded in that strong common sense which is the very essence of wisdom. Hence it was that he tested every theory and argument on its practical side, recognizing the fact that "the law is a practical science designed to promote the general welfare, to conserve the common happiness, to preserve public and private safety and to protect all the people in the enjoyment of life, liberty and property." His published opinions reveal the man. They possess a remarkable uniformity and strength, rare legal acumen in perceiving the vital issue and clearness of expression in deciding it.

He did not think rapidly, but he thought straight and he moved on from premise to conclusion with precision and with force. No opinion left his hands until it had been studied and restudied in all its bearings. He realized that once published in our reports, no second edition is permitted for the purpose of revision or correction. What is written is written. His opinions are to be found in fifteen volumes of the Maine Reports, the first case being *Stewart* v. *Towle,* 103 Maine,

129, an action against a deputy sheriff for failure to serve an execution by arrest; and the last being *Murinelli* v. *Stuart*, 117 Maine, 87, involving the question of assumption of risk. Between these two will be found his distinct contribution to the literature of the law, and these opinions will be read and cited and followed with increasing confidence and respect as the years roll by. They represent the stones, which one by one he lovingly, thoughtfully and reverently laid in the ever ascending temple of justice, than which no temple is more beautiful nor more sacred.

One word more. The recollection of our friends which lingers longest is not of the high positions which they attained nor of the great work which they accomplished, but rather those qualities which unite in what we call personality. Judge KING will ever be cherished along this personal side. As we look out of the windows of memory, we can see him as he walked our streets, a man of medium height, of sturdy build, of square, broad shoulders, of erect bearing, of firm step, the very personification of manly vigor and power; and then as he approached, we recall the ready smile, the cheery greeting and the cordial hand-clasp that revealed the warmth and the strength of his inner nature. He possessed a positive talent for friendship, and his loyal nature, free from every taint of envy, malice and hypocrisy fastened us to him with hooks of steel. He loved the worthwhile things of life. He was fond of his adopted city and ever ready to promote her business and civic interests. He was loyal to his church, recognizing full well the need of the Christian church in the life of today and tomorrow as in the life of yesterday. He was loyal to his college of which he was an honored and helpful trustee. He was loyal to country and he wore with pardonable pride the two-starred badge that told us of a son and a son-in-law in the service in the great war. He was fond of nature in all her moods, but fonder still of children and often have I seen him stop and fondle some little child just because to him, as to the Master, children represented the very Kingdom of Heaven. Most of all he was devoted to his family and his home, and to them his heart ever turned as the needle to the pole. In short, Judge KING looked out upon the world with a loving, tender and unselfish heart and the world loved him in return.

At the memorial exercises held in honor of Chief Justice WISWELL by the Hancock County Bar in April, 1907, Judge KING, then a member of the Bar concluded his tribute to the memory of his old-

time instructor, partner and friend in words which, paraphrased, apply here and now with equal force to himself. "Who say he is dead! Go tell them no. For so long as truth shall prevail, so long as justice shall be tempered with mercy, so long as human sighs call not to human hearts in vain, so long as friendship and love shall last, so long must ARNO W. KING live."

It was a beautiful summer day when we followed our loved associate and friend to his last resting-place in God's acre. There, amid a wealth of flowers, and only a little removed from the resting-place of his old partner, Chief Justice WISWELL, and almost in sight of the sea near which he was born, we bade him a tender, silent farewell, and turned about, as men must do, to take up again the duties of life; but with us went this thought:

"We'll hide his loving memory in our hearts,
We'll follow in the pathway that he trod,
We'll make each day another step upon
The stairway leading up to him and God."

The resolutions are gratefully accepted and shall be entered upon the records of this court as a permanent memorial of his life and service; and as a further token of respect, this court will now be adjourned for the day.

JOSEPH W. SYMONDS

IN MEMORIAM

SERVICES AND EXERCISES BEFORE THE LAW COURT, AT PORTLAND, JULY 11, 1919, IN MEMORY OF

HONORABLE JOSEPH W. SYMONDS,

LATE JUSTICE OF THE SUPREME JUDICIAL COURT

Born September 2, 1840. Died September 28, 1918.

SITTING: CORNISH, C. J., SPEAR, HANSON, PHILBROOK, DUNN, MORRILL, WILSON, DEASY, JJ.

Resolutions of the Cumberland Bar Association, and the remarks of THOMAS L. TALBOT, Esquire, President of the Bar Association, in presenting them;

MAY IT PLEASE YOUR HONORS:

Since the last session of this court, in this county, there has passed from the realm of things seen the acknowledged leader of the Cumberland Bar. It seems hardly necessary to mention his name. It will at once occur to your Honors that I refer to none other than Hon. JOSEPH W. SYMONDS. His brothers of the profession, recognizing his high position as a judge and practitioner, mindful of his services to the State and to this city, proud of his scholarship and literary ability, have chosen a committee to give expression of their estimate of his life and character. That committee, with the permission of the court, will now report.

Resolutions of the Cumberland Bar Association on the death of Hon. JOSEPH WHITE SYMONDS.

The Cumberland Bar Association reminded anew by the demise of our late associate, Judge JOSEPH WHITE SYMONDS, of the losses constantly occurring in our ranks by the visitations of death, and especially among those eminent in our profession, desires to place upon record our appreciation of our deceased brother, therefore,

Resolved, That in the decease of JOSEPH WHITE SYMONDS this association, and each of us personally, have sustained the loss of a member of our Bar who by the high standard of deportment which he set for himself, and by his constant excellence in the faithful and conscientious discharge of every duty devolving upon him in public and private life always maintained the best traditions of our profession and embellished its record by a life of eminent ability and unswerving integrity.

Resolved, That the history of his life in the distinguished positions which he was called to fill, is a stimulus to all in the direction of right living, and furnishes a bright and encouraging example for those who remain. He has left a memory in which respect and affection are both combined, and which will long endure with the members of the great profession which he loved and adorned.

And we respectfully request that the Honorable Presiding Justice will cause these resolutions to be spread as a perpetual memorial upon the records of this court.

Remarks of Hon. AUGUSTUS F. MOULTON, of Cumberland Bar.

The Cumberland Bar and the State Bar of Maine meet today to give a farewell token of appreciation to one who for years held a position in the very front rank of the legal profession in this State. To those of us who long knew his genial presence and realized his great ability it seems indeed that a leader in Israel has fallen. JOSEPH WHITE SYMONDS whose loss we mourn today was admitted to the Bar in Cumberland County in 1863 and continued in the active practice of his profession at the Bar and upon the Bench until the time of his decease, so that his professional activities covered a period of some fifty-five years. Those who believe that great ability has in it something of inheritance will call attention to the fact that he came

of notable ancestry. His grandfather Nathaniel Symonds was a descendant of Governor Simon Bradstreet, of Massachusetts, and came to Raymond, Maine, in 1823 and there settled upon what is still known as the Symonds homestead. JOSEPH SYMONDS, his father, was a merchant in Raymond and removed to Portland in 1845 when the son, JOSEPH WHITE, was something less than five years old. Our brother was a precocious child and after taking a regular course at the Portland High School entered Bowdoin College at the age of sixteen and there graduated in the class of 1860. Among his college classmates were Speaker Thomas B. Reed, Congressman Amos L. Allen and William Widgery Thomas, U. S. Minister to Sweden. Upon his graduation he entered upon the study of law in the office of Samuel Fessenden and then with Edward Fox, afterward Judge of the U. S. District Court. Upon his admission to the Bar in 1863 he at once entered upon the active practice of his professsion. After a few years he formed a law partnership with the late Hon. Charles F. Libbey and in 1872 became judge of the Superior Court for Cumberland County. Young as he was his judicial capacity was at once manifest and the Superior Court, whose jurisdiction was concurrent with that of the Supreme Judicial Court, became the common forum for cases even of the largest importance. The ability of Judge SYMONDS had much to do with raising this court to the honorable position which it has ever since maintained. After six years of service he was promoted to the Supreme Court Bench where he attained equal distinction. I well remember a long case of my own before him in York County where in a trial of nine days the competency of my client, a man who had made his will when over one hundred years old, was contested in a great legal battle. In firmness, courtesy and clearness of judgment he then, as usual, displayed judicial qualities of the highest order.

In 1884 he resigned his position on the Bench and resuming the partnership with Mr. Libbey again became a practising lawyer. He had so long been regarded as a judge that it occasioned surprise to see how readily and ably he took up the position of advocate and the conduct of jury trials. In all court matters he was a formidable opponent and a strong assistant when, as was often the case, he was called upon to assist other counsel. His principal business, especially in later years' was done in his office as counsellor and adviser in matters of great consequence.

He strongly felt the responsibility that belongs to good citizenship. Although never a candidate for public office he took an active interest in public affairs and not unfrequently did service in conventions and political gatherings. He was frequently called upon to deliver addresses on various occasions and became known as an orator of the very first class, and as a master of elegant and finished English style he was almost without a peer. Among other prominent positions which he held he was for a long time until his resignation five years ago, an honored member of the Board of Overseers of Bowdoin College, his Alma Mater. For more than twenty-five years he was president of the Board of Trustees of Thornton Academy of Saco, one of the best of the old academies of the State, and was there always a most interested and helpful member. He served as a trustee of the Portland Public Library and was a director in banks and railroads and held many other positions of honor and trust.

With all the activities of an exceedingly busy life he found time for reading and study of the best literature and was acquainted with all the masterpieces of authors ancient and modern. For a long time he was a prominent member of Portland's principal literary society, The Fraternity Club, and in the papers and discussions there he was at his very best. With nice discrimination and sound critical judgment he always held the close attention and won the appreciation of its members.

In every respect our brother, Judge SYMONDS, was in the best sense a manly man, a great lawyer, a citizen of the highest type and a lovable friend and companion. His whole life was an influence for good in his chosen profession and in the community where he dwelt. His memory will remain as an inspiration for high ideals and noble living and it is scarcely too much to say of such as he, "He was a man that take him all in all we shall not look upon his like again."

Remarks of Hon. CHARLES SUMNER COOK of Cumberland Bar.

MAY IT PLEASE THE COURT:

It is with a peculiar sadness and yet with a sense of pleasurable privilege that I rise to participate in this memorial of the Bar to the late Honorable JOSEPH WHITE SYMONDS.

The sorrow that his death brings to me personally and the joy that is mine in the rich recollection of his friendship and of his brilliant

and delightful companionship, at times, seem to me to be strangely variant. And yet, upon reflection, I realize that their relationship is orderly and natural enough. The loss, the end of the things that we prize most highly must always be to us a source of sorrow, must always leave us with a heavy sense of sadness and regret.

But these, I am sure, are not the emotions that we would indulge on this occasion, but rather would restrain and subordinate. They are but the negative phases of our experience. We should look today not to the shadow but to the flaming light that casts it. We should fill our vison with the beauties and varied accomplishments of the life which we commemorate. We should remember and admire its wonderful and permanent achievements; its dignity and nobility of purpose; its industry and its integrity; its high thinking and clarity of vision; its brilliant advocacy of right; and, what lent it such resistless charm, its sympathy and generosity, its never-failing courtesy and kindness, its gentleness of heart and patient forbearance and consideration of others; so, I conceive, we may best do honor to him who lived it and, for ourselves, out of the wealth of its manifestations, lay hold upon the things of real and permanent satisfaction and value to us.

It is easy to say that Judge SYMONDS was an unusual man. That was evident to one who had only a casual opportunity to observe him.

He moved with a quiet and dignified grace; erect, and with a certain air of serenity and calm. His strong and kindly face reflected his intellectual supremacy and the fine attributes of his heart. His modesty, his simplicity and graciousness of manner never carried with them any suggestion of weakness, but rather seemed always to reflect a conscious strength and rectitude of purpose, ample in themselves and needing not at all the aid of overbearing rudeness, of pompous pretense or of wanton disregard of others. His whole bearing and personality, while in no way characterized by austere stateliness, yet had about it a certain quality of impressiveness; that indefinable something about a person that even among strangers instinctively fixes the attention and draws the second look.

But whatever one may say of the fine and impressive personality of Judge SYMONDS, it was only when he spoke that one felt its full force and charm. Whether he spoke in easy, pleasant conversation or in some more formal manner, one fell immediately under the spell of his voice. It seemed perfectly suited, in its musical tone and

flexibility, to interpret his wide range of thought and emotion. Who of us that knew him well does not remember its sunny, cheerful quality,—the very tonal reflex of his winning, friendly smile,—as he greeted us, or voiced his kind wishes or solicitude for us, or chatted lightly with us of the thousand pleasant things of common interest; or its even, steady, confident tones that marked his statement, with clear precision, of those conclusions of law or fact which he had reached by patient industry and careful thought and would impress on court or jury; or its ringing, trumpet blasts with which, upon occasion, he would assail the things that roused his indignation or did violence to his sense of right and justice. As was said of Webster, the musical tones of his voice were born in him as much as the gift of speech and the unequalled power of statement, and formed a most essential and effective part of his extraordinary natural equipment.

Judge SYMONDS was admitted to the Bar of this county in 1863 when twenty-three years of age. He had graduated from Bowdoin College in 1860 and had pursued his legal studies in the offices of Samuel Fessenden and Edward Fox. The influence of General Fessenden upon him was most pronounced and lasting. He frequently spoke to me about his early association with him, referring to his great strength of character, his rugged manhood, the broadness of his sympathy and his undaunted courage in the support of the cause of human freedom in those early days before our Civil War when its open supporters were not too numerous or its popularity too extensive. On these occasions he has often said to me that, in his opinion, the father was even greater than his highly gifted and distinguished son. All these qualities of General Fessenden made a strong appeal to him and were plainly reflected later in the similar excellences of his own character.

After his admission to the Bar, he entered upon the active practice of his profession in which he continued with increasing reputation until 1872 when he was appointed to the Judgeship of the Superior Court of this County from which he was advanced in 1878, upon Judge Dickerson's death, to the position of an Associate Justice of this Honorable Court.

His judicial work was marked with great fidelity and was rendered luminous and distinguished by his high conception of the duties of his office, his scholarly legal attainments and his great facility of expression and clearness of perception and statement.

His charges to the jury were reputed for the ease and clearness with which he apprehended and presented the controlling issues and made plain and understandable to the jurors the principles of law that were applicable and decisive.

His opinions, published in the Maine Reports, show his full and discriminating knowledge of the law, are logical and comprehensive and are written in the clear and direct style of which he was the master, but rightly and properly without that embellishment and richness of poetic thought and fancy that characterized much of his other literary work.

For the judicial office he held the highest respect. No one knew or appreciated better than he its important functions and its strict demands or placed a higher estimate upon the dignity and honor that attach to it. He himself has referred to "the genius and learning which should be manifest in the decisions of our courts of last resort" and expressed the hope that "the time will come when our countrymen will have a truer appreciation and therefore a higher estimate than now of the value of the labors of the men who devoted their lives to shaping the guiding principles of conduct in human society."

Yet, with all the lofty views that he entertained in reference to it, the high judicial office that he held was not wholly congenial and satisfying to him. I think perhaps he had a longing for the greater freedom and the more varied and colorful experiences of private life; the wider opportunity to exercise his splendid natural gifts in the private practice of his profession and to gratify more freely his marked literary tastes and inclinations. It is entirely probable also that he felt somewhat the wisdom, if not the necessity, of more amply providing in a pecuniary way for himself and for those who might be dependent upon him.

Whatever may have been the motives that controlled his decision, in the early spring of 1884, he resigned his position as Associate Justice and entered again upon the active practice of his profession. He was at that time forty-three years of age. His fine mental and physical powers were then robust and well balanced and sufficient for almost any strain of professional labor.

His reputation as a lawyer of exceptional talent and ability,—a reputation that was enhanced and broadened by his judicial service,—his high character and wide acquaintance soon brought to him most important and responsible legal work to which, and to that which

followed in increasing volume, he closely devoted himself through all the remaining years of his life.

His services were largely sought in important litigated matters, both on the law and equity side of the court, and with this opportunity for the exercise of his discriminating perception and the display of his especial talent for clear and logical statement and pleasing and persuasive speech, his fame as a brilliant and successful advocate soon rivalled his reputation for great legal learning.

For many years he occupied the acknowledged position of a leader, if not the leader, of the Bar of Maine.

He had a high conception of the duties of a lawyer and exemplified in his own practice the highest ethics of the profession. He could never argue well any cause which had less than the full support of his own reason and confident judgment. I knew him once, however, to accept, much against his own personal inclination, the defense of a man charged with murder because he told me that he felt no lawyer had a right to decline to act for a person to be tried for his life if such person requested his service in the belief that he, better than any one else, could protect his rights.

He always regarded the law as "a jealous mistress" and wisely declined to be led aside into other fields of endeavor. He practiced law, as by his very nature he must, honestly, with a fine and high sense of his duty to his client and to the court, and without rancor or unfairness towards his adversary. He had, among his high rewards, the respect, the confidence, the affection and esteem of his contemporaries. So far as the fame of any lawyer is not ephemeral, his will remain for the delight, the admiration and the emulation of those who follow him.

I well understand that this is not the occasion to give prominence to my personal association with Judge SYMONDS. Such association, however, covered more than a third of a century beginning when I entered his office as a law student a few months after his retirement from the Bench and ending only with his death.

During all those years, our association was never marred by a single unpleasantness and was characterized on his part by the most conspicuous kindness, encouragement and assistance to me. He filled my want of knowledge from his abundance. He restrained my folly with his wisdom. He guided my inexperience in the safe

courses he knew so well. He tempered my asperities with his considerate and charitable views. He quieted my apprehensions with his hopefulness and with his confident belief in Lord Salisbury's philosophy of life that, our own part well done, "nothing matters." He always beckoned to me, as indeed to others, from the clear heights on which he himself stood until his blazing torch fell from his listless hand and burned no more.

Such a man he was.

May it please the Court:

I have great honor and pleasure in seconding the resolutions presented by the Chairman of the Committee.

Tribute of former Chief Justice Wm. P. Whitehouse.

May it please the Court:

We are all aware that any portraiture of the most skilful word-painting could never do justice to the image of Joseph W. Symonds which has been impressed upon the minds and hearts of his friends and associates and the bar and the people of the State by the abundant and never-failing evidence of a brilliant intellect and a kindly heart.

But I beg to submit for the permanent records of this court a brief tribute expressive of our affectionate regard for the memory of this learned lawyer, eloquent orator, upright judge, loyal friend and Christian gentleman.

"The world exists" says our New England philosopher, Mr. Emerson, "for the education of each man. . . . Thus all history becomes subjective. In other words, there is properly no history, only biography. And it is a satisfaction to believe, and a just tribute to the dignity of human nature to assert, that every high ideal of social life will somewhere and some time find its realization in the life and character of a great and good man. "The world," says our philosopher again, "is upheld by the veracity of good men. They make the earth wholesome . . . . Life is sweet and tolerable only in our belief in such society; and actually we manage to live with our superiors."

The genealogist informs us that the chevron in the Symonds' coat of arms, which was found only in the armies of the followers of William the Conqueror into Britain, indicates that the family of Symonds is of ancient origin. In Lancashire, England, it is traced through twenty generations.

In 1638, John Symonds afterwards of Salem, Mass., and Samuel Symonds, afterward of Ipswich, Mass. and deputy Governor, appeared together in Boston. They appear to have been of that immortal 26,000 that emigrated from Old England to New England in the great Puritan exodus between 1620 and 1640. They came, it is said, from the finest rural gentry and yeomanry that had ever existed in any country, and their coming changed the current of civilization not only in New England but on the American continent. They came in pursuit of a land where there was religious freedom for all men. But their religion seem to us now to have been harsh and gloomy, and their society austere and repulsive, but these were only phases in the progress of social and religious life which long since passed away. They were intensely earnest, conscientious and practical men, as untiring in the pursuit of material prosperity as they were fervent in religious spirit; and these qualities and characteristics of the Puritan, modified by a broader spirit of humanity and softened by the influence of culture and refinement, have apparently been transmitted through all the generations of the Symonds family.

Judge JOSEPH W. SYMONDS was a descendant in the seventh generation from the John Symonds who, with his kinsman Samuel Symonds, appeared in Boston as before stated, in 1638. He was the son of Joseph, and Isabella Jordan Symonds, his mother being a descendant in the eighth generation from Rev. Robert Jordan, the first Episcopal clergyman in Maine.

JOSEPH W. was a native of the town of Raymond, in Cumberland County, Maine, where he was born September 2, 1840.

His early home was at East Raymond on a broad plateau four or five miles from Raymond village, on the easterly shore of Panther Pond, one of those beautiful sheets of water of transparent blue which have been poetically described as "the eyes of the landscape." In its broader outlook, this early home commanded a view of Sebago Lake and of the White Mountain range. This impressive environment was one of the many landscapes in our State, the beauty and grandeur of which cannot fail to reach the human heart and influence human life and character.

JOSEPH W.'s parentage appears to have been of an exceptionally intellectual type. His older brother, William Law Symonds, a graduate of Bowdoin College, was a notably precocious youth, who was recognized as a literary prodigy by his contemporaries in New York City; but he died at the age of 29 years in the midst of a rapidly growing fame. One of his contributions to the Atlantic Monthly, was pronounced by its editor at that time, James Russell Lowell, to be the best ever published in that magazine. In the "Life and Writings of William Law Symonds" published by William Winter, the brilliant journalist and famous dramatic critic, Mr. Winter says in the preface, "The selected writings serve to exhibit the dignity of character, the sweetness of temperament, the opulence of learning. . . . . the penetrative lucidity of thought and the felicity of style for which Mr. Symonds was remarkable, and above all will display that grand desire which was the absorbing passion of all his life . . . . to promote happiness by the diffusion of religious enthusiasm,—the emotion not resident in dogmas and ceremonies, but in the *practical living* of the spiritual life."

It thus appears that William Law Symonds adopted essentially the views of Ralph Waldo Emerson, and for a brief period preached in a Unitarian Church in Massachusetts but like Emerson, preferred to devote himself to literature. And according to the published correspondence between William Law and the other members of the family in Raymond, the atmosphere of that country home had always been intensely religious, and the parents being Free Baptists, theological discussions were the principal intellectual exercise in the family and in the neighborhood; but the children, two sons and three daughters all became Unitarians. In later years Judge SYMONDS was a prominent member of that church and was president of the Conference of the Unitarian Churches of Maine for several years.

In the early youth of these two sons, the father removed with his family from Raymond to Portland, and there Joseph W. fitted for college in the public schools and graduated from Bowdoin College with high honors in 1860 in the noted class which comprised in its membership, Thomas B. Reed, William Widgery Thomas, Gen. John F. Appleton and Amos L. Allen. His own words, employed by him many years afterward in his splendid tribute to the memory of a distinguished friend of his early years, are equally applicable to himself: "No boyhood as it passed by ever left behind it a more

shining example of truthfulness to itself and to others, of uprightness, virtue, honor, of the sway of high motives and noble sentiments over its whole course."

Promptly after his graduation he became an indefatigable student of the law, and was admitted to the Bar in the year 1863. He immediately engaged in practice as an attorney and counsellor at law in the City of Portland and during the succeeding five years he devoted himself to his profession with intense industry and never failing enthusiasm. He impressed himself upon the community in which he lived as a young man of superior natural endowments and fearless integrity, and was promptly recognized as a young lawyer of excellent abilities and splendid promise. In 1868 he was accordingly chosen city solicitor of the City of Portland and in discharging the duties of this office during the next five years and in his entire career thus far, at a Bar comprising lawyers who were distinguished throughout New England for their learning and the strength of their service, he continually added to the public estimate of the fullness of his own learning and his own strength as a lawyer. He had acquired a state-wide reputation as a lawyer of profound and accurate legal learning and as an advocate of logical power and glowing eloquence in argument. But he had also identified himself with the public life of the community during his residence in Portland, and was known to be a man whose probity and good faith did not depend upon the commands of the statute or the requirements of his oath of office as an attorney at law. They were inherent in his character and instinctive with his life. He was also known to be a courteous and kindly gentleman with that "vigilant moral sense which never fails to consider the rights, the interests and sensibilities of others" in all the relations of life. And while, according to Disraeli, propriety of manners and consideration for others are the two main characteristics of a gentleman, we sometimes meet an original gentleman says Mr. Emerson, who, if manners had not existed would have invented them. Judge SYMONDS was such an original gentleman.

When a vacancy occurred in 1872 on the Bench of the Superior Court of Cumberland County, JOSEPH W. SYMONDS was promptly designated by the Governor, at the request of the Cumberland Bar, to fill the vacancy. For six years he presided over this important and useful court as a magistrate who not only realized that the trial of a cause is for the purpose of discovering the truth, but was

imbued with a deep sense of judicial responsibility that the truth should prevail and justice be done. And when in October, 1878, a vacancy on the Bench of the Supreme Court was occasioned by the death of Associate Justice Dickerson, Judge SYMONDS was at once recognized by the Governor as in all respects the best qualified and most admirably equipped of all those suggested to fill that vacancy, and he was accordingly appointed.

In the trial of causes before the jury, he never forgot that he was presiding over a tribunal in which the dearest interests of the people are constantly at stake, and all the faculties of his keen and cultivated intellect, the ripe fruits of his valuable experience and the best qualities of an honest and kindly heart were constantly employed in the furtherance of that justice which is the "queen of all the moral virtues" and the chief end of human society.

His written opinions as a member of the Law Court of the State, published in the seven volumes of our reports of judicial decisions from the 68th to the 76th volume are an enduring monument to the extent and variety of his learning in the law, to his luminous exposition of it in the administration of justice, and his faculty of adapting the flexible principles of the common law to the changing conditions of a progressive society, where "new occasions teach new duties."

But Baron Pollock gave as his reason for declining a judicial appointment that he "deemed the functions of an advocate more agreeable and more honorable than those of a magistrate;" and either for this reason, or for the more practical and substantial reason that he believed the remuneration of his services as a practitioner at the Bar would be several times greater than the salary he was then receiving as a justice of the Supreme Court, or for both reasons combined, Judge SYMONDS tendered his resignation in March, 1884, and retired from the Bench to resume his practice at the Bar.

Soon after his retirement Judge SYMONDS was married to Mary Campbell Stuart of Huntington, N. Y. and he is survived by one son, Stuart Oakley Symonds, a talented member of the Cumberland Bar, and now a member of the Board of Aldermen in the City Government of Portland.

From the time of his retirement from the Bench, until the time of his decease Judge SYMONDS was engaged in the active practice of his profession in Portland, first as senior partner of the firm of Symonds & Libbey, and subsequently of the firm of Symonds, Snow & Cook and

Symonds, Snow, Cook and Hutchinson. He was a member of the Board of Directors of the Maine Central Railroad Company, and counsel for the company for many years and until the time of his decease.

Under the chastening influences of superior culture and the study of the masterpieces of English and American oratory, he had become familiar with the best examples of elegant diction and finished style, had acquired a well-deserved reputation as a speaker of genuine and forceful eloquence. Accordingly, during all the active years of his life he was in frequent demand for platform addresses and post-prandial speeches, and as an orator filled numerous appointments on important public occasions. The vigor, clearness and precision of thought which characterized all of his professional utterances and legal opinions, as well as all of his public addresses and discursive writings, are rarely found united with the same elegance of style and felicity of expression. He made others understand him, because he understood himself.

Judge SYMONDS was never known to express an unjust, an unkind or uncharitable thought respecting any person within the circle of his acquaintance. He had no envy of another's fame but was always generous in his commendation of the ability and learning of his associates at the Bar; and to the youthful and deserving practitioner such approval brought not only the "sensibility which praise from the praiseworthy never fails to bring," but often the encouragement needed for continued effort and higher exertion.

But no eulogy upon Judge SYMONDS is required. His life is his monument, and his portrait will ever command a conspicuous place in the gallery of Maine's learned lawyers, upright judges, eloquent orators and most intellectual men.

Response for the Court by Chief Justice LESLIE C. CORNISH.

GENTLEMEN OF THE COMMITTEE AND OF THE BAR:

Since the organization of this State a century ago, fifty-one justices have sat upon the Bench of the Supreme Judicial Court. The twenty-eighth, just past midway in that long line, was JOSEPH WHITE SYMONDS, whose life, character and accomplishments we are pausing today to consider. All who are taking part in these exercises have doubtless considered these elements many times in days gone by,

while we were having the privilege of meeting him face to face, of passing under the spell of his charming personality and of observing the finished products of his mind and tongue and pen. Today, however, our reflections and conclusions are grouped together and can be placed in lasting memorial upon the records of this court. His death has not changed our estimate of him nor our affection for him, but it has enabled us to give expression to what we long have thought, some things perhaps to which Judge SYMONDS in his modesty never would have willingly listened.

It is a happy coincidence that in this farewell, final so far as court proceedings are concerned, the resolutions have been presented and seconded by members of this Bar, who were his close personal and professional friends, by an honored partner who speaks from the vantage ground of that intimacy which over thirty years of business unity can create, and by a former chief justice of this court, whose life has covered almost an equal span, and between whom and Judge SYMONDS there has existed for nearly if not quite half a century a firm and uninterrupted friendship. The members of the Bar, not only in this county but throughout the entire State, unite in this tribute, and I count it both an honor and a personal privilege to take part in these exercises and to accept the resolutions in behalf of the court.

This memorial is in some respects unique. We are paying our tributes to a former member of this Bench, but his judicial life was completed so long ago that by most of those present today Judge SYMONDS is remembered not as the magistrate but as the able, resourceful, and eloquent lawyer, the accomplished orator, the cultured gentleman. The judicial mantle, placed upon his shoulders early in life, was voluntarily laid aside, but the dignity, the learning and the high character which it represented, continued to abide with him even unto the end.

Judge SYMONDS was well-born, well-nurtured, well-bred. Although Raymond was the place of his birth which occurred on September 2nd, 1840, he removed to Portland at so early an age, that it was here in this city which he loved so well, with all its rich traditions, and which loved him in return, that his youth and manhood were spent.

A graduate of Bowdoin College in the distinguished class of 1860, he left behind him with his alma mater a brilliant record for scholarship and achievement. The Bowdoin of that time, like all other

higher institutions of learning of that day, emphasized strongly and almost exclusively the cultural value of the classics, and no better illustration of the soundness of their theory can be found than in the graduate of that system whom we are honoring today.

After studying law with the Fessendens and with Judge Fox, he was admitted to the Bar of this County in 1863. At once he won public and professional confidence and respect. After only nine years of practice at the Bar he was appointed in 1872 judge of the Superior Court for Cumberland County at the age of thirty-two, the youngest man who was ever called to the Superior Bench in this State. When six years of conspicuous service had been rendered in that court, at the death of Justice Dickerson, he was appointed on October 16, 1878, Associate Justice of the Supreme Judicial Court at the age of thirty-eight, a promotion deserved by him and desired by the Bar of the State.

At some pains I have ascertained the age of each of the fifty-one justices of this court at the time of appointment and I find the average age to be fifty years. It may be of interest to know that the oldest was Justice Strout who assumed judicial duties at the age of sixty-seven and who surrendered them at the expiration of two full terms at the age of eighty-one. The youngest was Justice William Pitt Preble, who with Chief Justice Mellen and Nathan Weston, Jr. constituted our Supreme Judicial Court at its inception. Justice Preble was only thirty-seven at the time of his appointment. The next older was Justice Weston, his associate, who lacked less than a month of being thirty-eight, and during all the century that lies between that first tribunal and our own, and among all the forty-eight incumbents of the office during that time, the youngest at time of appointment was Justice SYMONDS who was only a month over thirty-eight.

The Bench to which he had come was the Bench as I first knew it, with Chief Justice Appleton, and Associate Justices Walton, Barrows, Virgin, Peters and Libbey, nomina memorabilia. After a service upon the Supreme Court covering five and one-half years Judge SYMONDS resigned on March 31, 1884, to resume practice.

The term of service of Judge SYMONDS in this court was too brief to stamp that distinctive and lasting impression upon the jurisprudence of this State which should have been his portion; yet it was sufficiently long to reveal his peculiar fitness for judicial life because of

temperament, learning and love of justice. I remember seeing him only once presiding at nisi prius, but the tradition is well founded that he held the scales at even poise, and yet he held them, for they cannot hold themselves, and that he administered law with an unruffled spirit, a calm dignity, an unfailing courtesy, a high sense of the rights of litigants and a full appreciation of the responsibility resting upon the presiding Justice.

His work in the Law Court is embodied in the 90 opinions bearing his name to be found in volumes 68 to 76 of our Maine Reports. They cover the wide range of subjects known to our common law practice, and are characterized by a clear conception of fundamental legal principles, logical reasoning and great simplicity and lucidity. Among those best known to the student of law are *Hamlin* v. *Jerrard*, 72 Maine, 62, involving the rights of trustees for mortgage bondholders to the rolling stock of a railroad in the event of consolidation; *Hamlin* v. *E. & N. A. Ry. Co.*, 72 Maine, 83, as to the rights of such trustees in after acquired property, and *Belfast Bank* v. *Stockton*, 72 Maine, 522, and *Lincoln* v. *Stockton*, 75 Maine, 141, concerning unauthorized loans to municipalities. It is to be regretted that judicial talents such as his could not have been retained in the service of the State for a lifetime. What fruitage might we not have expected from his thoughtful study, his widening experience and the ripening influence of the years.

But at the age of 43, seven years less than that at which on the average our judges have taken up their judicial labors, he voluntarily laid his down, and it is as Judge SYMONDS, the counsellor at law, the acknowledged head of our Maine Bar, that he has been known for the past quarter of a century, and that means to the present generation.

A few days ago there came into my hands a tribute to a distinguished member of our calling in another State, in the form of an allegory. The opening paragraph is as follows:

"There is a valley, of which those that dwell therein are fond. Its people by birth and by adoption are a clan. They know each other. They have measured their strength against each other. They have wrestled manfully together. He whose shoulders have been brought fairly to the ground does not stab the victor in the back. He whose arrow falls short carries no venom in his quiver for him whose keener archery pierces the center of the target. They do not utter fulsome praise, but they are prone each to acknowledge another's power

without envy, and are charitably silent as to his frailties. The success of one is the success of the clan. The prize of one becomes the pride of the clan."

Back then to his clan came this member who had worked with them for eleven years from the other side of the Bench. He was welcomed by his kin and as he mounted steadily to leadership he carried with him the admiration and the love of his followers. His success became "the success of the clan."

I will not dwell upon the characteristics that made Judge SYMONDS a leader at the Bar. You have recounted them with intelligent discrimination. To me the strongest seemed to be the power of seizing upon the heart of a case. Holding fast to this he troubled himself very slightly with the non-essentials. With this characteristic he combined rare business judgment so that great interests felt safe in his hands both from a legal and a business point of view.

One incident connected with his practice should be preserved. During an important trial at nisi prius in which he was counsel and at which Judge Walton was presiding, the latter had made a ruling contrary to Judge SYMOND'S contention. It was a vital point. Judge SYMONDS courteously but firmly pressed his objection. Judge Walton listened attentively and finally said, "Well, Judge SYMONDS, if you, with your great learning, say that that is the law I will accept it as such and will reverse my ruling." A greater compliment can hardly be conceived, especially coming, as this did, from a presiding Justice noted for his keen legal perception and his tenacity of opinion.

But Judge SYMONDS was more than an efficient judge and more than a great lawyer. He had certain talents and accomplishments that carried him beyond the professional zone, and it is these that we always recall when we summon him back in our hours of remembrance.

First and foremost we think of his charm of manner and his gracious courtesy. This characteristic was not a studied acquisition but it sprang from an inherent kindliness of heart. It was part and parcel of the man himself. It impressed one always and promptly converted chance acquaintances into friends.

Then too we recall his scholarly attainments in the broader fields. The law is said to be a jealous mistress and so she is, but she encourages her devotees to go afield in philosophy, and art, and science, and

literature, because such intellectual effort enriches the legal mind. Judge SYMONDS while a thorough student of the law was not a slave to law. He would not bind himself to her chariot wheel. He went forth into other domains. He was an intelligent traveller. He appreciated art and architecture. One day as he was admiring a residence in another city noted for the beauty of its Grecian porches. he remarked to a friend, "I wish that I might have the privilege of passing those beautiful columns every day of my life on my way to and from my office." He was a lover of books, which he regarded as personal friends, and his library was his favorite haunt. Not all books however commended themselves to his attention. He cared little for the modern, and he frankly said so. The old and seasoned in literature were his intimates, and these he read and re-read with ever increasing delight. The classics were not to him dim memories of college days but constant companions. He was fond of poetry, especially the poetry of Burns. He loved the novels of Scott, the word-painting of Washington Irving, while a set of Kipling he passed on to another as not suited to his taste. History, philosophy, science and religion all were within his active interest.

His parents were Free Will Baptists, but even in college he is said to have engaged in frequent and earnest discussion with his classmate Thomas B. Reed, over the fundamental problems of religion and of life, and he finally became an earnest Unitarian, to which denomination he gave loyal service as a prominent layman for many years.

In Simon Greenleaf's memoir of Chief Justice Mellen, published in the 17th Maine Report, the great reporter said of our first Chief Justice: "In the intervals of professional labor, he cultivated poetry, music and general literature with success, and administered the hospitalities of social life with all that graceful liberality and good taste which were exhibited by gentlemen of what we now with melancholy truth denominate 'the old school'. "

Those words were written more than three-quarters of a century ago, and even then apparently our predecessors were lamenting the fact that true gentlemen were of a former age, and they were even then speaking of gentlemen of the old school. That type, however, has never become wholly extinct, and here and there a man appears in every generation whom the term exactly fits. Judge SYMONDS belonged to that class and I have often wondered whether he did not

resemble Chief Justice Mellen more than any other justice in the long line. Natural taste, wide reading and a scholarly home environment all combined to make him familiar with the world's best thought, and with his air of refinement and grace of manner he was indeed a "gentleman of the old school."

Hence it is that Judge SYMONDS was sought for as a speaker on great occasions, and acquired the reputation of being one of Maine's most accomplished orators if not the single best. His public and occasional addresses were of the highest order. To their preparation he devoted unstinted care, deeming it neither just to himself nor to his hearers to give them extemporaneous and ill-considered efforts. He was not only an able but often a most eloquent speaker, and when at his best, with that rich voice which always carried with it a captivating note of pathos, the effect was never to be forgotten. You and I can almost hear him now as with manner impassioned but restrained, with beauty of diction rarely surpassed, and with quivering voice he pleaded for some great cause or stirred his hearers to higher ideals.

His two latest addresses at which I was present, were delivered in Augusta, the one at the dinner of the Maine State Bar Association in January, 1917, at which ex-President Taft was the special guest of honor, and the other at a dinner given by the Kennebec Bar Association in July following. Both were at a high level, the former arousing us to our duty in the hour of the then impending peril, and the latter filled with the traditions of the earlier Bench and Bar, a subject which he loved and in the treatment of which he gave full play to his versatile genius. His kinsmen of the clan could then proudly say and now can proudly remember "He is one of us," but the leader.

During the last year of his life, Judge SYMOND'S strength showed signs of failing. But he still kept in touch with his duties. In late September of 1918, when nature was at her best, he took a motor trip to the White Mountains, and on reaching Bethlehem remarked upon the pleasure that the day had afforded him. He was happy to be among the White hills again. But on the evening of the next day, with no other warning than the single complaint that he was tired, he gently fell asleep, and there, amid the protection of the sheltering hills, that peace came to him which passeth understanding.

That sympathetic voice is still; that richly stored mind has ceased to give delight; that gentle courtesy can never again be felt, but

instead, the State has received into its treasure house of memory an honored citizen, a worthy judge, a great lawyer, and a cultured gentleman. His farewell to Justice Strout shall be our farewell to him.

"It was a beautiful lingering of life at the last and when the end came it was but the closing of heavy eyelids to sleep, at night. For him there was

'Another morn than ours'. "

The resolutions of the Bar are gratefully accepted and as a further and last public tribute to the memory of JOSEPH WHITE SYMONDS this court will now stand adjourned.

INDEX

ACCOUNT ANNEXED.

An action on account annexed for specified goods or merchandise does not require proof of delivery to support it.

But while delivery is unnecessary, a sale must be shown. Long usage has sanctioned the use of the account annexed as a substitute for the common counts for goods sold and delivered or bargained and sold. To support the action a sale must appear. *Kelsey* v. *Irving*, 310.

ADVERSE POSSESSION.

When land is contiguous to improved and cultivated land and commonly used therewith for fuel, fencing, repairs or pasturing it no longer has the character of wild land.

In an action involving a claim of possessory title to land, the fact that taxes upon it have been assessed to the occupant is immaterial; payment of taxes by him is not proof of possession, but such payment by an occupant who is not a tenant is evidence of an adverse claim of title.

Occasional trespasses will not ripen into title, but when a person in possession of land pays taxes upon it year after year, with the knowledge of the owner, such occupant cannot be properly classified as an occasional trespasser.
Holden v. *Page*, 242.

See *Harris, Applt.* v. *City of South Portland*, 356.

ALIENATION OF AFFECTIONS.

The statutory right of action given under R. S., Chap. 66, Sec. 7, to a married woman, enabling her to sue a female person more than eighteen years of age for alienation of the affections of plaintiff's husband, does not authorize such a suit against a male defendant for such alienation. *Farrell* v. *Farrell, et al.*, 441.

AMENDMENT TO DECLARATION.

See *Waterhouse* v. *Tilenius, et als.*, 239.

APPEAL.

Under R. S., Chap. 136, Sec. 28, an appeal lies from the Superior Court to the Law Court. *State of Maine* v. *Brown*, 164.

ARREST.

Where a creditor causes the arrest of a debtor under and by virtue of R. S., Chap. 115, Sec. 2, the belief of the creditor making the oath that the debtor has property, tangible or intangible, which he is about to take with him outside of the State, should be derived from facts and evidence sufficient in themselves to justify a man of ordinary prudence and caution, when calm and not swerved by self interest from the realms of reason and common sense, in believing the truth of the statements to which he makes oath. The oath clearly means that at the time it is made the debtor has within the State property, tangible or intangible, which he is about to take with him outside of the State.
Gammons v. *King*, 76.

The exemption of a married woman from arrest is granted by R. S., Chap. 66, Sec. 4.

The exemption from arrest is a personal privilege and as such may be lost by either waiver or estoppel.

Under certain facts and circumstances, a defendant may be equitably estopped from claiming an exoneretur. *Kalloch* v. *Elward*, 346.

ASSUMPSIT.

In actions to recover for services rendered, it is incumbent on the plaintiff to prove that the services were rendered by the plaintiff either in pursuance of a mutual understanding between the parties that she was to receive payment, or in the expectation and belief that she was to receive payment, and that the circumstances of the case and the conduct of the defendant's intestate justified such expectation and belief. It is not enough to show that valuable service was rendered. It must be shown also that the plaintiff expected to receive compensation and that the defendant's intestate so understood, by reason of a mutual understanding or otherwise, or that under the circumstances he ought so to have understood. Both propositions are essential and must be proved.
Gordon v. *Keene, Admr.*, 269.

Action to recover damages for alleged breach of contract. The plaintiff claims that the defendant agreed to pay him a commission of five per cent for selling certain stumpage at a minimum price of twelve dollars and a half per thousand, that on his part he fully performed the contract but that the defendant has failed to pay the commission as agreed.

For the purpose of proving the contract the plaintiff produced certain correspondence between the parties. Testimony was also introduced showing that the plaintiff procured and produced to the principal customers willing and prepared to purchase and pay for the stumpage at thirteen dollars per thousand. This would have entitled the plaintiff to the commission if the contract were proved as alleged. But the evidence does not show that the contract between the parties was as the plaintiff claims. The letters prior to that of July 23rd do not show a meeting of minds on any proposition. The letter of July 23rd which is relied upon by the plaintiff gives authority to sell the land for one hundred and twenty-five thousand dollars or upwards, and contains a promise to pay a commission of five per cent on the sale. No claim is made that the plaintiff sold the land. But the letter even when read in the light of the entire correspondence does not in the judgment of the court prove a contract to pay a commission for the sale of stumpage. *Furbish* v. *Chapman*, 449.

Where an express contract remains in full force, one is never implied by law.

When the act done is ultra vires, it is void and there can be no ratification, and when the mode of contracting is limited and provided for by statute an implied contract cannot be raised, i. e. without conforming to the statutory limitation. But a corporation like an individual is liable upon a quantum meruit when it has enjoyed the benefit of the work performed or goods purchased, when no statute forbids or limits its power to make a contract therefor.

Van Buren Light & Power Company v. *Inhabitants of Van Buren*, 458.

See *Hopkins* v. *Erskine*, 276.

In re Searsport Water Company & Lincoln Water Company, 382.

Weed v. *Clark*, 466.

Flaherty v. *Maine Motor Carriage Company*, 471.

ATTACHMENT.

The right of the vendor is that and only that of a mortgagee of personal property under a chattel mortgage given as security for a debt. He can attempt the collection of his debt by suit and also by enforcing his mortgage security concurrently or successively.

An attachment of mortgaged chattels in a suit to enforce the mortgage debt is a waiver of the lien. *Steinert & Sons Co.* v. *Reed*, 404.

AUTOMOBILES.

The law of the road, R. S., Chap. 26, Sec. 2, applies to automobiles, and makes it mandatory that cars approaching each other to meet must "seasonably turn to the right of the middle of the traveled part of the way."

The fact that a party is on the wrong side of the road at the time of a collision is strong evidence of carelessness and, unexplained and uncontrolled, exclusive evidence of carelessness, throwing the burden on the offending party in such a case.

Operators are not authorized to rely on the legal presumption that an approaching car is coming at a legal rate of speed, but must exercise due care in the operation of their own car, especially in approaching corners, curves and turns in the road, where their vision may be wholly or partially obscured.

Operators of cars, in seasonably turning to the right, must anticipate not according to the legal, but the usual experience of mankind in running automobiles in the public ways. *Bragdon* v. *Kellogg*, 42.

Plaintiff and defendant were traveling on a State road where for five hundred feet each could see the other approaching. The preponderance of the testimony indicated that the plaintiff was on the wrong side of the road and that he did not turn out or leave his position. The plaintiff offered no explanation of the delay, in turning out.

Held:

That the plaintiff had the burden of showing that at the time of the injury he was in the exercise of due care and that no want of due care on his part contributed to the injury. *Sylvester* v: *Gray*, 74.

AWARDS.

Action on the case in the nature of assumpsit to enforce an award of $300.

Held:

Had the submission been under seal, the action should have been in debt, the same as debt on judgment; but as it was not under seal, assumpsit to enforce the award was the proper form of action.

The original cause of action which was one of tort had been merged in the award if valid and, therefore, the issue here was clearly defined. If the award was valid the plaintiff was entitled to the full amount of the award. If for any reason the award was invalid, then the verdict should have been for the defendant. There was no place for the compromise verdict rendered.

The explanation seems to be that the cause of action as set forth in the writ was lost sight of and the case was tried throughout as if it were an action of tort for negligently setting fire to the plaintiff's property, involving the amount of damages recoverable if the defendants were liable. Both these issues had been foreclosed if the award was valid, and no attempt was made to vitiate the award.

Conant v. *Arsenault, et al.*, 281.

BANKRUPTCY.

See *Googins, pro ami.* v. *Skillings, et al.*, 299.

BANKS AND BANKING.

A person holding himself out as selling certain shares in a co-operative fund for the purpose of building, development and improving of real estate is not engaged in the banking business within the definition of the term as set forth in R. S., Chap. 52, Sec. 2. *State* v. *Pelletier*, 257.

BIGAMY.

Sec. 49, of Chap. 126, R. S., simply enlarges the jurisdiction of the court by giving it jurisdiction of the offense of bigamy in the county where the respondent resides or is apprehended, as well as in the county where the offense was committed; and cannot be construed as extending the jurisdiction of the courts of this State to this offense when committed in other States or foreign countries. *State of Maine* v. *Stephens*, 237.

CITIES AND TOWNS.

See *Harris, Applt.* v. *City of South Portland*, 356.
In re Searsport Water Company & Lincoln Water Company, 382.
Arnold v. *City of Augusta*, 399.
Van Buren Light & Power Co. v. *Inhabitants of Van Buren*, 458.

CONSTITUTIONAL LAW.

Constitutional limitations are subjects of judicial interpretation and effectuation. Questions of public policy such as the justice, expediency, necessity or urgency (immediate necessity) of laws are for final legislative determination. But the control by the Legislature of even these questions may be qualified by express constitutional limitations.

The provision of the Maine Constitution requiring the emergency, with the facts constituting it, to be expressed in the preamble of the act creates a limitation upon legislative power and without conforming to it no act can be made an emergency act and as such be given immediate effect. The preamble of Chapter 112 contains an assumption that there is "a necessity of preserving the public health in general," and the conclusion that "the enactment of more

stringent laws is an emergency measure." It contains no statement of facts as required by the Constitution and no facts that are even suggestive of an emergency. In argument, indeed, facts are presented which give the act an emergent character. In argument it is said that a great World War had been raging; that while an armistice had been declared large bodies of troops were still assembled; that for preventing the spread among these troops of sexual disorders, destructive ofmilitary efficiency, existing laws were in adequate and that the Federal authorities had requested the co-operation of the State in meeting these conditions. But these facts are not, as the Constitution requires, expressd in the preamble. Chapter 112 is, therefore, not an emergency act as defined by the Constitution.

Whether a legislative finding that an act is immediately necessary for the preservation of the public peace, health or safety is open to judicial review is a question concerning which courts of different states are at variance. Mindful of the long established rule that questions of constitutional law should not be passed upon unless strictly necessary to a decision of the case under consideration, this court defers expressing a final opinion upon this question, inasmuch as the point first above determined is decisive of the case.

Payne v. *Graham*, 252.

The defendant took the plaintiff's horse from his possession and killed it. The defendant undertakes to justify the act as agent for the S. P. C. A. He invokes R. S., Chap. 126, Sec. 59. The constitutionality of this section is challenged by the plaintiff.

Held:

The Constitution of the United States and of this State forbids depriving any person of his property without due process of law.

Notice and opportunity for hearing are of the essence of due process of law. A hearing before a judicial tribunal is not essential, but there must be notice and reasonable opportunity for hearing before some tribunal.

Necessity or expediency of any legal enactment is a purely legislative question. But a legislative enactment which is admittedly expedient and which has been determined by the Legislature to be necessary is void if it violates an espress constitutional mandate.

In so far as Chap. 326, Sec. 59, R. S. purports to authorize the taking of animals from the possession of their owners without consent of the owners and the destruction of the same without hearing and without notice, it violates explicit constitutional guaranties and cannot be given effect to by the courts.

Randall v. *Patch*, 303.

CORPORATIONS.

Petition for mandamus by a stockholder to compel the defendant company to open its books to inspection to enable the petitioner to "take copies and minutes therefrom," as provided in R. S., Chap. 51, Sec. 22. The defendant contends that this statute does not apply to a corporation doing business in this State and "having a treasurer's office at some fixed place in the State where a stock-book is kept, giving the names, residences and amount of stock of each stockholder."

Held:

1. Every reason that can be urged for the first part of R. S., Chap. 51, Sec. 22, regarding the right to examine the books of non-resident corporation is equally cogent with respect to the books of a resident corporation.

2. The facts presented fail to show any vexatious, improper or unlawful purpose on the part of the petitioner, and under the decisions of our State petitioner is entitled to have relief prayed for. *Bryer, Pet.* v. *Wyman*, 378.

COSTS.

(Taxation of)

See *Reed* v. *Reed*, 321.

COURTS.

The jurisdiction of a court in criminal matters is confined to offenses committed in the county, unless a special statute extends it beyond.

State v. *Damerest*, 86.

Courts of this State have no jurisdiction of offenses committed outside the boundaries of the State.

Sec. 4 of Chap. 126, R. S., simply enlarges the jurisdiction of the court by giving it jurisdiction of the offense of bigamy in the county where the respondent resides or is apprehended, as well as in the county where the offense was committed; and cannot be construed as extending the jurisdiction of the courts of this State to this offense when committed in other States or foreign countries.

State of Maine v. *Stephens*, 237.

CRIMINAL LAW.

Where a respondent, charged with an offense punishable by imprisonment for life, does not demand a trial at the "first term" after the finding of the indictment, Sec. 25 of Chap. 136, R. S., does not by implication preclude the continuance of the case by order of court to a later term, but leaves it subject to the common law and the discretion of the presiding Justice, as modified by the provisions of Sec. 11, Chap. 136, R. S., and Section 6, Article 1 of the Constitution of Maine.

Sec. 11, Chap. 136, R. S., was designed to carry out the provisions of Section 6 of Article 1 of the Constitution in guaranteeing a "speedy trial," but silence on the part of the respondent cannot be construed as a demand for trial. Where no demand for trial at the "first term" is made by the respondent, a trial at the "second term" is a compliance with Section 6 of Article 1 of the Constitution; and where no demand for trial is made by the respondent at the "first term," an exception to the order of the court continuing the case to the "second term" cannot be sustained. The "first" and "second" terms within the meaning of Sec. 11, Chap. 136, are the first and second terms respectively after the term at which the indictment was found.

Where at the "second term" after the finding of the indictment, the case is not in order for trial owing to the voluntary act of the respondent in prematurely causing the case to be transferred to the Law docket, he must be held by such act to have waived his right of trial at the "second term," and a motion to quash the indictment on the sole ground that he was not placed on trial at the "second term" according to the provisions of Sec. 11, Chap. 136, was properly overruled.

Jeopardy in a criminal case begins when a jury has been impanelled and sworn. A respondent once in jeopardy is entitled to a verdict of guilty or acquittal, unless the case is withdrawn from the jury by the court with his consent, or by reason of some manifest, urgent necessity in order that the ends of justice may not be denied.

A manifest or urgent necessity may arise from purely moral or legal grounds as well as from physical. The knowledge that a jury does not stand indifferent or has been subjected to influences, whether for or against the accused, that might render it impossible for them to stand indifferent between the State and the respondent, creates such an urgent, manifest necessity as to warrant the court in withdrawing the case from the jury.

The consent of the accused; the illness of the court; a member of the panel or of the respondent; the absence of a member of the panel or the respondent; the end of the term before verdict when the term is fixed in duration; or where the jury cannot agree, are all recognized as constituting that "manifest necessity" warranting the court withdrawing the case from the jury.

To create such a "necessity" due to outside influences upon a jury, it is not necessary for it to appear that the jury was actually prejudiced or biased thereby. It is sufficient, if the incident or influence was of such a nature that it may have produced such a bias or prejudice, that they would not stand indifferent, whether it be in favor of the State or the accused.

The purpose of a view in a criminal case is not to procure evidence on which to base the verdict, but to enable the jury to better understand and appreciate the evidence produced in court. Neither is it a part of the trial within the meaning of that word as used in Sec. 23, Chap. 136, R. S. A respondent in a capital case has an inherent right to be present at a view, if he demands it, but he may waive it. His right to be present, however, is not based on Section 6 of Article 1, of the Constitution, or Sec. 23 of Chap. 136, R. S.

No evidence of any kind should be permitted to be presented to a jury during a view in a criminal case, whether in the presence or absence of the accused. The jury may take into consideration only such facts as appear to the eye and only for the purpose indicated above.

A respondent in a capital case may expressly waive all his rights, constitutional or otherwise, except matters involving jurisdiction or the anciently established forms of our judicial tribunals,—as the number of members of the panel. Unless by acts or words he expressly waives them he will not be presumed to waive anything but to stand upon all his rights.

The absence of a respondent by his request, or unless he demands the right to attend, while a view is being taken, violates none of his rights, constitutional or otherwise, and the respondent cannot afterward take advantage of the fact under such conditions, if the jury proceeded with the view in his absence.

But acts and unsworn statements of the accused bearing on the issues raised by his pleadings, out of court, but in the presence of the jury, while the jury were taking a view of the premises where the crime was committed, which acts and unsworn statements are of such a nature that they might naturally affect the minds of the jury whether for or against the accused, are sufficient to warrant the presiding Justice, after having the facts appear as a part of the record, in withdrawing the case from the jury.

The right of determining when such urgent necessity exists must be left to the legal discretion of the presiding Justice, acting under his oath of office but subject always to review by this court. *State of Maine* v. *Slorah*, 203.

By the revision of the statutes, relating to Sea and Shore Fisheries in 1901, Chapter 284, Public Laws, a radical change was effected in the nature of the offense of buying, selling, exposing for sale or having in possession "short lobsters." Prior to that time, the penalty was imposed for buying, selling, giving away or exposing for sale or having in possession lobsters that should have been liberated alive and were not.

Under the present statute the basis of the offense of buying, selling, giving away or exposing for sale or having in possession is the fact that the lobsters are of less than lawful length, whatever the condition in which they may be found; nor does it matter what their length was when caught, if they were of less than lawful length when seized, whether dead or alive, cooked or uncooked.

In a complaint for buying, selling, giving away or exposing for sale, it, therefore, is not necessary under the present statute to allege that they were shorter than the prescribed length when caught or were alive, or, even, that they were not liberated alive.

In a complaint for catching or having in possession, however, it is still necessary to allege that they were not immediately liberated alive at the risk and cost of the party taking them,—in a charge of catching, because it is a necessary element of the offense; in a charge of having in possession, in order to negative the lawful possession between the time of catching and the liberation under the statute. *State of Maine* v. *Chadwick*, 233.

Courts of this State have no jurisdiction of offenses committed outside the boundaries of the State.

State of Maine v. *Stephens*, 237.

Against the respondent the following indictment was returned,—"that the respondent upon the body of Helen Irene Townsend a female child under the age of fourteen years an assault did make and her the said Helen Irene Townsend did then and there beat, bruise, would and ill treat and other wrongs to the said Helen Irene Townsend then and there did and did unlawfully and carnally know and abuse said Helen Irene Townsend, against the peace of said State, and contrary to the form of the statute in such case made and provided."

After the State's case was closed, the respondent moved that the indictment be quashed for the following reason, to wit; "that the said indictment is for assault and battery; that the last allegation in the said indictment, to wit, 'and did unlawfully and carnally know and abuse said Helen Irene Townsend' is surplusage and that the said respondent could only be tried upon the first allegation in the indictment, to wit, Assault and Battery, and that any testimony introduced by the State in support of their last allegation should not have been allowed; and asked the court to rule that this indictment is an indictment for assault and battery only and that the last allegation is surplusage and of no effect."

Held:

1. That assault and battery constitutes a part, though not an essential part,of the offense which the statute defines and punishes.

2. That the indictment properly described the offense upon which the respondent was tried and convicted. *State of Maine* v. *Townsend*, 380.

Plumbing may be defined as the installing, altering or repairing of pipes, tanks, faucets, valves and other fixtures through which gas, water, waste or sewage is conducted and carried.

It is only when rain-water conductors or leaders enter waste-carrying pipes or drains that the installation or repair of any part of them can be considered plumbing within the meaning of an ordinance requiring a plan of the work to be submitted to the Local Board of Health and a permit obtained.

The complaint in this case does not set out that the rain-water leaders installed by the respondent were connected with any waste, drain or soil-pipe. No offense, therefore, is charged in the complaint. *State of Maine* v. *Hahnel*, 452.

See *State* v. *Bridges*, 487.

DAMAGES.

Special damages can be recovered only if alleged and proved and punitive damages only if actual malice is shown.

The plaintiff in an action of libel is entitled to recover for her injuries caused by the libel, including all damages, present as well as future. She is entitled to damages sufficient to compensate her for her humiliation and for such injury to her feelings and to her reputation as have been proved or may reasonably be presumed. She is not confined to such damages as might have resulted from a communication to a single person never communicated by that person to another. The plaintiff is not entitled to damages for the publicity which a trial causes; but such repetition and such publicity as are the natural consequences of the original publication may be taken into account.

Elms v. *Crane*, 261.

DEBTOR.

See *Gammons* v. *King*, 76.

DECEIT.

Where in a previous action of deceit between the same parties on the ground of fraudulent representation as the inducement of a contract of sale, both a waiver of the alleged fraud and a rescission of the contract were pleaded by the defendants as special matters of defense in a brief statement under the general issue, and an entry of non suit was made with the consent of the plaintiff, it is

Held:

That in a later action of assumpsit to recover the money paid on account of said contract of sale alleging rescission of the contract by reason of the same fraudulent representations as were set forth in the action of deceit, it was error to rule that the defendant by reason of his plea of rescission in the action of deceit was estopped in the later action from denying rescission and relying on a waiver of the alleged fraud. *Gordon* v. *Hutchins, et al.*, 6.

DEDICATION OF STREETS OR WAYS.

See *Harris, Applt.* v. *City of South Portland*, 356.

DEEDS.

Where there was a mutual mistake of facts as to the condition of a title intended to be conveyed, a court of equity will correct same.

A mistake as to title is a mistake of fact, even though arising from an erroneous view of the legal effect of a deed. *Williams* v. *Libby, et al.*, 80.

DIVORCE.

To establish desertion as a ground for divorce, three things must concur and must be proved, viz: Cessation from cohabitation continued for the statutory period, intention in the mind of the deserter not to resume cohabitation, and the absence of the other party's consent to the separation.

If the absence is assented to by the party claiming to be deserted, it does not constitute desertion within the meaning of the law.

Where a husband filed a libel for divorce alleging extreme cruelty, cruel and abusive treatment, and utter desertion contined for three consecutive years next prior to the filing of the libel, which came to hearing and was dismissed without prejudice, his act necessarily and conclusively imported an intention not to live with his wife; her absence, if previous to the filing of the libel it had been without his consent, was so no longer.

In the present case, the assent of the libellant, as shown by his overt act in filing the libel and causing it to be served, is substantiated by his positive statement to the trial judge that he would not take back his wife to live with him, and by his neglect to reply to her letter expressing a willingness to return and asking for his reply.

The libel now before the court was filed within one year after the filing of the former libel; a request for a directed verdict in favor of the libellee upon the issue of desertion should have been granted, and exceptions to the refusal to give such instruction must be sustained.

The dismissal of the former libel without prejudice does not change the situation; the former proceedings could not be pleaded in bar to the maintenance of the present libel; but the continuity of the desertion which had been broken, was not thereby restored.

The desertion for the required period must continue to the date of the filing of the libel. *Moody* v. *Moody*, 454.

DOMESTIC ANIMALS.

It is no longer unlawful by statute to allow domestic animals to graze in the public highway; and at common law an owner may lawfully permit his domestic animals to graze within the limits of the highway in front of his own premises.

Such animals being lawfully in the highway within these limits, for the above purposes, unless of vicious disposition of which the owner had knowledge, the owner will not be liable for damage resulting therefrom which he could not reasonably have anticipated. This must, of course, be true where animals are within the highway without the owner's knowledge or negligence, of which evidence in the case is lacking. *Dyer* v. *Mudgett*, 267.

DYING DECLARATIONS.

See *State of Maine* v. *Bordeleau*, 424.

ELECTIONS.

The fact that a certain number of ballots in a ward were illegally cast does not cause the rejection of the entire vote of said ward.

Russell, et als. v. *Stevens, et als.*, 101.

In a petition brought under R. S., Chap. 7, Secs. 87-91, the burden is on the petitioner to show that he was elected to the office which he claims. Before the court can enter judgment in his favor it must appear "that the petitioner has been elected, and is entitled by law to the office claimed by him." It is not sufficient to show that the incumbent was not elected; the petitioner must show that he himself was elected and is entitled by law to the office.

Russell, et als. v. *Stevens, et als.*, 106.

EMERGENCY LEGISLATION.

See *Payne* v. *Graham*, 251.

EQUITY.

Findings of fact by a single justice sitting in equity will not be reversed, unless clearly erroneous; and the burden showing such error is upon the appellant. In passing upon questions of law, however, the presiding Justice occupies no such vantage ground. The opinion of the single justice may produce conviction, but upon issues of law it brings with it no presumption.

O'Leary, et als. v. *Menard, et als.*, 25.

Where credit is obtained through fraud the equitable remedy need not await the expiration of the term of such credit. *Kautz* v. *Sheridan, et al.*, 30.

Where there was a mutual mistake of facts as to the condition of a title intended to be conveyed, a court of equity will correct same.

A mistake as to title is a mistake of fact, even though arising from an erroneous view of the legal effect of a deed.

When money due upon a mortgage is paid, it may operate to cancel the mortgage or in the nature of an assignment of it, placing the person who pays the money in the shoes of the mortgagee as may best subserve the purposes of justice and the just and true interests of the parties.

Equity will not declare the cancellation of a discharge of a mortgage when it will result prejudicially to third parties, nor when the rights of third parties have intervened. *Williams* v. *Libby, et al.*, 80.

Bill in equity in which the plaintiffs ask that a certain deed purporting to bear their signatures as grantors be declared void as to them on the grounds of forgery. The sitting Justice sustained the bill and the defendants appealed.

Held:

When a serious crime like forgery is set up in a civil action, the evidence to sustain the charge must be full, clear and convincing.
Colby, et als. v. *Richards, et al.*, 288.

Only when property is entrusted or advanced by husband to wife or vice versa, under conditions where it is apparent that it was regarded by the parties not as a joint or common interest, or as a gift, but as the separate property of the party advancing it for which the recipient ought in equity and good conscience to account, can the remedy provided in Sec. 6, Chap. 66, R. S., be invoked.
Walbridge v. *Walbridge, et al.*, 337.

ESTOPPEL.

To create an estoppel in pais, known as an equitable estoppel, all the elements must be present, including ignorance of the true facts on the part of the one claiming the estoppel.

To estop one from taking a position inconsistent with that taken in his pleadings in a former action, the position taken in the first action must have been successfully maintained, and in the event of the dismissal of the former action without any binding judgment, as by an entry of non suit, and the other party not being misled by the former plea into taking any position to his prejudice through ignorance of the real facts, the fact that a certain position was taken in the prior action, though admissible as evidence against the pleader, does not estop him from taking a position inconsistent with his former plea in a later action concerning the same subject matter between the same parties.
Gordon v. *Hutchins, et al.*, 6.

EVIDENCE.

Questions, the answers to which involve the conclusions the jury is to find from all the evidence, are objectionable and should be excluded.

Where an erroneous instruction is given, or a correct instruction is refused, if the erroneous instruction or refusal may have misled the jury, and the court is not clearly satisfied that under a correct instruction a different verdict could not have been given, or, if given, could not be permitted to stand, exceptions thereto must be sustained. *Starkey* v. *Lewin, et al.*, 87.

In the absence of the record of a previous deed, long and uninterrupted possession by the plaintiff and his grantors creates a presumption that formal instruments of title once existed, even if they cannot be found. *Sproul* v. *Cummings*, 129.

Where there was a certain contract between the parties complete in its terms purporting to include all stipulations between the parties and particularizing the items included, the articles in question being of such kind that the omission to include them in the particularization indicating that they were not agreed upon as included in the trade, it is

Held:

That evidence of conversations between the parties during their negotiations before the contract or agreement was signed, offered for the purpose of showing that the chattels in question were included in the property purchased for the consideration named was rightly excluded.

Held also,

That evidence of declarations of the agent of the plaintiff who had the property for sale, made prior to the date of the written contract or agreement as to whether articles in question were to go to the purchaser in the trade, were also rightly excluded. *Bassett* v. *Breen*, 279.

The stenographer's transcript of the evidence should be filed in the clerk's office of the county where the cause is tried, and whether the case is printed under the immediate supervision of the clerk or by the party himself, the printed copies should be certified by the clerk to the Law Court. That is the practice. No other clerk can properly certify the record. But it is common knowledge that not infrequently, through oversight or otherwise, the printed copies lack the proper certification, and when the Law Court discovers that fact or it is called to their attention, the case is not dismissed from the docket, nor even are the arguments suspended, but the omission is subsequently supplied.

Reed v. *Reed*, 323.

When, in trials for homicide, the declarations of the victim are offered in evidence as dying declarations, it must appear to the presiding Justice that at the time of making the statements, the deceased was conscious of the certainty of approaching speedy death; if any hope of recovery remained, the declarations are inadmissible.

It is not sufficient that the deceased has only the belief that he may ultimately die of his injuries. Death, shortly to ensue, must be an absolute certainty, so far as the consciousness of the person making the declaration is concerned.

The actual period of survival after making the declaration is immaterial. It is the consciousness of almost immediate dissolution, and not the rapid succession of death in point of fact, that renders the testimony admissible.

This consciousness of impending death may be established by any relevant evidence. The range of competent evidence may include evidence of the physical condition of declarant at the time of making the statement, from which the inference may be legitimately drawn that the declarant had a conscious sense of impending death, as well as evidence of the declarant's conduct and declarations.

When evidence of the declarations of the deceased has been admitted by the presiding Justice, its credibility is for the consideration of the jury, who should have the opportunity to weigh all the circumstances under which the declarations were made, including those already proved to the presiding Justice, and may give the testimony and the declarations such credit as they think they may deserve.

Having ruled that the statements of deceased were dying declarations, and as such competent evidence, the presiding Justice in his charge submitted the same question to the jury; after first fully defining the rule of admissibility of dying declarations, he instructed the jury that they must find that the declarations were made by deceased under the sense of impending death as so defined, before they should consider them as dying declarations.

Held:

That the respondent was not prejudiced by the procedure adopted; it gave the opportunity for his counsel to reargue to the jury the question of fact upon which the presiding Justice had ruled adversely to him on the preliminary hearing; he was thus allowed a second chance to have the declarations excluded from consideration. *State of Maine* v. *Bordeleau*, 424.

Save where there are statutory provisions differently, in all cases in which an executor, administrator or other legal representative of a deceased person is a party, the rules of the common law control the competency of witnesses and evidence. No existing modification of such rules made the offered evidence competent. *Weed* v. *Clark*, 466.

See *Helen B. Mailman's Case*, 172.
Hodgman, Admrx. v. *Sandy River & Rangley Lakes R. R.*, 218.
State of Maine v. *O'Toole*, 314.

EXCEPTIONS.

Questions, the answers to which involve the conclusions the jury is to find from all the evidence, are objectionable and should be excluded.

Where an erroneous instruction is given, or a correct instruction is refused, if the erroneous instruction or refusal may have misled the jury, and the court is not clearly satisfied that under a correct instruction a different verdict could not have been given, or, if given, could not be permitted to stand, exceptions thereto must be sustained. *Starkey* v. *Lewin, et al.*, 87.

Exceptions to the decree of a Justice of the Supreme Court of Probate raise only questions of law. If as matter of law there is no evidence to sustain the decree, then the exceptions must be sustained, otherwise overruled.
Cotting, Applt. v. *Est. of Alonzo Tilton*, 91.

Where an entry of "exceptions filed and allowed" is made before the close of a term by consent of parties, the presentation of the bill of exceptions to the presiding Justice for his approval after the adjournment of the term will be considered as done as of the date of the entry.

Where an entry of "exceptions filed and allowed" has been made before the close of the term by consent of parties, and a bill of exceptions has been duly made up and presented to the presiding Justice, though after the adjournment of the term at which they were allowed, and before allowance the presiding Justice has become incapacitated for allowing them for any of the reasons assigned in Sec. 56 of Chap. 82, R. S., any justice may upon motion and hearing allow them. *Borneman, et als.* v. *Milliken, et als.*, 168.

When a party takes exceptions to the rulings of a presiding Justice, it is incumbent on such party to show affirmatively that there was error in such rulings and that he is aggrieved thereby. *Googins* v. *Skillings, et al.*, 299.

EXECUTORS AND ADMINISTRATORS.

Action of assumpsit on six promissory notes, three of the notes maturing before debtor's death and three thereafter.

Held:

When this action was brought, the period of eighteen months provided for in R. S., Chap. 86, Sec. 95, amended by Act of 1917, Chapter 133, for commencing suits against administrators had elapsed.

This statute permits the bringing of actions within that period, and "not afterward if barred by the other provisions hereof."

The other provisions referred to are those of the general six-year statute of limitations.

In case of the three notes which matured and actions on which accrued before the debtor's death, the general limitation had expired in 1911 and 1912. As to those three notes, therefore, the plea of bar by limitation must prevail.

Carpenter v. *Hadley, Admr.*, 437.

Additionally to the moral obligation either by express or implied direction of the maker, a statute imposes upon every supposed executor having custody of an unprobated will, the imperative legal duty of filing it for probate.

Merely filing a will for probate would not make a proposed executor party to forensic issue so as to give him the statutory status of one entitled to be served with copy of reasons of appeal. The putative executor may himself assume the burden of waging contest to establish the writing as an efficacious will, or he may leave that weight to be borne by those whom probate of the will would benefit. As petitioner that the court take proof and allow the will, he becomes a real party, albeit a representative one, "before the judge of probate."

The right of appeal, exercise of which was attempted in this case, is statutory. Compliance with indicated requirements was not had. It follows that jurisdiction was not conferred upon the appellate tribunal and that the reserved exceptions are without merit.

Nichols, Applt. v. *Est. of Madison M. J. L. Leavitt*, 464.

See *Weed* v. *Clark*, 466.

FEDERAL EMPLOYER'S LIABILITY ACT.

While the failure to equip an engine with power driving-wheel brakes was a violation of Section 8605 of the Federal Statutes requiring the same, this fact alone does not make the defendant liable per se; the burden is still on the plaintiff to show that the absence of such brakes contributed in whole or in part to produce the accident. *Hodgman, Admrx.* v. *S. R. & R. L. R. R.*, 218.

FRAUDULENT TRANSFER.

The holder of a matured obligation has his equitable remedy in case of a fraudulent transfer of his debtor's property. He need not first reduce his claim to judgment. His remedy exists notwithstanding at the time of the f audulent transfer his claim was unmatured or even contingent. But the mere fact that a debtor has fraudulently transferred his property will not justify the beginning of a suit either at common law or in equity before the debt is due.

Kautz v. *Sheridan, et al.*, 28.

Where credit is obtained through fraud, the equitable remedy need not await the expiration of the term of such credit. *Kautz* v. *Sheridan, et a'.*, 30.

Bill in equity in which the plaintiffs ask that a certain deed purporting to bear their signatures as grantors be declared void as to them on the grounds of forgery. The sitting Justice sustained the bill and the defendants appealed.
Held:
When a serious crime like forgery is set up in a civil action, the evidence to sustain the charge must be full, clear and convincing.
Colby, et als. v. *Richards, et al.*, 288.

A creditor may proceed in the State Courts to set aside a transfer fraudulent as to him, notwithstanding the grantor has been adjudicated a bankrupt, when the trustee has not taken action, and a creditor whose claim is not provable in bankruptcy may so proceed.
A trustee in bankruptcy may also proceed in the State Courts in behalf of all the creditors to set aside a fraudulent transfer or in proper cases may intervene in behalf of all the creditors in an action brought by one creditor for that purpose.
Googins, pro ami, v. *Skillings, et al.*, 299.

HUSBAND AND WIFE.

Only when property is entrusted or advanced by husband to wife or vice versa, under conditions where it is apparent that it was regarded by the parties not as a joint or common interest, or as a gift, but as the separate property of the party advancing it for which the recipient ought in equity and good conscience to account, can the remedy provided in Sec. 6, Chap. 66, R. S., be invoked.
Walbridge v. *Walbridge, et al.*, 337.

INDICTMENT.

Words in a statute are to be taken in their common and popular sense, unless the context shows the contrary.
In an indictment brought under R. S., Chap. 130, Sec. 1, as amended by Public Laws 1917, Chapter 126, evidence charging the respondent with violation of said Act by digging into and stirring up the bottom and sides of a spring with a stick was not sufficient to constitute the crime defined by the statute.
State of Maine v. *Blaisdell*, 13.

In an indictment brought under R. S., Chap. 23, Sec. 1 for maintaining a common nuisance, it is necessary for the State to show a customary or common use of the premises for the purpose laid in the indictment.
State of Maine v. *Gastonguay*, 31.

See *State of Maine* v. *Townsend*, 380.

INJUNCTION.

In the absence of a statute otherwise directing, the extraordinary remedy of an injunction will not be granted, save for the protection of legal rights adjudicated and settled, or in cases where great and irreparable damage is threatened.

Kautz v. *Sheridan, et al.*, 28.

INSTRUCTIONS TO JURIES.

See *State of Maine* v. *Derry*, 431.

INSURANCE.

The meaning of the word "dependent" as judicially interpreted in this and other States rests upon duty, not bounty; upon continuing obligation, not occasional giving; upon services imposed or undertaken, not upon favors voluntarily bestowed. True, the duty or obligation which it comprehends may be moral rather than legal, but the impulse that moves a brother to make gifts to his adult sister does not create the relation of dependency as the term is judicially defined. *O'Leary, et als.* v. *Menard, et als.*, 25.

The constitution and by-laws of a fraternal beneficiary association, in respect to which the beneficiary contract of insurance was entered into, so far as applicable, form a part of the contract itself.

Where the by-laws of a fraternal beneficiary association provide that the member may, in accordance with such by-laws, change the beneficiary named in the benefit certificate without the latter's consent, the beneficiary has no vested interest either in the certificate or the money to be paid under it. Such beneficiary has during the lifetime of the member, a mere expectancy; this expectancy is not property.

When in an action by the widow of a member to recover the amount of the death benefit named in the benefit certificate expressly made payable to her, it appears that the member committed suicide, but the case is silent as to his sanity or insanity at the time, the presumption of sanity must be entertained, and for the purposes of the case, the member must be considered as sane at the time of his suicide.

Where the by-laws in force when the original benefit certificate was issued, contained the following provisions only relating to suicide of a member, viz; "No benefit shall be paid on account of the death of any member who within three years next after becoming a beneficiary member voluntarily takes his own life, and, provided further, that any member who within three years after changing his Benefit Certificate from a lower to a higher rate, voluntarily takes his own life, shall thereby forfeit all right to participate in the Benefit Fund beyond the amount named in the Benefit Certificate issued for such lower rate;" and later

the by-laws were duly amended by providing "that after three years from the date of initiation or transfer to a higher rate, death by suicide, whether the member be sane or insane, and whether the act be voluntary or involuntary, shall constitute a hazard not assumed under the ordinary condition of the certificate of membership and the constitution and General Laws; but in all such cases the liability of the Order shall be limited to an amount equal to the total of the sums paid into the benefit fund by any such member; but in no case shall the sum so paid exceed the amount named in the benefit certificate;" it is held that it was undoubtedly the intention of the members of the order in adopting the amendment, that it should apply to the existing as well as future membership, and to certificates of membership then outstanding as well as those thereafter issued; it did not apply to death claims then pending.

When, in an action by the widow of a member upon a benefit certificate expressly made payable to her, issued when such original by-law was in force "and upon condition that the said Member complies in the future with the laws, rules and regulations now governing the said Commandery and Fund, or that may hereafter be enacted by the Supreme Commandery to govern said Commandery and Fund,"—it appears that the by-laws further provide that the member may in accordance with such by-laws, change the beneficiary named in the benefit certificate without the latter's consent, and it further appears that the member committed suicide when sane after three years from date of becoming a member, and after such amendment to the by-laws became effective, it is held that the plaintiff did not obtain a vested interest in the certificate in question at the time the same was issued or in the money to be paid thereon, which could not be defeated by a change in the terms upon which the death benefit should be payable, made in accordance with the constitution and by-laws of the Order, although without her actual knowledge and consent; that she had during the lifetime of her husband a mere expectancy dependent upon the terms of the contract existing at the time of his death and that the amended by-law is applicable to the certificate in suit. *Wallace* v. *United Order of the Golden Cross*, 184.

The spirit of the statute relative to the arbitration of insurance claims requires that the three referees shall be as free from pecuniary interest and relationship as judges and juries are required to be, and also be as free from bias, prejudice, sympathy and partizanship as judges and jurors are presumed to be. If the arbitration fails by reason of the defendant's fault, the other party is not bound to enter into a new arbitration agreement.

Bradbury v. *Insurance Company of Philadelphia*, 191.

Sec. 21 of Chap. 80, R. S., relating to life insurance is not qualified by Section 14 of the same chapter, because proceeds of life insurance is not "personal estate of such testatrix" within the purview of the statute. The right of a solvent testator to dispose by will of life insurance payable to himself is unqualified.

Berman, Exr. v. *Beaudry, et al.*, 248.

The By-Laws of a fraternal corporation read themselves into and become a part of its contracts of insurance.

A provision contained in a beneficiary certificate prescribing that a substitution must be made in the presence of a designated official is a material and substantial requirement, without conformity to which, or waiver by the member during his life time, no substitution can be legally effected.

The requirement that a revocation shall be executed in the presence of an official is not solely for the benefit of the society nor for that of the beneficiary. One of its objects, and perhaps its primary object is to guard against the frustration of the member's purpose.

The member has the unqualified right to change the beneficiary. He also has the right to determine how, when he can no longer speak, the fact of the change shall be ascertained and verified.

Grand Lodge of A. O. U. W. v. *Martin, et al.*, 410.

INTEREST.

Interest is regarded as incidental to the principal debt and not as a part of it, and an action cannot be maintained to recover it after payment of the principal, unless there is an express contract to pay interest. *Hopkins* v. *Erskine*, 276.

INTOXICATING LIQUORS.

In an indictment brought under R. S., Chap. 23, Sec. 1, for maintaining a common nuisance, it is necessary for the State to show a customary or common use of the premises for the purpose laid in the indictment.

State of Maine v. *Gastonguay*, 31.

If the composition of any liquid extracts or compounds is such that it is practicable to commonly and ordinarily drink it as a beverage and drink it in such quantities as to produce intoxication, then it is intoxicating liquor within the meaning of the statute, R. S., Chap. 127, Sec. 21. It is immaterial whether the plaintiff had any knowledge for what purpose the liquors were purchased if they were in fact intoxicating liquors and intended by the purchasers for illegal sale in this State. *State of Maine* v. *Intoxicating Liquors*, 198.

On trial of a complaint for keeping intoxicating liquor with intent unlawfully to sell it in this State, the Judge presiding, against objection on the ground of remoteness of time, permitted the prosecution to offer evidence that, some 18 months before the time charged in the complaint, persons were seen going in and coming out of the place which respondent had continuously occupied for years before the occasion in question; and that, on one day about 3 months after that on which the persons were seen going in and coming out, the respondent then had intoxicating liquor in her possession. Suitable instruction was given the jury, that the evidence was competent only in relation to the intent with which the respondent kept the particular liquor, for the keeping of which she was being prosecuted.

Reception of such evidence is largely for the discretion of the Judge presiding at the trial. It should come from a time near that in question, or be connected therewith by testimony showing the existence of a like condition through the intervening period. Remoteness of time is merely one consideration which may actuate the ruling of a trial Judge. What may seem far off in one case may appear very differently when looked back upon from the environment of another. *State of Maine* v. *O'Toole*, 314.

JURISDICTION.

See *State* v. *Damerest*, 86.

JUSTICES.

Findings of fact by a single Justice sitting in equity will not be reversed, unless clearly erroneous; and the burden showing such error is upon the appellant. In passing upon questions of law, however, the presiding Justice occupies no such vantage ground. The opinion of the single Justice may produce conviction, but upon issues of law it brings with it no presumption.

O'Leary, et als. v. *Menard, et als.*, 25.

LANDLORD AND TENANT.

On appeal by defendant from a decree of the sitting Justice enjoining it from interfering with the plaintiff's possession of certain leased premises, the issue is whether the lease had been renewed or had expired.

The lease provided for a term of one year from September 1, 1916, the lessee to "have the right of renewal to July 1, 1921."

Held:

1. That this was not a lease from year to year, but a lease for one year with the right of renewal for the entire balance of the term, that is until July 1, 1921, a period of three years and ten months.
2. The plaintiff legally and seasonably exercised its right of renewal before the expiration of the first year by a written notice which, although somewhat ambiguous, was deemed sufficient by both parties at the time.
3. Apart from this notice, the continuance of the tenancy beyond the specified term and the payment of rent, are strong and convincing evidence of the lessee's intention to avail itself of the futher term, especially in view of the fact that the lessee had sublet a portion of the premises with the knowledge and consent of the lessor. *Hooper's Sons* v. *Sterling-Cox Shoe Co., et al.*, 404.

LEGACIES.

Legacies are due and payable one year after death of testator, and interest begins to run from that date. *Nickels* v. *Nichols, Exr.*, 21.

LESSOR AND LESSEE.

See *Hooper's Sons* v. *Sterling-Cox Shoe Co., et al.*, 404.

LIENS.

A lien cannot be sustained in behalf of a material man, upon the interest of the lessee who had no actual knowledge that the lien claimant, who dealt with a sub-contractor under the general contractor, was furnishing materials for the building.

R. S., Chap. 96, Sec. 30, pre-supposes that the owner has knowledge of the furnishing of materials; without such knowledge, he cannot protect his property by giving the notice mentioned in that section; nor in strictness can the owner be said to consent to that, of which he has no knowledge.

So, when a sub-contractor under the general contractor, makes a contract with another for materials intended to be used, and which are actually used in the construction, of which contract the owner has no knowledge, the owner's consent to the furnishing of such materials should not be inferred in favor of the material man so dealing with the sub-contractor, against the established fact that the necessary knowledge of the owner on which to base such consent, and the necessary opportunity to consent or to object do not exist.

Corey Co. v. *Cummings Construction Co., et als.*, 35.

A fair construction of the statute and of the decisions of the Supreme Judicial Court of Maine in reference to liens must come back to the proposition that, in order that the interest in real estate of any person shall be affected by reason of his statutory consent, he must be held to have set in motion a train of circumstances which necessarily or reasonably, or ordinarily resulted in the furnishing of labor and supplies for which a lien is claimed.

Corey Co. v. *Cummings Construction Co., et als.*, 30.

MARRIED WOMEN.

The exemption of a married woman from arrest is granted by R. S., Chap. 66, Sec. 4.

The exemption from arrest is a personal privilege and as such may be lost by either waiver or estoppel.

Under certain facts and circumstances, a defendant may be equitably estopped from claiming an exoneretur. *Kalloch* v. *Elward*, 346.

MORTGAGES.

When money due upon a mortgage is paid, it may operate to cancel the mortgage or in the nature of an assignment of it, placing the person who pays the money in the shoes of the mortgagee as may best subserve the purposes of justice and the just and true interests of the parties.

Equity will not declare the cancellation of a discharge of a mortgage when it will result prejudicially to third parties, nor when the rights of third parties have intervened. *Williams* v. *Libby, et al.*, 80.

Action by a mortgagor against a mortgagee to recover damages for selling certain cows and a calf, included in the mortgage, after the mortgagee had taken possession for breach of conditions and before the mortgage was foreclosed.

Held:

The defendant by his own admission, having admitted he could not restore the property mortgaged, a tender would be an idle, useless ceremony and not required by law.

The defendant not being the owner of the property could not lawfully sell the same. His mortgage was security for a debt, and the mortgagor had a right to redeem by the payment of the debt, until the mortgage was legally foreclosed. *Drummond* v. *Trickey*, 296.

In proceedings to foreclose a real estate mortgage by publication, a certificate of the register of deeds which fails to state that the notice of foreclosure was published in a newspaper published and printed in whole or in part in the county where the premises are situated is so defective as to invalidate the foreclosure proceedings. *Higgins* v. *Smith*, 312.

Replevin by the holder of a Holmes note to recover a piano described therein as the chattel securing the debt. The defense was that the plaintiff had brought suit on the note, recovered judgment, and thereby waived his lien.

Held:

That no attachment on the piano having been made in the suit, there was no waiver of lien. *Steinert & Sons Co.* v. *Reed*, 403.

The right of the vendor is that and only that of a mortgagee of personal property under a chattel mortgage given as security for a debt. He can attempt the collection of his debt by suit and also by enforcing his mortgage security concurrently or successively.

An attachment of mortgaged chattels in a suit to enforce the mortgage debt is a waiver of the lien. *Steinert & Sons Co.* v. *Reed*, 404.

MOTION IN ARREST OF JUDGMENT.

See *State of Maine* v. *Derry*, 431.

NEGLIGENCE.

The law of the road, R. S., Chap. 26, Sec. 2, applies to automobiles, and makes it mandatory that cars approaching each other to meet must "seasonably turn to the right of the middle of the traveled part of the way."

The fact that a party is on the wrong side of the road at the time of a collision is strong evidence of carelessness and, unexplained and uncontrolled, exclusive evidence of carelessness, throwing the burden on the offending party in such a case.

Operators are not authorized to rely on the legal presumption that an approaching car is coming at a legal rate of speed, but must exercise due care in the operation of their own car, especially in approaching corners, curves and turns in the road, where their vision may be wholly or partially obscured.

Operators of cars, in seasonably turning to the right, must anticipate not according to the legal, but the usual experience of mankind in running automobiles in the public ways. *Bragdon* v. *Kellogg*, 42.

Plaintiff and defendant were traveling on a State road where for five hundred feet each could see the other approaching. The preponderance of the testimony indicated that the plaintiff was on the wrong side of the road and that he did not turn out or leave his position. The plaintiff offered no explanation of the delay, in turning out.

Held:

That the plaintiff had the burden of showing that at the time of the injury he was in the exercise of due care and that no want of due care on his part contributed to the injury. *Sylvester* v. *Gray*, 74.

Liability of parents for negligence of children in operation of automobile. *Farnum* v. *Clifford*, 145.

While the failure to equip an engine with power driving-wheel brakes was a violation of Section 8605 of the Federal Statutes requiring the same, this fact alone does not make the defendant liable per se; the burden is still on the plaintiff to show that the absence of such brakes contributed in whole or in part to produce the accident. *Hodgman, Admrx.* v. *S. R. R. L. R. R.*, 218.

In cases where suit is brought against a large employer, the injured employee may omit the allegation of due care on his own part, R. S., Chap. 50, Secs. 2 and 3. In such case, however, the declaration must show that the defendant belongs to the class of employers to which Section 2 applies, to wit, large employers. The plaintiff should allege and prove that he is an employee of the defendant in a specified occupation and that the defendant employs more than five workmen or operatives regularly in the same business in which the plaintiff is employed.

In common law actions for negligence against large employers, the defense of assumed risk is not available.

Nadeau v. *Caribou Water, Light & Power Co.*, 331.

Action brought under the provisions of R. S., Chap. 92, Secs. 9-10, by the administrator of the estate of Alton A. Chickering, to recover pecuniary damages resulting from the immediate death of the intestate in consequence of alleged wrongful acts or neglect of the defendant. Defendant filed general demurrer which was overruled by presiding Justice.

Held:

1. By interposing a general demurrer, defendant did not raise any question of fact, but advanced an issue challenging the legal vitality of the case.
2. It is good pleading in an action of tort, founded on a defendant's negligence, for the declaration to allege what duty was owing by the one to the other, together with its breach and the consequential injury.
3. A declaration will not be intrinsically bad for want of such averments, for a plaintiff may make direct and positive averments of fact from which the law will imply the existence of duty, and by like averments he may show wherein the defendant left duty undischarged.
4. It would be difficult in an acceptable general rule to set bounds to the extent to which ownership makes it possible for one to use his own property without incurring liability for injury to the person or property of another in consequence of such use. The test is not whether the use caused the injury, or whether the injury was a natural result, but whether the use was a reasonable exercise of that dominion which the owner of property has, having regard to his own interests, the rights of others, and having too in view public policy.
5. As a general proposition, a person takes a risk of accident, or contributes negligently to his own injury, as the case and relation may be, only where he voluntarily exposes himself to a danger of the existence of which he knows, or, in the exercise of that degree of care which an ordinarily prudent person would exercise, he ought to know.
6. The law discriminates between children and adults, the feeble and the strong, and only requires of each the exercise of that degree of care to be reasonably expected in view of his age and condition. There is a radical difference in the degree of care to be exercised by one reasonably approaching a lurking, injurious element of which he does not know, and by one approaching an obvious or known source of danger where he realizes that lack of heed on his part may impend disaster. *Chickering, Admr.* v. *Lincoln County Power Co.*, 414.

NEGOTIABLE INSTRUMENTS

See *Carpenter* v. *Hadley, Admr.*, 437.

NEW TRIAL.

A motion for new trial on the ground of newly discovered evidence cannot be entertained unless it is accompanied by a full report of the evidence produced at the trial. This is necessary to enable the court to determine whether the additional facts proposed to be proved are in fact new evidence and also whether if admitted, in connection with that before in the case, a different result would have been reached. *Farnum* v. *Clifford*, 145.

When a new trial is granted for any cause, the proceedings begin de novo, and no facts determined in the prior proceedings can be considered res judicata.
Borneman, et als. v. *Milliken, et als.*, 168.

NON SUIT

An entry of non suit determines no rights between the parties to an action.
Gordon v. *Kendall, et al.*, 6.

See *Hayden* v. *Maine Central Railroad Company*, 442.

ORDINANCES.

See *State of Maine* v. *Hahnel*, 452.

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. *Look* v. *Watson*, 339.

PAUPER SUPPLIES

Action to recover for pauper supplies furnished to one Lulu Grindle and her two illegitimate children and before the court on report.

Held:

The person alleged to be a pauper must have fallen into distress and stood in need of immediate relief, and it must appear that the supplies furnished were necessary for their maintenance and support.

To constitute pauper supplies, it must be shown that there was an adjudication by a majority of the overseers of the poor that the alleged pauper had fallen into distress and stood in need of relief, or that the overseer furnished the supplies upon his own view of what is necessary and proper, if his act is subsequently assented to or ratified by a majority of the board.
Inhabitants of Mt. Desert v. *Inhabitants of Bluehill*, 293.

PERSONAL ESTATE

See *Berman, Exr.* v. *Beaudry, et al.*, 248.

PETITION FOR PARTITION.

When a co-tenant has filed a petition for partition of the common property, his rights are not affected by any action of the other co-tenants forming a so-called corporation under R. S., Chap. 62, Secs. 15 to 28.

Where the sitting Justice finds that "because of the nature and condition of the property and the number and variety of the fractional interests, the premises are not susceptible of physical division and separate occupancy," it is sufficient to sustain a decree appointing a receiver of the common property and ordering sale thereof. *Burpee, et als.* v. *Burpee, et als.*, 1.

PLEADING AND PRACTICE.

Where in a previous action of deceit between the same parties on the ground of fraudulent representation as the inducement of a contract of sale, both a waiver of the alleged fraud and a rescission of the contract were pleaded by the defendants as special matters of defense in a brief statement under the general issue, and an entry of non suit was made with the consent of the plaintiff, it is,

Held:

That in a later action of assumpsit to recover the money paid on account of said contract of sale alleging rescission of the contract by reason of the same fraudulent representations as were set forth in the action of deceit, it was error to rule that the defendant by reason of his plea of rescission in the action of deceit was estopped in the later action from denying rescission and relying on a waiver of the alleged fraud. *Gordon* v. *Hutchins, et al.*, 6.

The right of opening and closing is a legal right, not a matter of judicial discretion. Unless clearly shown to be non-prejudicial exceptions lie to its erroneous denial.

The right to open and close belongs to the party against whom judgment would be rendered if no evidence were introduced on either side. *Rawley, Applt.*, 109.

A motion for new trial on the ground of newly discovered evidence cannot be entertained unless it is accompanied by a full report of the evidence produced at the trial. This is necessary to enable the court to determine whether the additional facts proposed to be proved are in fact new evidence and also whether if admitted, in connection with that before in the case, a different result would have been reached. *Farnum* v. *Clifford*, 145.

Where action is brought in quantum meruit, there being a special contract, the defendant is permitted under a plea of general issue to offer evidence showing what damages the breach of the special contract has caused to him.

Viles v. *Kennebec Lumber Co.*, 148.

A quantum meruit upon an implied contract and a quantum meruit upon a special contract originate and proceed to a judicial termination upon quite different grounds. A quantum meruit upon an implied contract is not founded upon a breach but upon conditions and circumstances which the law says implies a promise on the part of the beneficiary to pay what in equity and good conscience the services are reasonably worth. There is no fixed standard to which the value of the services may be referred for determination. On the other hand, a quantum meruit, upon a special contract, is founded upon the plaintiff's breach, and "the contract price is the standard by which the damages are to be estimated." *Viles* v. *Kennebec Lumber Co.*, 150.

The moment the plaintiff brings quantum meruit on a contract, he acknowledges a breach and admits notice that he may have damaged the defendant by such breach.

The only object of a brief statement, under our present form of pleading, is to give notice of the defense to be made. The rules of special pleading were abolished, and superseded by the general issue and a brief statement, for the express purpose of abrogating the technical forms and permitting notice of defense regardless of form. Substance was submitted for form. Accordingly, the technical requirement being obsolete, actual notice is all that is now required. And when a party is charged with notice of the defense by his own pleadings, it would seem a useless form to require further notice, under the general issue. *Viles* v. *Kennebec Lumber Co.*, 153.

When during the trial of a cause before the presiding Justice without a jury, the plaintiff asks and obtains leave to amend the first count of his declaration, containing three counts, and by agreement the case proceeds on trial and the amendment is filled after a decision for plaintiff to which defendants have exceptions; and when at argument on the exceptions in the Law Court, it is found that by mistake the amendment as actually drawn changes the form of the action, contrary to the agreement and understanding when leave to file the amendment was granted, and defendants refuse to consent to the correction of the error, the amendment will be rejected by the Law Court and the declaration must stand as originally drawn.

A count upon the penal part alone of a bond conditioned for the payment of money is sufficient; it is not necessary to include any other part of the instrument.

Upon a plea of non est factum, which is joined, with a brief statement under the general issue, that he does not owe the plaintiff any sum of money demanded by plaintiff, which is not joined, nor is counter brief statement thereto filed, no issue, except the general issue which denies the execution of the bond, is presented. *Waterhouse* v. *Tilenius, et als.*, 239.

A party shall not take the chance of obtaining a decision in his favor without being bound by the result if the decision is against him.

A defendant shall not take advantage of defects in plaintiff's declaration not objected to at the nisi prius trial and which do not affect his substantial rights.

Litigation is an expense to the public as well as to the parties. In fact the expense to the public is often greater than it is to the parties. It is for the public good, therefore, that there be an end of litigation. And when a case has been once fairly tried it ought not to be tried over again, even if the parties are willing.

Kelsey v. *Irving*, 311.

It is good pleading in an action of tort, founded on a defendant's negligence, for the declaration to allege what duty was owing by the one to the other, together with its breach and the consequential injury.

A declaration will not be intrinsically bad for want of such averments, for a plaintiff may make direct and positive averments of fact from which the law will imply the existence of duty, and by like averments he may show wherein the defendant left duty undischarged.

Chickering, Admr. v. *Lincoln County Power Co.*, 414.

The right of the presiding Justice to correct his instructions either before or by recalling the jury after their retirement, directing attention specifically to any part of the original charge withdrawn or qualified, has been determined by so many judicial authorities as to be beyond dispute.

If a respondent would avail himself of the privilege of raising the question of duplicity, he should do so when he first feels the hurt of the duplicity. When this is done the prosecutor may, by entering a nol pros as to the objectionable part of the indictment, accord to the respondent his full privilege and proceed with the case. By failing to seasonably object the respondent waives his privilege. He is not permitted to revive it after verdict by a motion in arrest of judgment.

State of Maine v. *Derry*, 431.

When exceptions are sustained in jury cases, as well as in those tried before a single Justice, without the aid of a jury, a trial de novo follows, unless it is otherwise decided and stated in the rescript.

The rules governing right of plaintiff to an entry of nonsuit, as given in *Washburn* v. *Allen*, 77 Maine, 344, are affirmed, but the rule "after verdict there can be no nonsuit" refers to a subsisting verdict.

A verdict which has been set aside by sustaining exceptions is not a subsisting verdict, and since the case, after such sustained exceptions, comes up for trial as if no trial had ever been held, *Derrick* v. *Taylor*, 171 Mass., 444, the plaintiff is entitled to voluntary nonsuit, as of right, in accordance with *Washburn* v. *Allen*, supra.

The mistaken selection of a remedy that never existed and its fruitless prosecution until it is adjudged inapplicable, does not prevent the exercise of another, if appropriate, even if inconsistent with that first adopted.

Hayden v. *Maine Central Railroad Company*, 442.

POLICE POWER

Under the Police Power the use of private property is subject to uncompensated restriction and regulation. In cases of extreme and urgent necessity, as conflagrations or epidemics, it justifies the destruction of property without preliminary notice or hearing and even without compensation. But Chap. 126, Sec. 59, R. S., cannot be justified on the ground of extreme and urgent necessity, and it provides for the destruction of property and not merely its restriction or regulation. *Randall* v. *Patch*, 303.

PROBATE APPEAL.

Where a will and codicil have been presented for allowance and the Judge of Probate court makes decree allowing same and an appeal is taken, which is later dismissed in the Supreme Court of Probate, there is no authority for appellant to later take another appeal declaring that the will and codicil should have been declared null and void. *Mc Kellar, Applt.*, 64.

There is no provision of statute for an appeal from a decree of the Justice of the Supreme Court of Probate and such attempted appeal cannot be entertained or considered.

Exceptions to the decree of a justice of the Supreme Court of Probate raise only questions of law. If as matter of law there is no evidence to sustain the decree, then the exceptions must be sustained, otherwise overruled.
Cotting, Applt. v. *Estate of Alonzo Tilton*, 91.

An appeal from a probate court vacates the decree appealed from.
Rawley, Applt., 109.

As a matter of strict statutory construction, it may well be doubted whether an appeal lies from the finding of the Supreme Court of Probate.
Thompson, Applt., 114.

See *Nichols, Applt.* v. *Est. of Madison M. J. L. Leavitt*, 464.

PUBLIC UTILITIES COMMISSION.

The State, as an attribute of sovereignty, is endowed with authority, in the appropriate exercise of the police power, to regulate the charges of public utilities. Regulation in such cases is not an unwarranted interference with the right of contract which the constitutional guaranty of the enjoyment of liberty includes. Private contracts, concerning property rights, are inviolable, but no obligation of a contract can extend to the defeat of legitimate governmental power. Contract rights, which affect the public safety and welfare, must yield

to that which is essential to the general good. The Legislature, in the exercise of the police power, is unrestricted by the provisions of contracts between individuals or corporations, or between individuals and municipal corporations.

The State may decrease or increase the contract specified rates for public utility, services as justness and reasonableness may require. Underlying such right of regulation is the fundamental doctrine that the utility for the adequate doing of that which it was chartered to do, should receive tolls sufficient to enable it to meet the exacted requirement. Rates neither should be so low as to deprive the utility of means of appropriately discharging duty nor so high as to unduly burden the public. Safe and efficient service, with substantial equality of treatment in like situations, is the essential.

In creating the Public Utilities Commission, the Legislature conferred upon that body powers of great scope, and imposed upon it great responsibilities. Subject to review on questions of law, the Commission has authority, inclusive of quasi-legislative and quasi-judicial power, to fix rates for all public utility services.

In Re Guilford Water Company, 368.

The control and regulation by the State of the rates of public utilities is a legislative or governmental function and a legitimate exercise of the police powers of the State.

When one devotes his property to a use in which the public has an interest, he must submit to be controlled by the public for the common good to the extent of the public interest he has created.

The public interest in the rates charged for the public service rendered by a public utility company does not cease at the point when the operating expenses of the company is insured, and begin again when the rates result in more than a fair return, or exceed the value of the service rendered. So long as the property is devoted to the public use, the State may control the rates at all times. The public cannot be assured of adequate service, except upon the fair basis of a return upon a fair value of the property devoted to the public use; the rates in no case, however, to exceed the value of the service rendered.

While all contracts by municipalities or by individuals with a utility company for any service are presumed to be entered into with the understanding that the State may at any time regulate the service and the rates to be charged therefor, the State may by appropriate legislation suspend its authority to exercise its power of regulation, and authorize a municipality to enter into an inviolable contract with a utility company for a reasonable period fixing the rates to be charged by such utility for the public service, which contract will be protected against impairment under the Federal and State Constitutions.

The surrender by the State of this important governmental function, however, must be in terms so clear and unequivocal as to admit of no doubt of the intent to surrender. General authority to contract is not sufficient. Express terms are required. All doubts must be resolved in favor of the State.

In the cases at bar no such clear and unmistakable intent to surrender this important function of government is found in the Charter of either of the Water Companies, or in Sec. 63, Chap. 4, R. S.

Unless such surrender is made, the rates for any public service such as the supplying of water or other utility for public or domestic uses are just as fully subject to regulation by the State under its police powers, when fixed by mutual consent in a contract, as when summarily determined by the utility company itself.

All contracts relating to the public service must be understood as made in contemplation of the possible exercise at any time by the State of this legitimate governmental power. The duty, once undertaken, to serve the public in a reasonable manner cannot be avoided by a contract.

The general purpose of Chap. 55, R. S., known as the Public Utilities Act, was to place the entire regulation and control of all public service companies in the hands of the Utilities Commission, which is authorized to inquire into the management of all public utilities within the State, and whenever any rate, toll or charge is found after hearing to be "unjust, unreasonable or insufficient" to substitute therefor just and reasonable rates.

The language of the act is broad enough to include the control and regulation of every rate, toll or charge whether fixed by contract or determined by the Utility Company itself.

Such construction does not give the act a retroactive effect. All existing contracts relating to the public service remain valid, binding obligations unaffected in their terms, and being voluntarily entered into between the articles, the rates fixed therein are presumed to be reasonable and just, until otherwise determined after hearing, when just and reasonable rates may then be substituted therefor.

No vested rights under such contracts are affected by the Act, as none can be gained against the proper exercise of the police powers of the State.

The power was in the State prior to the enactment of this legislation to require any utility over which the State had not surrendered its regulatory powers to furnish the public service in which it was engaged at just and reasonable rates notwithstanding any contract it may have entered into. No new duties or disabilities, therefore, were imposed on any public utility by the terms of Chap. 55, R. S. And when the Utilities Commission acts, it acts after hearing, and for the future.

There is no implication from the fact of all contracts granting undue preference or advantage entered into prior to January 1st 1913, being exempted from the provisions of Sections 33 and 34, that all other existing contracts are excepted from the operation of the Act. Quite the contrary. If any inference follows from the exception of existing discriminatory contracts from the effects of Sections 33 and 34, which are penal sections, it is rather that all other existing contracts are included within the general terms of the Act, unless expressly excepted.

From the general purpose of such legislation and by reason of the broad and inclusive terms employed in Chapter 55 in conferring powers on the Utilities Commission and in the light of the judicial construction of similar Acts by other courts of last resort, it is held, that the Legislature, unless otherwise expressly stating, or if following by necessary implication, intended to delegate to the Utilities Commission as full and complete power of regulation of rates of public utility companies as the State itself then possessed.

The Utilities Commission having determined, after hearing, that the rates, tolls or charges of any utility company whether fixed by the company itself or by contract, are in fact unjust and unreasonable, we must assume in the absence of exceptions to any ruling of law in connection with such finding, that it has so determined upon considerations that affect the public interest. Upon this point the conclusions of the Utilities Commission in the cases at bar must be treated as findings of fact properly determined.

In re Searsport Water Company & Lincoln Water Company, 382.

See *In Re Island Falls Water Company*, 397.

QUANTUM MERUIT.

See *Viles* v. *Kennebec Lumber Company*, 148.
Van Buren Light & Power Co. v. *Inhabitants of Van Buren*, 462.

REAL ACTIONS.

See *Merrow* v. *Inhabitants of Norway Village Corporation*, 352.

REFEREES.

The acceptance of the report of referees is a matter of judicial discretion and when that discretion is judicially exercised the decision of the presiding Justice is final and conclusive.

By making the ruling of another justice at a previous term upon the recommitment of the report, a part of the bill of exceptions, the scope of inquiry is not enlarged, and the correctness of the ruling of the former justice cannot be examined here, when no exceptions to that ruling were taken. That ruling could have been brought before this court only by exceptions duly signed and allowed by the justice who made it or by one of the methods prescribed by R. S., Chap. 82, Secs. 55 and 56. *Chasse* v. *Soucier*, 62.

The acceptance or rejection of a report of a referee is not a question of law, but a matter of discretion. But the discretion is of a judicial character, and must be exercised judicially. All judicial proceedings are predicated upon a full hearing or an opportunity to be fully heard. Judicial discretion is a judicial judgment, and must be based upon the requirements of judicial procedure. A fundamental requirement is a hearing or opportunity to be heard.

Ginsberg v. *Epstein*, 487.

REMOVAL OF ACTIONS.

Under the interpretation of the Removal Act, Chapter 373, Federal Statutes, 1887, as amended by Chapter 866 of Federal Statutes, 1888, by the Federal Courts, the petition for removal must be filed as soon as the defendant is required to make any defense whatever in the State Court, whether by plea in abatement or to the merits. *Elms* v. *Crane*, 18.

RES JUDICATA.

When a new trial is granted for any cause, the proceedings begin de novo, and no facts determined in the prior proceecings can be considered res judicata.

Borneman, et als. v. *Milliken, et als.*, 168.

In any suit at law or in equity a judgment by a court of competent jurisdiction in a prior action between the same parties or their privies for the same cause of action is, conceding regularity and absence of fraud, conclusive as to all issues actually tried, or that might have been tried therein.

If for a different cause of action it is conclusive as to matters actually litigated.

Van Buren Light & Power Co. v. *Inhabitants of Van Buren*, 463.

REVERSIONS.

The term "reversion" sometimes is loosely used in wills or deeds. The reversion is that estate which is left, when from the entire fee, a lesser particular estate in being is granted. It is that present vested, alienable, inheritable and devisable residue of an estate remaining in a grantor or his successors, or in the successors of a testator, to be enjoyed in possession, from and after the happening of a particular event, at some future time. *Johnson, et al.* v. *Palmer, et als.*, 230.

SALES.

Action of assumpsit to recover the balance due for certain wood. The defendant claimed that the wood was not of the contract quality and had never been accepted.

Held:

1. Whether defendant's agent had the right to accept the wood in its behalf was a question of fact for the determination of the jury.

2. Delivery of personal property at the place agreed upon operates as a perfected transfer, but such delivery does not preclude the buyer from the right of examination in order to ascertain whether the goods are of the contract quality and to reject them in case they are not.

3. The right of rejection, however, must be exercised within a reasonable time or it is lost, and the sale becomes absolute. Silence and delay for an unreasonable time are conclusive evidence of acceptance.

Fiske v. *Dunbar & Company*, 342.

SLANDER AND LIBEL.

Action to recover damages for a libel contained in letters written by the defendant to one Sarah L. Yeager. Not in terms but by necessary implication the letters charged the plaintiff with larceny.

The defendant contends that the letters were privileged in that they were written for the purpose of aiding in the investigation and punishment of crime.

Held:

That to be thus privileged an accusation of crime must be made (1) in good faith and without actual malice; (2) upon reasonable or probable cause after a reasonably careful inquiry, and (3) for the public purpose of detecting and bringing a criminal to punishment.

That the defense of privilege is not sustained.

That the defendant is responsible for such repetition of the libel and such publicity as are fairly within the contemplation of the original libel and are the natural consequences of it.

That special damages can be recovered only if alleged and proved and punitive damages only if actual malice is shown.

That there is and can be no fixed rule for determining even actual damages in this class of cases. The plaintiff is entitled to recover for her injuries caused by the libel, including damages up to the present time and for the future. She is entitled to damages sufficient to compensate her for her humiliation and for such injury to her feelings and to her reputation as have been proved or may reasonably be presumed. She is not confined to such damages as might have resulted from a communication to Mrs. Yeager alone, never communicated by her to any other. The plaintiff is not entitled to damages for the publicity which this trial has caused. But such repetition and such publicity as are the natural consequences of the original publication may be taken into account.

Elms v. *Crane*, 261.

Action on the case for libel, by the publication by the defendants, selectmen of the town of Sangerville, in the town report of 1918 among the available assets of the town this item: "Arthur Stanley, Larceny, Culvert, $50." The defendants pleaded the truth of the statement and also that the words were privileged because written and published by them in the performance of their official duty. The jury returned a verdict in favor of the plaintiff for $1500.

Held:

1. The printed words, as imputing a crime, were actionable per se.

2. The plaintiff was not guilty of larceny under the legal definition of that term. In order to constitute larceny, there must be not only a taking and carrying away of the goods of another, but there must also exist contemporaneously a felonious intent on the part of the taker which means a taking without excuse or color of right with the intent to deprive the owner permanently of his property and all compensation therefor.

3. The jury were justified in finding such felonious intent utterly lacking. The plaintiff evidently took the metal culvert in this case after two conferences with the chairman of the selectmen and openly used it in constructing a driveway across a ditch in the highway for his employer, Mr. Coburn, expecting that Mr. Coburn would pay for if it the town officers exacted pay, or if they did not require compensation, that Mr. Coburn would receive it as had many other citizens under like conditions.

4. It is the duty of town officers charged with the expenditure of money to make a full and detailed report of all their financial transactions in behalf of the town, with a full account of receipts and disbursements, of indebtedness and resources, together with a list of all delinquent tax payers and the amount due from each. R. S., Chap. 4, Sec. 45. A report published within the requirements and spirit of that statute would doubtless be regarded as privileged.

5. When, however, the selectmen in this case went further and published the libelous charge of larceny against the plaintiff, they transcended their duty, stepped outside the protection of privileged communication and became amenable to the law. The privilege is only commensurate with the duty.

6. The verdict is not excessive. The plaintiff is a reputable citizen holding an important position with a local industry. The defendants by virtue of their official position were also men of influence whose words carried weight. These town reports were distributed among the voters of the town. Copies must be deposited in the office of the selectmen or clerk there to remain as a part of the archives of the town. R. S., Chap. 4, Sec. 45. Such reports are also required by statute to be filed in the State Library there to remain as a part of the archives of the State. R. S., Chap. 3, Sec. 15. Printed defamation is more potent than spoken because more permanent. A criminal charge made under such circumstances is therefore a most serious matter.

Moreover, the attitude and conduct of the defendants throughout the whole transaction were such as to warrant the jury in awarding punitive damages if they saw fit to do so. *Stanley* v. *Prince, et als.*, 360.

SPECIAL WRIT.

See *Gammons* v. *King*, 76.

STATUTES.

Words in a statute are to be taken in their common and popular sense, unless the context shows the contrary. *State of Maine* v. *Blaisdell*, 13.

Where a statute creates a new right but provides no remedy for its enforcement, a remedy exists by implication; if, however, the statute conferring the right provides a remedy, such remedy is ordinarily exclusive.
Nash v. *Inhabitants of Sorrento*, 224.

STENOGRAPHER'S TRANSCRIPT.

See *Reed* v. *Reed*, 321.

SUBROGATION.

Subrogation will not be allowed so as to do injury to the rights of others.
Williams v. *Libby, et al.*, 80.

SUPERIOR COURTS.

Under R. S., Chap. 136, Sec. 28, an appeal lies from the Superior Court to the Law Court. *State of Maine* v. *Brown*, 164.

TAX DEEDS.

Action for money had and received to recover a sum paid by plaintiff to defendant as consideration for a tax deed, which deed conveyed no title because of irregularities in assessing the tax.

Held:

1. In many States provision by statute has been made so that the purchase money paid at a tax sale shall be refunded to the purchaser if the title conveyed proves to be invalid, and a right of action against the municipality is provided if the refund is refused, but at common law the purchaser at a tax sale assumes the risks of his purchase. Therefore, in the absence of special legislation to the contrary, he comes within the rule of caveat emptor, and if his title proves worthless he cannot recover the money from the municipality.

2. Our Legislature has provided no statute requiring a refund of money paid for a tax deed, based on defective proceedings in assessing a tax, nor is there any statutory authority in this State, for bringing an action against a municipality to compel such refund. The motion to set aside the verdict, as against law, must be sustained, but the exceptions need no consideration.

Arnold v. *City of Augusta*, 399.

TENDER.

A tender is not necessary when the recipient had not the power to return the property. *Drummond* v. *Trickey*, 296.

TOWNS.

In an action against a town by the wife of a man in naval service to recover State aid under Laws of 1917, Chapter 276, it is held, that the action is not maintainable, the remedy provided by Section 10 of the Act being exclusive.

Nash v. *Inhabitants of Sorrento*. 224,

TROVER.

One in possession of land may maintain trover against another taking the products of the soil.

As the right to the property cut depends upon the possession of the locus from which they were cut, a plaintiff to maintain his action must show that, at the time of the alleged conversion, he had either actual or constructive possession of the premises. If he did not have the title, he must show actual possession; the gist of the action being the invasion of the plaintiff's possession.

Sproul v. *Cummings*, 131.

See *Bassett* v. *Breen*, 279.

TRUSTEE ACTIONS.

The sole ground upon which a trustee in a trustee suit is held chargeable is his liability to the principal defendant by virtue of some contract between them, express or implied, or deposit of goods and effects.

The single question to be determined in charging a trustee is the amount of the goods, effects or credits belonging to the debtor in the hands of the alleged trustee at the time of service upon the latter.

The trustee cannot be charged because of an alleged independent guaranty claimed to have been given by him to the plaintiff. Whether such a guaranty was in fact made, and its legal effect if made can only be decided in an action brought by the plaintiff against the guarantor, to which action the principal defendant is not a party. In such an action the issue would be the liability of the trustee, the guarantor, to the plaintiff. In this action the issue on the trustee process is the liability of the trustee to the principal defendant. The two propositions are entirely distinct and cannot be commingled.

Davis v. *U. S. Bobbin & Shuttle Co.*, 285.

ULTRA VIRES.

See *Van Buren Light & Power Co.* v. *Inhabitants of Van Buren*, 462.

WAYS.

In 1863 one Day owning a large tract of land in what is now South Portland plotted it into several hundred lots and caused a plan to be made with several avenues delineated thereon, one of which was Adams Avenue. At or about the time of plotting, he sold several lots by reference to the plan, five of which abutted on Adams Avenue. The plotted streets were never accepted by the municipality.

Between 1863 and 1866, Day sold about ninety lots, all with reference to this plan, and then conveyed the balance of the tract as an entirety by warranty deed without reserving any of the delineated streets, but excepting the lots previously sold. The entire tract, with no streets opened, remained practically unchanged until 1918.

In 1869, one Merriam, the plaintiff's predecessor in title, obtained by warranty deed, title and possession of two of the five lots abutting on Adams Avenue which had been sold by Day previous to his sale of the remainder of the tract, and at some time prior to 1875 erected a fence enclosing said two lots and that part of Adams Avenue lying opposite thereto, using the whole as one lot. From that time until 1918, a period of forty-five years, Merriam, and later the appellant, his grantee, have had open, notorious, continuous and exclusive possession of the fenced portion of Adams Avenue in connection with their lots.

In 1918, the defendant laid out a street over what had been plotted as Adams Avenue, but the municipal officers refused to award the appellant any damages for the taking. From that decision this appeal was taken.

Held:

1. The conveyance by Day of these two lots abutting on Adams Avenue, so-called, carried with it to the grantee a right of way in the proposed street which neither Day nor his successors in title could afterwards destroy or interfere with; and to the public an incipient dedication of the street which neither Day nor his successors in title could afterwards revoke.

2. Such an incomplete dedication imposes no burden upon the municipality until the street is duly accepted by competent authority, or the public has used it at least twenty years. Neither of these events happened.

3. The adverse possession by Merriam and his successor ripened into a title as against the successors to Day in the balance of the tract in whom was the fee of the street subject to the inchoate easement of travel in the public.

4. So far as the municipality is concerned, such incipient dedication must be accepted within a reasonable time in order to be effective.

5. A period of forty-five years with no movement whatever on the part of the town or city toward acceptance is clearly beyond what could be deemed reasonable on the part of the municipality.

6. In view of all the facts and circumstances, the appellant had acquired title to the premises in question by adverse possession against the owners of the fee, and the city had no right of passage therein in 1918 because it had failed seasonably to accept the gift from the dedication.

Harris, Applt. v. *City of South Portland,* 356.

WILLS.

Under a will containing the following clause "I give, bequeath and devise to my beloved husband William B. Austin all the rest, residue and remainder of my estate, real, personal and mixed, wherever found and however situated, and to have full power to sell any or all of my estates and to convey the same for his own use." The next clause provides that at the death of her husband "any of my estates are left real or personal after paying his funeral charges and erecting a suitable set of grave stones or monument at his grave, I give bequeath and devise to my cousins or their . . . . heirs" etc., it is

Held:

1. That the actual intention in the mind of the testatrix was not to give the husband an absolute estate in fee simple, but a life estate with power of disposal for his personal use and benefit during his lifetime.

2. The will, though inartificially drawn, fulfills the purpose of the testatrix and violates no positive rules of law and no fixed canons of interpretation.

3. When a devise is expressed in such general terms as to create an estate of inheritance under R. S., Chap. 79, Sec. 16, and is coupled with an absolute and unqualified power of disposal either in express language or by implication, a gift over of any estate that may remain at the death of the first taker is repugnant and void.

4. If, however, the words of the general gift under the statutes are followed by a qualified and restricted power of disposal in the first taker, a life estate by implication is thereby created and the limitation over is valid.

5. The power of disposal in the husband under this rule is limited in this case to his personal use and benefit. It is not restricted in its source to the income alone, his personal use and benefit. It is not restricted in its source to the income alone, nor in its purpose to the bare necessities of life. He could use the principal as well as the income, if he so desired. He could sell and convey for the specified purpose, but had no authority to give by will which would be to dispose of the property, not for his own use but for the use of another.
6. The husband, therefore, was given a life estate by implication in the estate of his wife, coupled with a qualified power to dispose of the same during his lifetime for his own use, but not a power to dispose of the unused portion by will, as he attempted to do, and at his decease the unused remainder passed to the cousins of the testatrix or their heirs, and not to the second wife who is devisee under his will. *Barry, et als.* v. *Austin*, 51.

It is a presumption of the law, that the omission to provide for a child, or the issue of a deceased child, living when a will is made, is the result of forgetfulness, infirmity, or misapprehension, and not of design. But this presumption is rebuttable. With the wisdom or propriety of the act of the testator, in pretermitting his child from his will, the law has nothing to do.

That such omission was intentional, or was not occasioned by mistake, on the part of the testator may be established by evidence extrinsical the will itself. All the relevant facts and circumstances, including the intention of the testator as he declared it before, at, or after the making of the will, may be shown.
Ingraham, Applt., 67.

There is a distinction between an ordinary suit at law and a proceeding in the probate of a will. In the former the courts act upon the concessions of the parties of record, they being the only parties in interest; in the latter there are usually other persons interested who will be concluded by the result besides the proponent and contestant and their rights are not to be conceded away by the parties of record. If the contestant takes issue upon a single point only, he does not thereby admit the other facts necessary to be established and thus relieve the proponent from his obligation to prove them. This he cannot do by his pleadings or otherwise. *Rawley, Applt.*, 112.

The term "reversion" sometimes is loosely used in wills or deeds. The reversion is that estate which is left, when from the entire fee, a lesser particular estate in being is granted. It is that present vested, alienable, inheritable and devisable residue of an estate remaining in a grantor or his successors, or in the successors of a testator, to be enjoyed in possession, from and after the happening of a particular event, at some future time.
Johnson, et al. v. *Palmer, et als.*, 230.

"I give and bequeath to Ellen M. Bartlett my beloved wife the use, improvement and income of all my estate both real and personal including rights and credits of every description wherever the same may be found. Together with the

right to sell and to convey any part or all of my estate and to take to her use and benefit the proceeds of such sales whenever it shall be necessary for her comfort and maintenance paying my funeral charges and probate expenses of this my last will and testament."

Held:

1. That the two sentences should be read together.
2. Thus read, the wife was given a life estate by implication coupled with a qualified power of disposal, the qualification being the necessity of sale by her in order to secure her comfort and maintenance.
3. That power of sale must of necessity be exercised by the beneficiary during her lifetime and cannot be exercised by will. At her decease the real estate in question, not having been disposed of by her, passed as intestate estate to the heirs at law of George S. Bartlett. *Reed, Ex'r.* v. *Creamer, et als.*, 317.

A testator made the following provisions in his will; "Third: To my beloved wife, E. M. A., I give, bequeath and devise all the rest, residue and remainder of my estate both the real, personal and mixed, wherever situated and whenever and however acquired that I may own at the time of my death. Giving my wife the full power to sell, convey and dispose of any or all of said estate during her lifetime that she may choose to, and to use in any manner she chooses the whole of said estate and the proceeds realized from the sale of same for her support and maintenance or the support and maintenance of any person or number of persons that she may select. Meaning and intending to give my wife the full power to dispose and consume of all my property, if she chooses, same as I could do if living and without any interference or suggestions from any heirs or legatees.

Fourth: If, after the decease of my wife, there is any part of my estate left, after my wife has exercised the power heretofore stated, then I give bequeath and devise to my nieces all the rest, residue and remainder of my estate to my nieces in the following manner, viz."

Upon bill in equity praying construction of these two paragraphs,

Held:

That the wife took a life estate in the real and personal property, with qualified power of disposal by deed or gift in her lifetime, with remainder over, of such property as she did not thus dispose of, to the nieces mentioned in the residuary clause.

That such was the actual intention of the testator and that such intention was judicially expressed. *Smith, et als.* v. *Walker, et als.*, 473.

WORDS AND PHRASES.

"About"—*Viles* v. *Kennebec Lumber Co.* 148
"Banking Business"—*State of Maine* v. *Pelletier* 257
"Dependent"—*O'Leary, et als.* v. *Menard, et als.* 25

"Loss of"—*Clarence B. Merhcant's Case* 96
"Loss of Use of"—*Clarence B. Merchant's Case* 96
"Personal Estate"—*Berman, Exr.* v. *Beaudry, et al.* 248
"Quantum Meruit"—*Viles* v. *Kennebec Lumber Co.* 148
"Reversion"—*Johnson, et al.* v. *Palmer, et als.* 226

WORKMEN'S COMPENSATION.

Under R. S., Chap. 50, Sec. 16, which provides for compensation for the "loss" of a member or part of a member, the statute contemplates actual physical severance, and not merely loss of use. *Clarence B. Merchant's Case*, 96.

The burden of proof rests upon the claimant to prove the facts necessary to establish the right to compensation under the Workmen's Compensation Act. *Westman's Case*, 134.

In the hearing before the Commission the plaintiff has the burden of proof. To sustain the decree it must appear that there was produced at the trial of facts competent legal evidence of three things, to wit: That the deceased died, or was disabled, as the result of (1) an accident arising (2) out of, and (3) in the course of his employment by the defendant.

In the absence of fraud the chairman of the Industrial Accident Commission is under the statute final judge of the facts. When the evidence is direct the court will not review the commissioner's finding in respect to the credibility and weight of testimony.

The decree of the commissioner is analogous to a finding of a judge who by consent determines facts or (as indeed it is) an award by a referee agreed upon by the parties. That such a finding or award cannot be impeached by showing errors of judgment, however gross, as to the weight and credibility of testimony, is settled by so many authorities that citation is unnecessary.

In a case proved wholly, or in part, circumstantially, where there is a dispute as to what the circumstances are, the determination of such dispute by the commissioner is final. It is for the trier of facts, who sees and hears witnesses, to weigh their testimony and without appeal to determine their trustworthiness.

When the evidence is circumstantial and a state of facts is shown more consistent with the commissioner's finding than with any other theory and the finding is supported by rational and natural inferences from facts proved or admitted, an appeal cannot be sustained.

The Workman's Compensation law is not violative of the Constitution in respect to the method by it provided for the exclusive determination of issues of fact. Being elective it does not deny or abridge the right of jury trial.

The admission by the commissioner of plainly incompetent hearsay testimony does not require the court to disturb the decree unless such decree was in whole, or in part, based on such inadmissible testimony.

The spontaneous exclamation of the helpless man "I got hurt" was properly admitted. But only as tending to show the physical condition of the deceased at the time. *Mailman's Case*, 173.

In cases where suit is brought against a large employer, the injured employee may omit the allegation of due care on his own part, R. S., Chap. 50, Secs. 2 and 3. In such case, however, the declaration must show that the defendant belongs to the class of employers to which Section 2 applies to wit, large employers. The plaintiff should allege and prove that he is an employee of the defendant in a specified occupation and that the defendant employs more than five workmen or operatives regularly in the same business in which the plaintiff is employed.

In common law actions for negligence against large employers, the defense of assumed risk is not available.

Nadeau v. *Caribou Water, Light & Power Co.*, 331.

WRIT OF ENTRY.

Plaintiff brought a real action against the defendants at the May term, 1918, Oxford County, demanding "against the said defendants the possession of the lot of land in Norway Village Corporation which is known as the Fordyce McAllister place" &c. On the second day of the return term, the defendants filed a disclaimer of the entire tract and of all interest therein. At the February term, 1919, they filed a special demurrer to the writ on the ground that the description of the demanded premises was not sufficiently definite and was not so certain that seizin could be delivered to the sheriff without reference to some description dehors the writ.

Held:

1. The description is sufficiently precise to meet the requirement specified in the demurrer. It is not expected that the officer can identify the premises any more than he could identify a stranger whom he is directed to arrest, without inquiry.
2. The true test of clearness of description, however, is that stated in the original statute, (Public Laws, 1826, Chap. 34, Sec. 1) of which R. S., Chap. 109, Sec. 21 is a condensation, viz: They "shall be so defined and described in the declaration that the defendant may know with reasonable certainty what lands and tenements are demanded."
3. Applying this criterion the description is adequate. The defendants have admitted the fact by filing the disclaimer. They had no difficulty then in determining what premises were demanded, but said that they were not in possession of them and had no title or interest therein.

Merrow v. *Inh. of Norway Village Corp.*, 352.

APPENDIX

STATUTES AND CONSTITUTIONS CITED, EXPOUNDED, ETC.

CONSTITUTION OF UNITED STATES.

Article I, Sec. 10 371
14th Amendment 305

CONSTITUTION OF CALIFORNIA.

Article IV, Sec. 1 255

CONSTITUTION OF MAINE.

Article I, Sec. 6 ..... 203, 305
Article I, Sec. 11 371
Article IV, Part 3, Sec. 8 348
Article IV, Part 3, Sec. 16 253

CONSTITUTION OF MASSACHUSETTS.

Amendment of 1918 255

CONSTITUTION OF MISSISSIPPI.

Amendment of 1914 255

CONSTITUTION OF NORTH DAKOTA.

Article II, Sec. 25 255

CONSTITUTION OF OHIO.

Article II, Sec. 1d 255

STATUTES OF UNITED STATES.

Chap. II, Sec. 1233 136
Chap. 196, Vol. 27, page 531 222
Removal Act, F. S. 1887, Chap. 373 18
F. S. 1888, Chap. 866 18

REVISED STATUTES OF UNITED STATES.

Chap. C., Sec. 8605 220
Chap. E., Secs. 8612, 8657, 8658, 8659 220

STATUTES OF VERMONT.

Vermont Pub. Stat., 5101 201

LAWS OF MASSACHUSETTS.

Revised Laws, Chap. 123 3
12 William III, Chap. 7; Ancient Charters, page 351 69
Gen. Statutes, Chap. 160, Sec. 67 381

SPECIAL LAWS OF MAINE.

1905, Chap. 22 397
1909, Chap. 88 458
1909, Chap. 226 369
1911, Chap. 201 370
1911, Chap. 249 369

STATUTES OF MAINE.

1821, Chap. 43 2
1826, Chap. 344, Sec. 1 ..... 353, 354
1841, Chap. 145, Sec. 24 354
1857, Chap. 104, Sec. 21 354
1868, Chap. 151 165

1868, Chap. 207 39
1868, Chap. 216 165
1871 39
1876, Chap. 140 39
1880, Chap. 207 166
1883, Chap. 134, Sec. 27 166
1883, Chap. 138 235
1883, Chap. 183, Sec. 12 304
1883, Chap. 205, Sec. 8 166
1883, Chap. 212 456
1889, Chap. 152 166
1901, Chap. 284 233
1905, Chap. 70 305
1905, Chap. 74 250
1909, Chap. 184 166
1911, Chap. 74 62
1913, Chap. 18 167
1913, Chap. 103 123
1915, Chap. 244 23
1917, Chap. 126 13
1917, Chap. 133 437
1917, Chap. 276, Sec. 10 224
1919, Chap. 112 251
1919, Chap. 238 329

REVISED STATUTES OF MAINE.

1871, Chap. 27, Sec. 1 121
1871, Chap. 63, Sec. 21 121
1871, Chap. 77, Sec. 13 122
1871, Chap. 82, Sec. 33 123
1883, Chap. 77, Sec. 82 167
1903, Chap. 4, Sec. 76 461
1903, Chap. 65, Sec. 28 22
1903, Chap. 106, Sec. 43 62
1903, Chap. 135, Sec. 27 166
1916, Chap. 1, Sec. 6, paragraph 1 ..... 60, 97
1916, Chap. 3, Sec. 15 361
1916, Chap. 4, Sec. 45 361
1916, Chap. 4, Sec. 63 ..... 373, 383
1916, Chap. 7, Secs, 87-91 101
1916, Chap. 19, Sec. 112 452
1916, Chap. 23, Sec. 1 31
1916, Chap. 24, Sec. 106 360
1916, Chap. 26, Sec. 2 ..... 42, 74
1916, Chap. 26, Sec. 38 431

1916, Chap. 36, Sec. 27 341
1916, Chap. 36, Sec. 29 ..... 339, 341
1916, Chap. 45, Sec. 34 86
1916, Chap. 45, Sec. 35 ..... 233, 487
1916, Chap. 50, Sec. 1, paragraph 2 136
1916, Chap. 50, Secs. 1-48 329
1916, Chap. 50, Sec. 11 176
1916, Chap. 50, Sec. 14 98
1916, Chap. 50, Secs. 15, 16 ..... 96, 97
1916, Chap. 50, Sec. 34 172
1916, Chap. 50, Secs. 49-57 334
1916, Chap. 51, Sec. 22 378
1916, Chap. 52, Sec. 2 257
1916, Chap. 52, Sec. 120 257
1916, Chap. 53, Secs. 21, 26 118
1916, Chap. 55 383
1916, Chap. 55, Sec. 4 376
1916, Chap. 55, Sec. 16 376
1916, Chap. 55, Sec. 46 376
1916, Chap. 55, Sec. 55 369
1916, Chap. 60, Sec. 27 416
1916, Chap. 62, Secs. 15-28 2
1916, Chap. 63, Sec. 21 121
1916, Chap. 63, Sec. 26 122
1916, Chap. 65, Sec. 2 454
1916, Chap. 66, Sec. 4 346
1916, Chap. 66, Sec. 6 337
1916, Chap. 66, Sec. 7 ..... 347, 441
1916, Chap. 67, Sec. 31 93
1916, Chap. 67, Sec. 32 465
1916, Chap. 67, Sec. 35 111
1916, Chap. 67, Sec. 36 116
1916, Chap. 68, Sec. 4 112
1916, Chap. 68, Secs. 4, 5 465
1916, Chap. 68, Sec. 50 250
1916, Chap. 70, Sec. 26 ..... 21, 23
1916, Chap. 77, Sec. 1 121
1916, Chap. 78, Sec. 4 228
1916, Chap. 79, Sec. 9 67
1916, Chap. 79, Sec. 16 ..... 51, 319, 473
1916, Chap. 80, Sec. 14 248
1916, Chap. 80, Sec. 20 250
1916, Chap. 80, Sec. 21 248
1916, Chap. 82, Sec. 100 167
1916, Chap. 82, Sec. 6, paragraph XI 29
1916, Chap. 82, Sec. 33 119

1916, Chap. 82, Sec. 46 117
1916, Chap. 82, Secs. 55, 56 ..... 63, 110, 168, 169
1916, Chap. 82, Sec. 100 165
1916, Chap. 86, Sec. 59 82
1916, Chap. 86, Sec. 95 437
1916, Chap. 87, Sec. 38 192
1916, Chap. 87, Sec. 45 364
1916, Chap. 87, Sec. 57 123
1916, Chap. 87, Sec. 117 468
1916, Chap. 87, Sec. 146 447
1916, Chap. 92, Sec. 9, ... 334
1916, Chap. 92, Secs. 9-10 414
1916, Chap. 92, Sec. 14 440
1916, Chap. 93, Secs. 2, 13 5
1916, Chap. 96, Secs. 29-30 34
1916, Chap. 109, Sec. 21 353
1916, Chap. 109, Sec. 43 62
1916, Chap. 110, Sec. 10 242
1916, Chap. 110, Sec. 18 129
1916, Chap. 115, Sec. 2 76
1916, Chap. 115, Sec. 77 30
1916, Chap. 129, Sec. 16 380
1916, Chap. 126, Sec. 2 164
1916, Chap. 126, Sec. 4 237
1916, Chap. 126, Sec. 59 303
1916, Chap. 126, Sec. 60 305
1916, Chap. 126, Sec. 65 486
1916, Chap. 127, Secs. 21, 27, 28 198
1916, Chap. 130, Sec. 1 13
1916, Chap. 136, Sec. 11 203
1916, Chap. 136, Sec. 23 204
1916, Chap. 136, Sec. 25 203
1916, Chap. 136, Sec. 28 ..... 165, 478

ERRATA.

Barry v. *Austin*, page 54, sixth line from top of page, strike out "Parker" and substitute therefor "Palmer." On page 60, fourth line from bottom of page, strike out "Taylor" and substitute therefor "Fogler."

Bradbury v. *Insurance Co.*, page 192, third line from bottom of page, strike out "485" and substitute therefor "486." On page 193, fourth line from top of page, strike out "invoked" and substitute therefor "invalid."

Gammons v. *King*, page 76, third line from top of page, strike out "*Gleason* v. *Brewer*, 50 Maine, 22" and substitute therefor "*Gleason* v. *Bremen*, 50 Maine, 222."

Sproul v. *Cummings*, page 131, line 20 from bottom of page, strike out "504" and substitute therefor "564."

State vs. Slorah, page 203, headnote 2, third line, strike out "constructed," and substitute therefor "construed."

State v. *Chadwick*, page 233, line 10 from bottom of page, strike out "Mo."and substitute therefor "Me."

Thompson, Applt., page 119, last line of first paragraph, strike out "110" and substitute therefor "100."

Viles v. *Kennebec Lumber Co.*, page 149, line 1 at top of page, strike out "plaintiff" and substitute therefor "defendant."